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Testimony HB 848

Good afternoon, I am Rich Angstrom. I represent several group on this issue – OCAPA, NWUCA and APAO. We are all in opposition to SB 848.

In a construction job, many things can go wrong, but they generally fall into four categories: a design issue, a workmanship issue, a material quality issue, a use issue of the constructed item by the owner, or a contribution of all the above.

Indemnity provisions in a contract allow parties to a contract to assign risk. Indemnity provisions are essentially mini contracts within the main contract where one party (indemnitor) agrees to indemnify another party (indemnitee) for certain risks and occurrences that may occur during the construction or use phase of the project or building. Duty to Defend provisions are common clauses in construction contracts and are within the definition of indemnity.

Current, Oregon law voids indemnity provisions where one party tries to force their negligent conduct and subsequent liability onto another innocent party involving property loss and personal injury or death. Also, current Oregon law voids duty to defend provision requiring an innocent party to defend the negligent conduct of the other party involving property loss and personal injury or death. OCAPA offered the proponents of this bill language that would insert "duty to defend" into Oregon statute last session to make this prohibition clear. Curiously, because this "duty to defend" is the problem statement for their lobby effort, the proponent rejected OCAPA's proposal.

After many meeting with the proponents on this indemnity issue, it has become clear to me that the design professionals have an insurance coverage problem not a liability problem or a contract provision problem. Design professionals say they can't get insurance coverage for defense costs up to the final resolution of a case when their profession liability policies come into play after a case is litigated and the design professional's liability is determined. Their fix is not a duty to defend prohibition, but a liability reform that only benefits the design professionals and puts the litigation cost on the other parties. That is why you will see in the meeting materials that every organization involved in construction projects, other than the design professionals, opposes SB 848.

Not a single Oregon case has shown a circumstance where a design professional had to bear the cost of litigation from a construction agreements indemnity provisions. Proponents point to local government indemnity provision in public works construction contracts as the offending language. I have asked and have not received nor read a single provision that would supports the need for this bill. Moreover, construction contracts are a negotiated instrument. I find it again curious that if a design professional found an unfair or unlawful indemnity provisions that the design professionals would not simply rewrite or negotiate the removal or modification of the offending provision. Freedom to contract and negotiate terms of the contract is about as basic as contract law gets.

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It is my recommendation to this committee that design professionals focus on the scope of their professional liability coverage and the insurance products they use. There simply is not a foundation demonstrating a problem to solve. This bill will have the effect of transferring defense costs on other parties to the construction agreement or make it harder for aggrieved owners to collect all because they say they can't get defense cost insurance. This is patently unfair. We ask the committee to reject SB 848.

Rich Angstrom
President