101 SW Main Street, Suite 1100
Portland, Oregon 97204
balljanik.com
t 503.228.2525
f 503.295.1058

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Adele J. Ridenour
aridenour@balljanik.com
Licensed in Oregon, Washington, Idaho and Utah

Re: Opposition to S.B. 213 (2021) Including the -2 Amendments

Dear Members of the Senate Judiciary Committee:

The following written testimony is being presented at the request of the Committee following this morning's public hearing on S.B. 213 (2021). By way of introduction, I am a partner at Ball Janik, LLP in the firm's construction litigation department. My primary practice involves representing owners/developers in construction and design defect disputes. My clients include single-family homeowners, condominium and townhome associations, multi-family apartment owners, commercial property owners, non-profit affordable housing organizations, and governmental and quasi-governmental entities, such as schools and park districts. I write to urge this committee to vote NO on moving S.B. 213 to the Senate Floor. The following are my concerns with this bill, including the recent -2 Amendments.

1. **Existing Protections for Design Professionals in Oregon from Spurious Claims.**

First, design professionals in Oregon already enjoy protection from spurious claims for civil liability by virtue of ORS 31.300(2). Pursuant to this statute, before a party may bring any claim against a design professional arising out of their work, such party's attorney must first certify that they have consulted with a design professional with similar credentials who is ready, willing and available to testify to that the design professional's work fell below the standard of care. During today's hearing it was suggested that this certification is only necessary when the claim at issue involves professional negligence. This is not accurate. ORS 31.300(2) invokes a broad swath of claims, including breach of contract claims, so long as the claim arises out the design professional's provision of services and/or scope of activities on a project.[1]

[1]ORS 31.300(2) states in relevant part:

A complaint, cross-claim, counterclaim or third-party complaint asserting a claim against a design professional that arises out of the provision of services within the course and scope of the activities for which the person is registered or licensed may not be filed unless the claimant's attorney certifies that the attorney has consulted a design professional with similar credentials who is qualified, available and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the design professional. The certification must contain a statement that a design

Additionally, design professionals, just like all other parties to construction agreements in Oregon, cannot be asked to indemnify someone else for the other party's negligence. ORS 30.140(1)-(2). Such clauses are void as a matter of law. *Id*. Thus, if a design professional were to agree to a contractual duty to indemnify another party, as a matter of law, the design professional's duty is limited to the extent of the design professional's negligence.

2. <u>The -2 Amendments to S.B. 213 Conflict with Existing Oregon Law.</u>

The -2 amendments are in conflict with ORS 31.610(3)-(4), which is known as Oregon's reallocation statute. Pursuant to ORS 31.610(3), if, after a year of trying, an injured party is unable to collect against a negligent party, any other defendant who is found at least 25% responsible for the claimant's damages may have the non-paying defendant's proportionate share of liability reallocated to them for payment. ORS 31.610(3)-(4). The purpose of this statute is to prevent injured plaintiffs from being unable to recover the full amount of their judgment. The -2 amendments, however, would mean that ORS 31.610(3) no longer applies to design professionals, even where the design professional has been determined to be a major factor in the harm (25% or more). The -2 Amendments also do not clarify what a court must do when faced with reallocating the uncollectable portion of a judgment against other non-design professional defendants who are 25% (or more) at fault for the injured plaintiff's damages. Do these other defendants now have the design professional's share of the uncollected amount reallocated to them? Does the injured plaintiff just not get to fully recover? This conflict will no doubt result in further litigation, cost, expense and court time to resolve.

3. <u>The Bill May Result in Numerous Unintended Consequences.</u>

S.B. 213 has the potential for causing numerous unintended consequences, including more litigation, not less, and unfair bargaining risk with regard to design-build vendors.

A. <u>Less Fair Outcomes for Property Owners Suffering Design Defects</u>.

The risk of owing contractual defense costs incentivizes all sides in a design/construction dispute to come to the table early to discuss resolution. However, if a design professional only faces the risk of paying defense costs once a trial or arbitration has been completed, then their insurers are going to be less

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professional with similar credentials who is qualified to testify as to the standard of professional skill and care applicable to the alleged facts, is available and willing to testify that:

> (a)The alleged conduct of the design professional failed to meet the standard of professional skill and care ordinarily provided by other design professionals with similar credentials, experience and expertise and practicing under the same or similar circumstances; and
> (b)The alleged conduct was a cause of the claimed damages, losses or other harm.

ORS 31.300(2)(emphasis added).

likely to negotiate fairly and early on regarding the design professional's defense and indemnity obligations. Why pay in settlement what is reasonable and fair when you can leverage the fact that continued prosecution of a design defect claim is costly and injured plaintiffs need resolution in order to fix their buildings? The irony is that this result injures not just the clients I serve, but also the design professionals, as the type of insurance coverage most design professionals purchase (if they purchase coverage at all, see below) often provides that any amounts the design professional spend in defense of a professional negligence claim erodes policy's limits. Thus, insurers who push more design defect cases to trial in hopes of whittling down the demand from injured plaintiffs will simultaneously be eroding the available insurance proceeds left to pay any claim once design liability is fully adjudicated (assuming the design professional has not purchased CGL coverage as discussed below).

B. <u>The Bill Would Prohibit Upfront Defense Costs Being Owed by Liable Design-Build Vendors</u>.

S.B. 213 is broadly drafted to encompass a lot of entities which are not purely architectural design or engineering firms. As drafted, it would prohibit the right of owners and general contractors to contract for upfront defense obligations from design-build companies. The classic example of a design-build firm is the HVAC subcontractor who has an in-house mechanical engineer that designs the system which the company then installs. If the HVAC system turns out to be defectively designed, under S.B. 213, a general contractor can no longer seek a contractual duty to defend (and likewise upfront defense costs) from its HVAC subcontractor. This would be true, despite the fact that the general contractor was not involved in either the system's defective design or construction (other than perhaps hiring the HVAC subcontractor).

4. <u>Insurance Coverage for Design Professionals.</u>

Unlike contractors, design professionals are actually not required to procure liability coverage in order to be licensed in Oregon. Those design professionals that do purchase insurance usually buy Errors & Omission ("E&O") coverage. However, design professionals may also purchase Commercial General Liability ("CGL") coverage. Most CGL policies do allow coverage for contractual duties to defend others (provided the insured purchases an additional insured endorsement). Here again, the classic example is a subcontractor which has been asked to defend and indemnify a general contractor for the subcontractor's work and to procure a liability policy naming the general contractor as an "additional insured" on the subcontractor's policy. General contractors frequently seek defense and indemnity from subcontractors under these contractual obligations and "additional insured" endorsements.

While many CGL policies carry a "professional services exclusion," which some may argue eliminates coverage for design professionals when it comes to honoring a contractual duty to defend, there is at least one Oregon case which says that, depending on the type of conduct alleged, the "professional services

exclusion" does not apply. See *State Farm & Casualty Co. v. Lorrick* Pacific, LLC (D. Oregon 2012). Furthermore, given that many design-build contractors are able to procure coverage for their work, it may be possible for design professionals to work with a CGL insurer to remove problematic exclusions which prevent them from getting coverage for a contractual duty to defend.[2]

5. <u>Practical Reality.</u>

The proponents of S.B. 213 have stated two reasons why S.B. 213 is necessary, which in summary are that: (a) their E&O policies do not cover the defense obligations they are being asked to undertake in their contracts; and (b) small design professional firms cannot afford to pay their own defense costs plus those of others upfront when they get dragged into design/construction disputes. For the reasons previously provided above, I don't believe this tells the full picture of the protections already afforded design professionals in their contractual relationships in Oregon.

Moreover, I don't believe these fears accurately depict the reality of what happens in litigation. The practical reality is that a design professional who agrees to a contractual duty to defend, and who receives a tender from an owner or general contractor under such defense obligation, is most likely not paying out-of-pocket upfront defense costs for a third-party, even where the defense obligation has been denied by their insurance carrier.

The situation above is no different from a subcontractor who agrees to a contractual duty to defend and indemnify a general contractor for the subcontractor's negligence, and likewise name the general contractor as an additional insured on the subcontractor's CGL policy. In those situations, were an owner to sue the general contractor, and the general contractor to tender the claim to the subcontractor and their insurer, the subcontractor and their insurer may initially deny the tender of defense (in fact this happens frequently). The result of the denial is not that the subcontractor company must suddenly pay out-of-pocket for the general contractor's attorney fees while the construction dispute continues in litigation. Instead, the defense obligation is a liability the subcontractor may owe at the end of the case, if it proceeds to a trial/arbitration and a judgment is rendered. That liability and risk either is monetized in the form of settlement negotiations or an ultimate judgment. The risk here, as noted above, is just in making it clear the defense obligation will never be owed, unless and until adjudication of liability is determined at a trial or arbitration. This provides the design professional's insurer with the added leverage and advantage to unfairly discount a legitimate design professional claim, in hopes of getting the injured plaintiff to accept a lower settlement offer rather than be forced to pay the continued and expensive costs of further litigation.

[2] Including many HVAC contractors who for years have worked in the design professional realm with their in-house mechanical engineers and nevertheless still been able to procure additional insured endorsements for general contractors where contractually required.

Given all of the potential conflicts with existing Oregon law, as well as the unintended and unfortunate consequences this bill might yield, I would urge this Committee to vote NO on moving S.B. 213 forward to the Senate Floor.

Respectfully,

Adele J. Ridenour
Enc. *ORS 31.300; ORS 31.610; State Farm v. Lorrick Pacific, LLC*

ORS 31.300[1]

Pleading requirements for actions against design professionals

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(1) As used in this section, "design professional" means an architect, landscape architect, professional engineer or professional land surveyor registered under ORS chapter 671 or 672 or licensed to practice as an architect, landscape architect, professional engineer or professional land surveyor in another state.

(2) A complaint, cross-claim, counterclaim or third-party complaint asserting a claim against a design professional that arises out of the provision of services within the course and scope of the activities for which the person is registered or licensed may not be filed unless the claimant s attorney certifies that the attorney has consulted a design professional with similar credentials who is qualified, available and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the design professional. The certification must contain a statement that a design professional with similar credentials who is qualified to testify as to the standard of professional skill and care applicable to the alleged facts, is available and willing to testify that:

(a) The alleged conduct of the design professional failed to meet the standard of professional skill and care ordinarily provided by other design professionals with similar credentials, experience and expertise and practicing under the same or similar circumstances; **and**

(b) The alleged conduct was a cause of the claimed damages, losses or other harm.

(3) In lieu of providing the certification described in subsection (2) of this section, the claimant's attorney may file with the court at the time of filing a complaint, cross-claim, counterclaim or third-party complaint an affidavit that states:

(a) The applicable statute of limitations is about to expire;

(b) The certification required under subsection (2) of this section will be filed within 30 days after filing the complaint, cross-claim, counterclaim or third-party complaint or such longer time as the court may allow for good cause shown; **and**

(c) The attorney has made such inquiry as is reasonable under the circumstances and has made a good faith attempt to consult with at least one registered or licensed design professional who is qualified to testify as to the standard of professional skill and care applicable to the alleged facts, as required by subsection (2) of this section.

(4) Upon motion of the design professional, the court shall enter judgment dismissing any complaint, cross-claim, counterclaim or third-party

complaint against any design professional that fails to comply with the requirements of this section.

(5) This section applies only to a complaint, cross-claim, counterclaim or third-party complaint against a design professional by any plaintiff who:

(a) Is a design professional, contractor, subcontractor or other person providing labor, materials or services for the real property improvement that is the subject of the claim;

(b) Is the owner, lessor, lessee, renter or occupier of the real property improvement that is the subject of the claim;

(c) Is involved in the operation or management of the real property improvement that is the subject of the claim;

(d) Has contracted with or otherwise employed the design professional; **or**

(e) Is a person for whose benefit the design professional performed services. [2003 c.418 §1; 2015 c.610 §1]

[1] Legislative Counsel Committee, *CHAPTER 31—Tort Actions*, **https://www.-oregonlegislature.gov/bills_laws/ors/ors031.html** (2019) (last accessed May 16, 2020).

[2] OregonLaws.org contains the contents of Volume 21 of the ORS, inserted alongside the pertinent statutes. See the **preface to the ORS Annotations** for more information.

[3] OregonLaws.org assembles these lists by analyzing references between Sections. Each listed item refers back to the current Section in its own text. The result reveals relationships in the code that may not have otherwise been apparent. **Currency Information**

ORS 31.610[1]

Liability of defendants several only

- determination of defendants shares of monetary obligation
- reallocation of uncollectible obligation
- parties exempt from reallocation

- Text
- News
- Annotations
- Related Statutes

(1) Except as otherwise provided in this section, in any civil action arising out of bodily injury, death or property damage, including claims for emotional injury or distress, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for damages awarded to plaintiff shall be several only and shall not be joint.

(2) In any action described in subsection (1) of this section, the court shall determine the award of damages to each claimant in accordance with the percentages of fault determined by the trier of fact under ORS **31.605 (Special questions to trier of fact)** and shall enter judgment against each party determined to be liable. The court shall enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable in any degree, even if the plaintiff did not make a direct claim against the third party defendant. The several liability of each defendant and third party defendant shall be set out separately in the judgment, based on the percentages of fault determined by the trier of fact under ORS **31.605 (Special questions to trier of fact)**. The court

shall calculate and state in the judgment a monetary amount reflecting the share of the obligation of each person specified in ORS **31.600 (Contributory negligence not bar to recovery)** (2). Each person's share of the obligation shall be equal to the total amount of the damages found by the trier of fact, with no reduction for amounts paid in settlement of the claim or by way of contribution, multiplied by the percentage of fault determined for the person by the trier of fact under ORS **31.605 (Special questions to trier of fact)**.

(3) Upon motion made not later than one year after judgment has become final by lapse of time for appeal or after appellate review, the court shall determine whether all or part of a party's share of the obligation determined under subsection (2) of this section is uncollectible. If the court determines that all or part of any party's share of the obligation is uncollectible, the court shall reallocate any uncollectible share among the other parties. The reallocation shall be made on the basis of each party s respective percentage of fault determined by the trier of fact under ORS **31.605 (Special questions to trier of fact)**. The claimant's share of the reallocation shall be based on any percentage of fault determined to be attributable to the claimant by the trier of fact under ORS **31.605 (Special questions to trier of fact)**, plus any percentage of fault attributable to a person who has settled with the claimant. Reallocation of obligations under this subsection does not affect any right to contribution from the party whose share of the obligation is determined to be uncollectible. Unless the party has entered into a covenant not to sue or not to enforce a judgment with the claimant, reallocation under this subsection does not affect continuing liability on the judgment to the

claimant by the party whose share of the obligation is determined to be uncollectible.

(4) Notwithstanding subsection (3) of this section, a party's share of the obligation to a claimant may not be increased by reason of reallocation under subsection (3) of this section if:

(a) The percentage of fault of the claimant is equal to or greater than the percentage of fault of the party as determined by the trier of fact under ORS **31.605 (Special questions to trier of fact)**; **or**

(b) The percentage of fault of the party is 25 percent or less as determined by the trier of fact under ORS **31.605 (Special questions to trier of fact)**.

(5) If any party's share of the obligation to a claimant is not increased by reason of the application of subsection (4) of this section, the amount of that party's share of the reallocation shall be considered uncollectible and shall be reallocated among all other parties who are not subject to subsection (4) of this section, including the claimant, in the same manner as otherwise provided for reallocation under subsection (3) of this section.

(6) This section does not apply to:

(a)A civil action resulting from the violation of a standard established by Oregon or federal statute, rule or regulation for the spill, release or disposal of any hazardous waste, as defined in ORS **466.005 (Definitions for ORS 453.635 and 466.005 to 466.385)**, hazardous substance, as defined in

ORS **453.005 (Definitions for ORS 453.005 to 453.135)** or radioactive waste, as defined in ORS **469.300 (Definitions)**.

(b)A civil action resulting from the violation of Oregon or federal standards for air pollution, as defined in ORS **468A.005 (Definitions for air pollution laws)** or water pollution, as defined in ORS **468B.005 (Definitions for water pollution control laws)**. [Formerly **18.485**]

[1] Legislative Counsel Committee, *CHAPTER 31—Tort Actions*, **https://www.-oregonlegislature.gov/bills_laws/ors/ors031.html** (2019) (last accessed May 16, 2020).

[2] Legislative Counsel Committee, *Annotations to the Oregon Revised Statutes, Cumulative Supplement - 2019, Chapter 31*, **https://www.oregonlegislature.gov/bills_laws/ors/-ano031.html** (2019) (last accessed May 16, 2020).

[3] OregonLaws.org assembles these lists by analyzing references between Sections. Each listed item refers back to the current Section in its own text. The result reveals relationships in the code that may not have otherwise been apparent. **Currency Information**