

February 22, 2023

Subject: Testimony to the Senate Committee on Judiciary in Opposition of SB 848

Dear Chair Prozanski, Vice Chair Thatcher and members of the Senate Committee on Judiciary,

My name is Nicholas Thibodeau, a resident of Washington County, and I'm testifying in my personal capacity. I have been trained as a lawyer but am not licensed nor do I practice in the State of Oregon. I am writing today to oppose Senate Bill 848. The provisions of the Bill not only harm those entitled to indemnification, they also do not legally follow, given the wording of language and the definitions of the words used.

Black's Law Dictionary defines "indemnify" as "to give *security* for the reimbursement of a person in case of an *anticipated* loss falling upon him" [emphasis mine]. Please note that the definition of indemnity requires *security* and an *anticipated* loss, not actualized or adjudicated losses. Black's Law Dictionary also defines "defend" as "To contest and endeavor to defeat a claimor demand made against one in a court of justice." Note also that the definition requires the party's contesting and endeavoring to be in the court of justice, not after that court has adjudicated.

If we apply the definition of "indemnify," the language of the Bill reads that a design professional will "give security for an anticipated loss" only after that loss is determined. In other words, no security is actually provided for an *anticipated* loss. And, to use the definition of "defend," it reads that a design professional will "contest and endeavor to defeat a claimor demand made in a court of justice" after that loss has actually been determined in a court of justice.

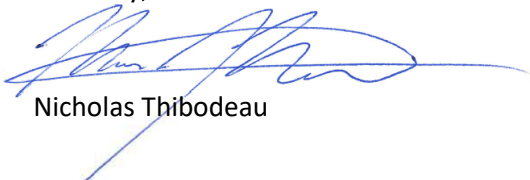
Clearly this does not logically follow. Indemnity and defense cannot apply after adjudication if by its very nature it must apply before. One cannot indemnify and defend if adjudication or alternative dispute resolution has already been made. At the conclusion of such proceedings, liability or fault is determined rather than defense and indemnification finally being able to apply, since the time for defense and indemnity has passed.

In effect, this Bill absolves design professionals from all defense and indemnification because it prevents defense and indemnification from applying in the only instance when defense and indemnification could apply. The result being that it requires cross claims or third-party complaints to every adjudication. No other provision in any Oregon Statute absolves an entire profession from defense and indemnification for the exercise of their profession.

Moreover, a standard of contract law and contract drafting is that the party that is most able to control the risks should be the party to bear that risk. With this language, in preventing defense and indemnification prior to adjudication, design professionals are prevented from defending or indemnifying for *their own negligence*, let alone any other risk they are most able to control and should bear.

While I understand the concerns of the design community through various other testimonies submitted, the structure of this proposed language is not the best means to achieve that end. Rather, it absolves the entire profession of simple contractual responsibilities every other profession must fulfill if one is to exercise the freedom of contract. For the foregoing reasons, I oppose Senate Bill 848.

Sincerely,



Nicholas Thibodeau