Marvin Chorzempa
& Larson | Attorneys at Law

Jon C. Larson

Admitted in Oregon, Washington & Arizona
Kruse Woods II
5335 Meadows Road
Suite 115
Lake Oswego, OR 97035-3398
P: 503.232.1410
F: 503.430.1691
E: jclarson@mca-law.com

Testimony to the
Senate Committee on Judiciary
In Support of SB 848

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Chair Prozanski, Vice Chair Thatcher and members of the Senate Committee on Judiciary:

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 defense of construction defect claims and lawsuits. In this capacity I have negotiated hundreds of indemnity clauses and represented designers in dozens and dozens of claims and lawsuits. My testimony is based on my experience. I support SB 848 because everyone should pay their share and SB 848 stops large developers and organizations from requiring designers to pay for their lawyers, unless the designers are at fault.

At the outset, it is critical to understand the following:

1. The duty to defend is NOT the same as the duty to indemnify. Indemnity is paying another party for the damages you cause them. This means that indemnity is based on the respective parties' fault. That is not the case with the duty of defense, which requires one party to pay another party's attorneys' fees and litigation costs for the defense of that other party, regardless of fault. Here, SB 848 prevents owners from contractually requiring designers to provide the owners with a free (to the owners) defense even though the designers have not been found at fault and may not be at fault.

2. SB 848 seeks only to effect a change to the duty to defend, not to the duty to indemnify. The designers' obligations to pay others for the damages caused by those designers (indemnity) remains as it is, regardless of the passage, or not, of SB 848.

Understanding this distinction between a duty to defend and indemnity is important to understand why the opponents' arguments about SB 848 fail.

Response to Joint Opposition Submitted by Interested Parties

A group of interested parties have submitted a joint written opposition, which OACES subsequently submitted as its own written testimony. I will address their arguments first, and in the order in which they asserted them.

Opposition: "If passed, this bill would remove the ability of parties to contract the upfront legal costs of design professionals."

Response: This bill has nothing to do with design professionals' legal costs. Design professionals will pay their own legal fees to defend themselves and their work in claims asserted against them. SB 848 in no way changes that.

Opposition: "The practical implication of this change will be to require contractors and owners to defend the liability of design professionals until a case is concluded."

Response: This argument mixes two points. First, it assumes the contractors' and owners' interests are aligned and, for some reason, it's in their joint interests to "defend the design" together. In my experience, I've never seen that or heard of that being the case. Overwhelmingly, the owners and contractors are adverse to one another, but sometimes the owner is ambivalent about blame. Second, this assumes there is a claim that implicates the design and in which no one has named the designer as a defendant. The designer is always a part of these claims and thus leading the defense of its designs. This means neither the owner nor the contractor will be required to defend "the liability of design professional" at any time and certainly not "until a case is concluded."

In contrast to the opponents' argument, under SB 848, each party will pay their own legal costs. The owners will remain free to contract to require the designers to reimburse the owners for the attorneys' fees and costs the owner incurred and which were caused by the designers' negligence. Again, this is the indemnity obligation which, as noted above, remains unchanged.

Opposition: "Particularly egregious is that the contractors and owners will be required to front the cost for the design professionals' attorneys' fees."

Response: This argument egregiously mischaracterizes, or perhaps misunderstands, SB 848. Nowhere does SB 848 say anything about who, or how, the designers' legal bills are to be paid. SB 848 does not suggest, much less require, any one to pay the designers' legal fees and costs other than the designers. Again, designers will still be required to provide their own defenses.

Opposition: "The design professionals should be responsible for the costs to defend themselves against claims from the beginning and other parties to a construction agreement should be able to require this in their contracts."

Response: We appreciate the opponents' assertion here and wholeheartedly agree! Designers should, and do, pay for the legal costs to defend themselves. SB 848 in no way changes that.

Opposition: "Removing design professionals from contract provisions that assign risk is problematic in an era where construction design goals are fluid . . ."

Response: SB 848 does not change designers' obligations to indemnify owners for losses caused by the designers' negligence, including any legal fees and costs incurred by the owner that are caused by the designers' negligence. Under SB 848, owners may still contract with designers for the repayment of these legal costs as indemnity.

Response to Opposition Submitted by the City of Beaverton

The City of Beaverton also submitted written testimony in opposition to SB 848. I turn to those arguments now.

Opposition: ". . . SB 848, which fundamentally shifts the risk of liability for defending construction defect claims from the . . . ("design professional") to the contracting agency . . ."

Response: Let's be crystal clear about the shift caused by SB 848. SB 848 prohibits the contracting agencies from getting a free ride by requiring the designers to pay for the entire defense of the contracting agencies, even where the designers are not at fault. Yes, that may be a fundamental shift for the contracting agencies who have grown accustomed to never having any skin in the game. Under SB 848, each party defends itself. Under SB 848, the contracting agencies may contractually require the designers to reimburse the contracting agencies for the contracting agencies' legal costs to the extent the designer is at fault. Thus, the shift the City of Beaverton opposes is one by which the parties would pay, based on their liability, and no one gets a free ride.

Opposition: "First, the city should be able to contractually require a design professional to defend their work and indemnify the city if the city receives a claim based on a faulty design or low-quality work."

Response: SB 848 does exactly that! Regardless of SB 848, designers will defend themselves. Under SB 848, though, designers will only have to pay the owners for the owners' legal fees and costs, to the extent the designers caused those damages by the designers' "faulty design of low-quality work".

Opposition: "Local government should not be required to spend taxpayer dollars to defend a claim for a design professional's negligence."

Response: That misstates the effect of SB 848. SB 848 permits the City to sue designers and seek indemnity from them (including defense costs), which will be recovered by the City, but only to the extent of the designers' fault.

Opposition: "Second, there is no reason to treat architects, engineers, and land surveyors differently from any other professional contractor, which this legislation would require."

Response: Yes, there is a reason to treat designers differently: unlike contractors, designers cannot obtain insurance to cover this duty to defend. Thus, the City is advocating that designers, who may have done nothing wrong, should pay all of the City's defense costs out of the designers' own resources. This is true even if the City, itself, is at fault. In stark contrast to the City's position, SB 848 allows the City to recover those expenses from the designers as an INSURED item of indemnified damages.

Opposition: "The city currently requires all vendors, contractors, and design professionals to indemnify and defend the city against claims alleged to arise from their negligence."

Response: Under Oregon law, the City is already prohibited from requiring anyone to indemnify the City for claims "alleged" to arise from the City's negligence. Oregon's Anti-Indemnity Statute, ORS 30.140, which SB 848 seeks to align with, limits the City to requiring that the City be indemnified by another party only to the extent of that other party's liability. That same proportionate or pro-rata liability for indemnity is the goal SB 848 tries to achieve for owners' defense costs.

Opposition: "Third, design professionals already have some protection in the standard of care, which requires the design professional to exercise an ordinary degree of skill and care that would be used by other reasonably competent practitioners of the same discipline under similar circumstances and conditions. The design professional should be able to enter into a contract that requires it to defend against allegations that this standard is not met."

Response: Designers do and will continue to defend themselves against claims that they failed to meet the standard of care. This is true regardless of whether there's a contract, and regardless of ORS 30.140, and regardless of SB 848. The designers' standard of care has no impact on that.

Thank you for your attention to and consideration of the equitable merits of SB 848. If there is anything I can do to assist this committee, please let me know.

Very truly yours,

Jon C. Larson