

# To infinity and beyond: Hazards of overly broad indemnity clauses

This document represents a high-level summary of this webinar. You can watch the full webinar recording [here](#).

## What is an indemnity clause?

When you agree to indemnify your client, you agree to reimburse the client for certain losses. The scope of that obligation will depend on what the language of the particular clause says when your indemnity obligations are triggered. By way of example, standard industry documents, such as those from the AIA, define the design professional's indemnity obligation as follows:

**AIA B103-2017, § 8.1.3:** The Architect shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement. The Architect's obligation to indemnify and hold the Owner and the Owner's officers and employees harmless does not include a duty to defend. The Architect's duty to indemnify the Owner under this Section 8.1.3 shall be limited to the available proceeds of the insurance coverage required by this Agreement.

The EJCDC uses similar language in E-500, 2020 edition, Exhibit I, § 6.10(A) and (C)).

## Avoiding common pitfalls

To avoid assuming an overly broad indemnity obligation, consider the following:

1. Limit your indemnity obligation to the client and client entity;
2. Limit your indemnity obligation to the damages that are caused by your negligence in the performance of your services;
3. Explicitly disclaim a duty to defend; and
4. Consider jurisdiction-specific considerations that can impact your risks or the enforceability of the indemnity obligation and consult with a knowledgeable local attorney to address contractually.

## Coverage concern

Assuming an overly broad indemnity obligation can create coverage concerns under your professional liability insurance policy due to the exclusion for contractually assumed liability that would not exist in the absence of the parties' agreement. This exclusion aligns with your interests because if your insurance

carrier were to insure a duty to defend your client it could (1) create a conflict of interest and (2) erode your limits more quickly, leaving you to pay out of your own pocket for any additional costs.

## Managing risks

To help you manage some of the risks associated with an overly broad indemnity clause, here are some strategies to consider:

1. Seek a mutual indemnity obligation from the client. When a client is insistent on imposing an overly broad indemnity obligation on your firm, asking the client to take on a similar risk can provide them with greater insight into the uninsured exposure they're asking you to take on and help you negotiate a more fair and balanced provision (see, EJCDC E-500, 2020 edition, Exhibit I, § 1.01(A)).
2. Carve out professional liability claims from an overly broad indemnity obligation and draft a separate indemnity clause specific to professional liability claims.
3. Negotiate for a limitation of liability clause that limits your total aggregate liability to the client or that limits your indemnity obligations to the client in the event of a claim (see, AIA E503-2017, § C-6. Also, see EJCDC E-500, 2020 edition, Exhibit I, § 1.02).
4. Consider other mechanisms, such as a waiver of consequential damages, that can help minimize the risks to your firm in the event of a claim.