

Design professionals win big in revised anti-indemnity statute

■ *Contractors also benefit from the Legislature's decision to prohibit contracts that require payment of defense costs for damages caused by another party's negligence.*

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On March 30, Gov. Chris Gregoire signed into law SHB 1559, which clarifies the scope of the so-called "anti-indemnity statute" and now specifically includes design professionals within its coverage.



The statute voids any indemnity provision in a construction contract that requires one party to indemnify the other party for his or her negligence. Numerous associations representing the design professional community raised three major points of concern regarding the

previous version of the statute, which the Legislature addressed:

1 The previous statute applied to "construction" contracts, but was unclear regarding whether that included contracts with design professionals, such as contracts between owners and architects. The revised statute now expressly applies to contracts for "architectural, landscape architectural, engineering and land surveying services."

2 The statute had been silent on the issue of the scope of a contractor's or a design professional's duty to defend

a project owner, which is regularly part of contractual indemnity agreements. Absent any statutory limitations, contractors and design professionals often were required to provide or pay for defense related to any claim arising out of their services regardless of whether the entity receiving the defense was negligent.

Insurers increasingly balked at providing coverage for contractually created defense obligations. When coverage is available, payment of defense costs erode the limits of many professional liability policies for design professionals, potentially leaving the firms exposed to uninsured liability. The revised statute expressly limits the duty to defend and voids provisions that require design professionals to defend a client for claims arising out of the client's negligence.

3 The statute had limited its application to liability for damages arising out of bodily injury or property damage

only, but indemnity provisions often encompass a broader scope of damages. The revised statute expands the scope to include any damages arising out of the services provided.

The Legislature made no changes to the limitations on indemnification in contracts between general contractors and project owners. However, contractors also benefit from the Legislature's decision to prohibit contracts that require payment of defense costs for damages caused by a project owner's negligence.

For damages that are caused by the concurrent negligence of the project owner and the contractor (or its subcontractors), the contractor's liability for indemnification and defense can be limited to the extent of the contractor's negligence, but only if it is expressly stated in the contract. The same indemnity and defense limitations for claims arising out of concurrent negligence are available for design professionals.

The revised anti-indemnity statute provides design professionals with the same protections previously enjoyed by other contracting parties within the construction industry and expands application to defense obligations. The revised statute should reduce the number of uninsurable risks created by indemnity provisions in professional services agreements, thereby allowing the design professionals and their clients to better allocate risk.



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