Marvin Chorzempa & Larson | Attorneys at Law

Jon C. Larson

Admitted in Oregon, Washington & Arizona
P: 503.232.1410
F: 503.430.1691
E: jclarson@mca-law.com

Kruse Woods II
5335 Meadows Road
Suite 115
Lake Oswego, OR 97035

Testimony to the
Senate Committee on Judiciary & Ballot Measure 110 Implementation
In Support of SB 213-2

March 22, 2021

Chair Prozanski, Vice Chair Thatcher and members of the Senate Committee on Judiciary and Ballot Measure 110 Implementation:

My name is Jon C. Larson. I am the principal of Marvin, Chorzempa & Larson, P.C. and have practiced law for over 30 years. I represent design professionals in contract negotiations with both public and private entities and in construction defect claims and lawsuits.

The committee requested that I provide it with written testimony consistent with my oral testimony on March 22, 2021. It is my pleasure to do so.

I support SB 213-2. The opponents of SB 213 offered several arguments against the bill in their testimony on March 22. I will explain why those objections are misplaced in more detail below, but my summary response to those objections is as follows:

1. The professional standard of care, and Oregon's Certificate of Merit, are irrelevant to the contractual upfront duty to defend.

2. Oregon's Anti-Indemnity Statute does not prohibit the contractual upfront duty to defend.

3. SB 213 will not delay how long it takes to settle claims.

4. Contractors' insurance covers the contractual upfront duty to defend; design professionals' insurance does not.

Several of the opponents of SB 213 suggested that claims against design professionals seeking to enforce a contractual duty to defend will be tempered, or limited, by the application of the common-law standard of care applicable to design professionals and by ORS 31.300. Neither of these are relevant to a design professional's contractual upfront duty to defend. A design professional may be liable to the client for negligence and/or for breach of contract. The duty to defend is a contractual claim against the design professional. A negligence claim against the design professional is based upon the allegation that the design professional failed to meet the applicable standard of care for its professional services. Thus, claims for negligence and claims for breach of contract are different from each other and have different predicates. This is particularly true with a contractual obligation to provide an upfront duty to defend. In that situation, the only predicates necessary for a client to assert is that they have a contract with the design professional with this contractual provision and there is a claim against that client regarding the project at issue. Note that there is no obligation to demonstrate the actual liability of the design professional for the claim against the client; the claim's mere existence is the predicate and there is no relevance of whether the design professional failed to meet the standard of care.

The above points also applies to the opponents' reliance on Oregon's "Certificate of Merit" found in 0RS 31.300. The Certificate of Merit merely requires that when a claim is made against design professional for that design professional's failure to meet the standard of care (i.e., negligence) the claimant must include a certificate that they have consulted with similarly credentialed design professional who is of the opinion that the defendant design professional failed to meet the applicable standard of care. This Certificate is relevant to a claim for professional negligence, but is irrelevant to a contractual duty to defend.

Next, one of the opponents to SB213 asserted that Oregon law already prohibits claims against design professionals for defense costs where the design professional has no liability. It appears the opponent is relying on Oregon's "Anti-Indemnity Statute" found at ORS 30.140. That statute's actual language, however, does not include a duty to defend under its coverage. Perhaps our opponent believes that the Anti-Indemnity Statute covered the duty to defend as well as the duty to indemnify. But a recent case in California shows how courts may conclude otherwise. In UDC-Universal, L.P. v. CH2M Hill, 181 Cal.App.4th 10 (Cal. Ct. App. 2010), 103 Cal. Rptr. 3d 685 (2010), an Oregon based engineering firm signed a contract with a condominium developer that included a duty to defend provision. When the developer was sued for construction defects, the developer asked that CH2M Hill provide its defense. CH2M Hill declined to provide a defense asserting that it had no liability for the problems at issue in the claim. As the case played out, the court determined that CH2M Hill had no liability for the claimed problems. Nevertheless, the court concluded that, by virtue of the duty to defend clause in the contract, CH2M Hill had to reimburse the owner for its defense costs. Thus, the design professional was obligated to pay the developer's defense costs because of the contractual provision it agreed to, even though it was not negligent. And, as the SB 213 proponents pointed out in great detail in their testimony to this committee, the insurer for CH2M Hill declined to pay those expenses and they were paid by CH2M Hill instead.

Another issue raised by opponents is the claim that this statute would delay the resolution of cases. With respect to the opponents making this argument, I do not believe that to be true. First, please note that the -2 amendment specifically allows the parties to lawsuits to mutually agree upon the design professionals' proportionate fault as part of a settlement agreement. The overwhelming majority of construction defect case are resolved through negotiated settlements. These cases settle once the parties have assessed who did what on the project, whether and how various parties may have contributed to the problems and what will be the cost to make the claimants whole. If there is an obligation to reimburse the client for defense costs based on the design professional's pro

rata negligence, which is the approach SB 213 creates, the design professionals' liability for those defense costs will be factored in the settlement by all of the parties. Negotiations over these actual risks and exposures will almost always result in a settlement and there's no reason to believe this one additional item of liability will delay these typical negotiations. In contrast, if the clients of the design professionals have the design professionals fully funding their defense, they have substantially less motivation to settle the claim expeditiously.

The last point that the opponents made was whether and how design professionals may have defense costs for its clients covered by Commercial General Liability ("CGL") insurance versus Professional Liability ("PL") insurance. The testimony of Mike Olson made clear that there is no viable professional liability insurance that covers defense costs. In contrast, all of the testimony offered to this committee by both the opponents and the proponents of SB 213 is that duty to defend defense costs are covered by CGL insurance. Further, it is undisputed in the testimony that contractors' CGL insurance covers the contractors' duty to defend. Professional Liability insurance policies specifically exclude coverage for claims arising out of non-professional services or actions by the design professional. Design professionals' CGL policies specifically exclude claims against the design professional relating to the professional services provided by the design professional. Because design professionals are sued for professional negligence, only their PL insurer will take on the defense, and it will not defend any other party.

CONCLUSION

SB 213 will result in design professionals continuing to defend their own work, and paying the damages caused by their negligence, while maximizing the insurance money available to resolve claims. The effect that the opponents seek by opposing SB 213 is one where all the contractors have their contractual duty to defend covered by their insurers, while leaving the design professionals uninsured for these same defense obligations. This uninsured liability may be business-ending for small and emerging design firms if they sign contracts with these onerous contractual provisions requiring them to provide the defense for their clients, regardless of the designers' fault.

Thank you for your service and I am happy to assist this committee in any way.

Thank you.

Sincerely,

Jon C. Larson, Esq.
Marvin, Chorzempa & Larson, P.C.