Client-authored Indemnification Clauses

Client-authored indemnification clauses inserted into a standard contract are a particular concern since, despite their benign appearance – just looking out for your client's interests – they may be at your expense. To quote Pro-Demnity Claim Watch No. 24 (August 2005):

Any agreement to indemnify or defend another party to a contract in excess of what you would be liable for in ordinary common law will not be insurable in the ordinary liability insurance context.

This warning has been repeated in OAA Practice Tip PT.39.1, May 1 2019, (dealing with "Overly Broad Indemnification Clauses"), as well as Pro-Demnity Bulletins issued in 2005, 2015, and 2017, and Loss Prevention Events, including "Anatomy of a Murder (Clause)." Of note, Pro-Demnity Bulletin, March 22, 2018, "Client-Authored Contracts for Architectural Services," tells us: *of growing concern is contractual language promoted by some clients that has included a number of elements which exceed the architect's existing liability at law and hence its insurance coverage; in effect transferring client's or owner's risk onto the architect.*

To nullify the ill effects of such client-authored indemnity wordings, Pro-Demnity has, for more than 16 years, offered a “Notwithstanding Clause” as an antidote:

Notwithstanding the foregoing, the obligations and liabilities of the Architect are limited to the professional liability insurance provided by Pro-Demnity Insurance Company and any specific or excess professional liability insurance coverage in force.

Current forms of Client/Architect Agreements for the provision of professional services developed and recommended by the OAA do not include an indemnity provision, reasoning that it is not required. An architect’s (or any professional’s) obligation to indemnify a client or others respecting damages arising from its professional services is already a matter of established law.

However, there is a concern that the absence of an indemnity clause might be perceived as a “void,” triggering clients (or their lawyers) to concoct provisions to fill the perceived gap. Several years ago, with the assistance of two lawyers familiar with these issues, Pro-Demnity arrived at a “Benign Indemnification” that can be substituted for whatever indemnity wording a client proposes:

The Architect shall, within the limits of its insurance coverages, indemnify the Client from claims, demands, losses, costs, damages, actions, suits or proceedings in respect of claims by a third party, or from losses, costs or damages suffered by the Client, provided these are attributable to error, omission or negligent act of the Architect or of those for whom it is responsible at law.

Pro-Demnity has presented this alternate indemnity wording in recent Bulletins, at recent Loss

Prevention Events, and in advice to individual architects. The wording has also been offered to the OAA for possible inclusion in the next update to OAA Document 600. This would have the benefit of filling any perceived void in the OAA recommended forms, perhaps heading off a client's effort to fill the perceived gap. At the same time, the clause would provide suitable indemnification wording, in sync with the architect's professional liability insurance and the OAA's advice. An architect could compare this wording to whatever alternate a client might present.

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