

# Protecting your firm from a major claim: The importance of contract language

September 20, 2023



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**Design Practice and the Law**

Two Things about American Law:

- The law protects the reasonable expectations of all parties.
- You are responsible for the foreseeable costs of your wrongful conduct.

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**Design Practice and the Law**

Two Things about Design Practice:

- It is all about trade-offs.
- The trade-offs in design for construction are about money, time, and quality.

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**Design Practice and the Law**

When you provide design services you must meet:

- The contractual expectations of your client,
- The statutory expectations of licensing and practice laws,
- The public expectations that your design does not endanger health, safety, and welfare, and
- Tort law expectations that your services meet the standard of care applicable to your specific performance.

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### Three Roles of a Design Firm

- Providing consulting services**
  - Analyzing program and design constraints
  - Developing design recommendations
- Serving in an agency position**
  - Administering the construction contract
  - Managing the Owner-Contractor interaction
- Serving as an initial dispute neutral**
  - Assuming a quasi-judicial capacity
  - Reviewing Owner-Contractor conflicts

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### Determining Fault and Liability

**Tort Law: Protection of Negligence Standard**

- Legal framework of professional liability
- Based on standard of care

**Contract Law: Freedom to Assume Obligations**

- “Private Law” changing or creating rights and duties
- Ability to exceed normal legal liability

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### Standard of Care Jury Instructions\*

A professional [doctor, lawyer, architect, dentist, surveyor, health professional] is not negligent if [he] [she] adheres to the standard of care in the field.

You must decide whether the defendant was negligent by deciding whether the defendant failed to perform according to the professional standard of care.

To make this decision you must answer this question: Did the defendant do what a reasonable and prudent professional in [his] [her] field would have done under the circumstances?

\* § 9.02 General Standard of Care of Professionals, Standardized Civil Jury Instruction for the District of Columbia  
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**Professional Liability Jury Instructions\***

To be entitled to your verdict, the plaintiff must prove by a preponderance of the evidence:

\* § 9.03 General Standard of Care of Professionals, Standardized Civil Jury Instruction for the District of Columbia  
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**Elements Needed for Contract Creation**

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**Purposes of a Contract**

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**Extent of Exposure**

Who can recover?

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How much can they recover?

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How long before exposure ends?

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**Vicarious and Coordination Liability**

<p><b>Vicarious Liability</b></p> <p><b>Responsible for business and professional failing of a subconsultant</b></p> <ul style="list-style-type: none"><li>▪ Sub's insurance should be sufficient</li><li>▪ Indemnification by sub is important for business and professional responsibilities</li><li>▪ Liability should not be limited by contract</li></ul> <p><small>© 2023, Victor Insurance Managers LLC</small></p>	<p><b>Coordination Liability</b></p> <p><b>Responsible for negligence in a "joint" effort to serve a client even though no prime/sub relationship</b></p> <ul style="list-style-type: none"><li>▪ Client should require adequate coverages</li><li>▪ Contract should include a "right to rely on independent services"</li><li>▪ A waiver of client claims is ideal</li></ul>
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**The Result of a Claim**

A client dispute, claim, or loss damages the firm.

- ✓ Distracting management and design time
- ✓ Consuming profits from other projects
- ✓ Affecting staff morale and productivity
- ✓ Postponing strategic initiatives
- ✓ Destroying your reputation and marketing ability

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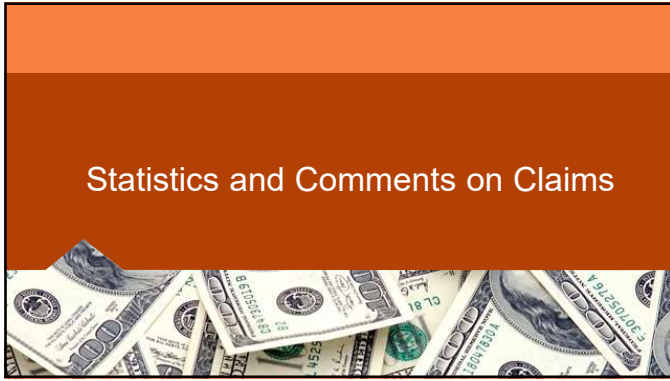
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### Causes of Professional Liability Claims

Triggering Events

- **Chance events:** Arbitrary developments that result in loss. **5%**
- **Changed conditions:** Financial problems, site issues, or unforeseen situations causing cost recovery efforts. **15%**
- **Technical errors:** Design problems that have to be corrected. **15%**
- **Managerial deficiencies:** Communication, documentation and actions not meeting project requirements, fee disputes, unmet expectations. **65%**

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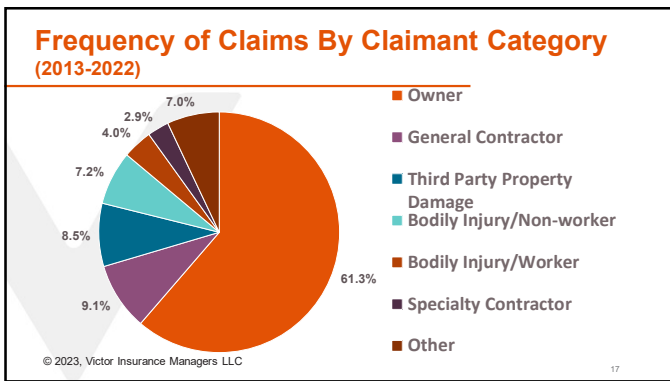
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**Contractual Issues**

- Elevated Standard of Care
- Unlimited Consequential Damages
- Contractual Defense and Indemnity
- Warranties and Guarantees
- Contractual Liability
- Design Defect Clauses/Change Orders
- Claims and Dispute Clauses
- Certifications/Lender Documents/Assignments
- Designing to Meet Unknown Climate Changes

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**Elevated Standard of Care: Unmanageable**

Consultant will meet the highest standard of care for this project type.

- What did your marketing information state?
- Why is the client demanding this?
  - Aspirational?
  - Targeting?
- Can you define "highest" in follow-up correspondence with your client to keep it from being an absolute?

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**Elevated Standard of Care: Fiduciary Obligation**

Consultant accepts this relationship with Client of utmost trust and confidence.

- Did the language also state that it is a fiduciary relationship?
- Does “trust and confidence” establish a fiduciary duty?
- How has the language been interpreted under applicable law?
- What does a fiduciary duty mean in this context?
- Can you define the relationship to your advantage?

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**AIA Standard of Care Provision**

(AIA B101-2017 Example)

§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

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**Unlimited Consequential Damages**

Client’s exposure to firm shall be limited to the payment of fees for services performed. Consultant’s exposure shall be for all costs, losses, and damages to Client or third party caused in any way by Consultant’s services.

- Waivers should be reciprocal; do you lose any rights if you waive consequential damages against your client?
- Did you anticipate when negotiating your fee that you could be held liable for unspecified consequential damages?
- Other than through performance, do you have any control over the exposure to non-direct damages?

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## AIA Waiver of Consequential Damages Provision

(AIA B101-2017 Example)

§ 8.1.3 The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7

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## Contractual Defense and Indemnity

Consultant shall defend Client against any claim related to the Project and indemnify Client for all costs, losses, and damages related in any way to Consultant's services.

- Can you pre-empt the tender of a defense obligation by making your client aware that no professional liability policy defends clients?
- Did you attempt to educate the client on the differences between CGL and PL coverages?
- Are you set to manage the exposures beyond insurance coverage?

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## Contractual Defense and Indemnity

Firms can address such contractually assumed defense and indemnity obligations in a number of ways:

- Charge extra for providing defense coverage for the client.
- Preface the provision with language your legal advisor might suggest such as "To the extent covered by the insurance required by this Agreement . . . ."
- Bifurcate the provision by adding a separate obligation such as: "With respect to Claims insured only under Consultant's professional liability policy, this indemnity shall apply only to the extent such claims arise out of or result from the negligent acts, errors, or omissions of Consultant or anyone for whose acts Consultant may be liable in the performance of professional services and the Consultant's defense obligation shall be the reimbursement of Client's reasonable legal expenses recoverable under applicable law in defending against an allegation of harm caused by the Consultant's failure to meet the standard of care for professional services once that failure is determined."

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## AIA Contractual Indemnity Provision

(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 . . . shall be limited to the available proceeds of the insurance coverage required by this Agreement.]

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## Warranties and Guarantees

Consultant's design and plans and specifications shall be fit for the purposes intended. Consultant shall further ensure that the project as constructed shall meet all codes.

- Are you aware that "fit for the purposes intended" is a product liability concept?
- Are you willing to accept a contractual obligation that is never covered by professional liability insurance?
- Unless you are a design-builder, do you have any control over the actual construction in a way that you can guarantee is compliance?

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## Contractual Liability

Consultant shall specifically insure its requirement to meet the contractual obligations of this Agreement.

- Are you aware that all contractual obligations are excluded from professional liability insurance coverage?
- Contractual liability is a business risk.
- Professional liability insurance covers harm from the failure to meet the standard of care irrespective of the contract.
- Can you convince the client that it is impossible for you to insure contractual liability as a professional?

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**Exclusion of Contractual Liability**

In every professional liability policy, there is an exclusion of assumed contractual liability. In the CNA policy it is stated that the policy will not cover:

*B. Contractual Liability arising out of:*

- 1. the Insured's actual or alleged liability under any oral or written contract or agreement, including but not limited to express warranties or guarantees; or*
- 2. any actual or alleged liability of others that the Insured assumes under any oral or written contract or agreement.*

*However, this exclusion shall not apply to the Insured's liability that exists in the absence of such contract or agreement.*

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**Design Defect Clauses/Change Orders**

**Consultant shall produce accurate construction documents and shall have responsibility for any costs, losses, or damages resulting from any defect in the design.**

- Are you taking responsibility for any defect in the design, the workmanship, and/or in the materials or systems used on a project that results in a failure of a component part of a building or structure and causes damage to person or property, usually resulting in financial harm to the owner?
- Does your contractual liability extend beyond your duty to meet the professional standard of care?

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**Liability for Defects in Construction**

(AIA B101-2017 Example)

**§3.6.1.2** The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures ..., nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents."

This provision is exculpatory – it relieves the architect from any liability for the contractor's acts or omissions. Some courts have adopted this position and have dismissed claims by owners suing architects for construction defects.

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**Liability for Defects in Construction**

- If the Architect has evaluation duties, the architect cannot disclaim liability for construction defects that even the most perfunctory monitoring would have prevented or fail to advise the owner of a known failure of the contractor to follow the plans and specifications.
- While the architect is not responsible for the contractor's negligence, the architect is required to perform its construction observation services as required under its contract. When the architect actually observes deviations, it is required to report these to the owner.
- The AIA agreement may absolve the architect of liability for any negligent acts or omissions of the contractor and subcontractors, but it does not absolve the architect of liability arising *out of its own failure to identify the defect in a reasonable manner.*

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**Claims and Disputes Clauses**

In any dispute between the Consultant and Client, the parties shall immediately arbitrate the dispute using Client's selected arbitrator who shall, in addition to damages award the prevailing party all legal costs.

- Shouldn't you attempt to "meet and confer" or mediate the dispute first rather than immediately resort to adjudication?
- If you arbitrate, shouldn't it be a neutral arbitrator?
- Can you afford to pay the client's legal fees that are not considered damages recoverable by law?

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**AIA Language on Dispute Resolution**

(AIA B101-2017 Example)

**§ 8.2 Mediation**

**§ 8.2.1** Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by binding dispute resolution.

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## AIA Language on Dispute Resolution

(AIA B101-2017 Example)

### § 8.3 Arbitration

§ 8.3.1 If the parties have selected arbitration as the method for binding dispute resolution in this Agreement, any claim, dispute or other matter in question arising out of or related to this Agreement subject to, but not resolved by, mediation shall be subject to arbitration, which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement. A demand for arbitration shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the arbitration.

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## AIA Option on Dispute Resolution

(AIA B503-2017 Example)

### Meet and Confer (as a condition precedent to mediation)

Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to a meet and confer session as a condition precedent to mediation.

The meet and confer session shall be attended by members of the Owner and Architect's senior management who shall have full authority to bind their respective party with respect to the claim, dispute or other matter in question. The meet and confer session shall take place within \_\_ days after a request by either party, unless the parties mutually agree otherwise.

If the parties reach a mutually acceptable resolution, then they shall prepare appropriate documentation memorializing the resolution. If the parties cannot reach a mutually acceptable resolution, they shall proceed to mediation in accordance with this Agreement.

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## Certifications/Lender Documents/Assignments

Consultant shall certify to Client, lender, surety and other designated parties that Project has been completed in compliance with the Contract Documents and all codes and standards.

- Are you ready to qualify any certification so that it is recognized as:
  - A fact known to you because of your services?
  - A professional opinion in line with state law?
- Can you limit the detrimental reliance?

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## Broad-Form Certifications

The certification must be based on knowledge gained from services performed and state a known fact or be qualified by stating that it is a professional opinion made in the exercise of due professional skill and care.

- Based on your services provided are you capable to make a declaration relating to conditions within the direct knowledge or control of the design professional?
- Do you have to perform additional services or have additional tests conducted to be able to certify a fact?
- Is the language of the certification properly qualified — if the certification is not based on a known fact, is it stated as a professional opinion so that it is clearly an expression of knowledge, information and belief?
- Does the proposed language of the certification constitute an express warranty or guarantee?

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## AIA Certification Limitation

(AIA B103-2017 Example)

§ 10.4 If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution. If the Owner requests the Architect to execute consents reasonably required to facilitate assignment to a lender, the Architect shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution. The Architect shall not be required to execute certificates or consents that would require knowledge, services, or responsibilities beyond the scope of this Agreement.

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## Lender Certifications and Assignments

- Know and understand the owner's and your rights and obligations under the design contract that was already negotiated.
- If the consent is asking you to grant any right to the lender that the owner would not have had under your original contract, then the lender is asking too much and you should request appropriate revisions to the consent.
- Be especially concerned about obligations related to:
  - Ownership and use of instruments of service
  - Representations and warranties
  - Notice to lender that establishes detrimental reliance

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**Designing to Meet Unknown Climate Changes**

Consultant shall examine possible effects of climate variability on the project and design for resiliency in accordance with possible environmental perils.

- Is the project owner willing to pay for resiliency beyond what is currently required by code?
- Is there any limit on what climate demands should be considered?
- Is the client willing to waive claims and provide protection from third-party claims.

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**Possible Contractual Protections**

**Informed Consent**

*The Design Professional will design in compliance with existing codes and regulations in place and applicable to the design services at the time the design is prepared. Project Owner understands that the Design Professional cannot anticipate changes in the project's site or environment unless the Project Owner specifically has those possible changes analyzed by a consultant and contractually requires that the changes be considered during the design stage of the project. Project Owner recognizes that the Design Professional has a right to rely on the information provided through the Project Owner by the Project Owner's consultant.*

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**Possible Contractual Protections**

**Disclaimers**

*During the Project design, Design Professional shall examine current codes and standards and shall use professional skill and care to design Project to meet the requirements of current codes and standards identified as applicable to the Project. Design Professional by training and experience does not possess the expertise to assess the effects of climate change or extreme climate events not addressed by current codes and standards on the Project and assumes no responsibility beyond the professional skill and care in designing to current codes and standards.*

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**Possible Contractual Protections**

**Waivers**

*Because disruptive climate events are unforeseeable at the time this contract for services was negotiated, Project Owner agrees that it will waive any claim against the Design Professional related to climate events that exceed those addressed by existing codes and standards. Project Owner waives all consequential damages caused by disruptive climate events that are not identified in the contract as needing to be addressed by the Design Professional. Consequential damages include but are not limited to loss of use, income, profit, financing, business or reputation.*

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**Possible Contractual Protections**

**Limitation of Liability**

*Project Owner limits the Design Professional's liability to the Project Owner and anyone claiming through the Project Owner for costs, losses, or damages resulting from changes in the environment and site that exceed existing and applicable codes and are not identified at the time of the design as design parameters. Design Firm's sole liability will be based on actual damages to the extent caused by the Design Firm's failure to design to existing and applicable codes.*

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**Possible Contractual Protections**

**Contractual Indemnity Obligation**

*In recognition of Project Owner's decision to have Design Professional design only to existing codes and standards, Project Owner agrees to defend Design Professional against any third-party claims alleging harm caused by Design Professional's failure to design to climate events not addressed by existing codes and standards and to indemnify Design Professional for any costs, losses, or damages to Design Professional resulting from such allegations.*

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### Surviving a Bad Contract

You can mitigate the professional liability and business risks of a bad contract through your:

1. Communications efforts
  - Focusing specifically on the client and the project
  - Clarifying vague requirements and refining onerous duties and responsibilities
2. Documentation efforts
  - Creating a record of client decisions and authorizations
  - Establishing conformance with the standard of care

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### Surviving a Bad Contract

3. Quality Control Efforts
  - Refining your project management procedures to address client goals and expectations.
  - Verifying your project concept both internally and with your client and other appropriate stakeholders.
  - Reviewing your design efforts and deliverables for suitability and sound design practices.
  - Conducting an independent internal review of both the design and the deliverables before releasing the design for construction.

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