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Senator Floyd Prozanski, Committee Chair
900 Court Street, NE, S-413
Salem, Oregon 97301
Submitted Electronically: https://olis.oregonlegislature.gov

RE: Testimony to the Senate Committee on Judiciary In Support of SB 848

Greetings, Mr. Chair Prozanski, Vice-Chair Thatcher, and members of the Senate Committee on Judiciary. My name is Michael Olson with AssuredPartners, an insurance broker focused on representation of the design professional industry. Our brokage represents over 5,000 design professional firms across the county for their commercial and professional liability insurance programs.

Under current Oregon law, designers can be contractually required to fund the legal defense of a client at the moment a claim is first made. This obligation exists when allegations may be meritless and can extend to cases where no fault was ever determined. When this up-front duty to defend happens there is no available insurance coverage for the designer's defense obligation of the client.

If SB 848 is passed, professional liability insurance already purchased by a designer would provide coverage by reimbursing the client for incurred defense costs to the extent of determined fault by the designer. As a testament to the insurable intent to reimburse these defense costs, the following is a policy form extract from a Professional Liability insurer with over 10,500 design firm policyholders and by many estimates the largest single insurer concentration of design firms nationwide.

> ***III. DEFINITIONS J. DAMAGES. DAMAGES*** *shall also include the INSURED'S legal obligation to reimburse any person or entity for their reasonable defense costs, but only to the extent caused by an actual negligent act, error or omission in the performance of PROFESSIONAL SERVICES to which this Policy applies, and only if such defense costs are awarded by a court or arbitrator of competent jurisdiction.*

Opponents have argued SB 848 is a way for a designer to evade defending themselves against claims. Written testimony on behalf of the City of Beaverton states: "*The design professional is in the best position to defend the quality of their actions and design".* A second written testimony form the Coalition Against SB 848/Associated General Contractors testimony letter states: *"Particularly egregious is that the contractors and owners will be required to front the cost for the design professionals' attorneys' fees… The design professionals should be responsible for the costs to defend themselves against claims from the beginning..."*

Under SB 848 designers are still responsible for their own defense costs and these costs are insured. A designer's professional liability policy is written on a duty to defend [the designer] basis even if any of the allegations are groundless, false, or fraudulent. Nothing in this bill alleviates a designer's obligation to defend

themselves up-front at any time. As a testament to the misconceptions presented by opposition, the following is another policy form extract from the same insurer confirming for the committee the insurers obligation to defend their policyholder(s).

> ***IX. DEFENSE, SETTLEMENT AND COOPERATION*** *A. With respect to the insurance afforded by this Policy, the Company shall defend any CLAIM(S) against the INSURED that seek DAMAGES to which this insurance applies, even if any of the allegations are groundless, false, or fraudulent.*

Opponents of this bill also purport its passing will adversely affect them as their insurance will be expected to cover a larger share of client defense costs. The Coalition Against SB 848/Associated General Contractors testimony letter states: *"The practical implication of this change will be to require contractors and owners to defend the liability of design professionals until a case is concluded."* There is no data to suggest this is true in the short or long term. Over the past decade, twenty states with legislature majorities of both parties have passed similar legislation, including Washington State in 2012. Comparable state associations for our opponents have not publicly reported any adverse effects. As a representative of a national insurance brokerage also focused on also insuring the construction industry, I can confirm these construction insurers have no publicly available claims data from these states representing a discernable shift of these demands from designers to contractors. Insurance underwriting is a complex and multifaceted process, but rating models for both designers and contractors do not consider similarly passed legislation in any of these twenty states for underwriting.

Opponents of this bill argue designers should homogenize their insurance programs to what a contractor can buy, because contractors can secure insurance for this exposure. Written testimony by Mr. Bill Kirby, on behalf of the City of Beaverton states: *"there is no reason to treat architects, engineers, and land surveyors differently from any other professional contractor, which this legislation would require."* This assessment fails to recognize the basic differences between these professions. Contractors erect and build incredible projects with steel, concrete, aggregate, wood, nails, and hammers in their hands. They also retain responsibility for control and safety of the entire jobsite. By comparison, designers provide professional opinions with pen, paper, computer-aided drafting, and periodic job site visit as requested by their contract. Why can we not recognize the differences and diversity of these professions? While these professions work together on the same projects, they have vastly different obligations under the law and maintain different insurance programs.

SB 848 is not about drafting legislation to fix purported loopholes in the insurance marketplace. The professional liability insurance industry has investigated solutions to this issue since it became mainstream in the 1960's. Several products have been attempted, but no viable or sustainable product has ever been developed. The suggestions by opponents that designers pursue supposed loopholes within other insurance products have been and continue to be commercially unavailable. The Coalition Against SB 848/Associated General Contractors testimony letter states: "*We have proposed two solutions that would put every party to the contract on even footing for contract agreements. Both proposals were rejected."* Just because an insurance product or coverage is commercially available to a contractor does not mean it is also available to

a designer. Designers should not need to pursue an unproven, unavailable, and unsustainable insurance product to address an unequitable issue spanning over sixty years.

Finally, opponents have implied a designer retains the greatest ability to control risk within construction contracts. The testimony letter by Mr. Nicholas Thibodeau of Washington County states: "*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 … 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.*" I agree with Mr. Thibodeau on the basis of the comment within a construction contract, but the party with the greatest ability to control risk is the project owner, not the designer. Not only are most construction contracts presented to designers as take-it or leave-it propositions, but owners exert control over all major aspects of their projects, including the funding, selection of the parties to both design and build, and final contract terms.

One of the risks of being a project owner is that third-party claims may arise from the project or its operations. By proceeding with this project, any project owner has presumably determined that the benefits of project ownership outweigh that risk. A designer receives a nominal one-time fee and some marketing photos for their professional services. Owners receive a completed project intended to last them for fifty years or more. Designers and their insurers will be there to defend against allegations of negligence in design, and to pay damages caused by their negligence if those allegations are proven. Designers cannot serve as the guarantor of the owner's project; they are not even responsible for the jobsite, as this is the purview of the contractor.

SB 848 resolves the insurability issue for designers with insurance policies they already purchase and creates fairness in contracting for the design community. Insurance proceeds are often the only financial mechanisms available for a designer to compensate others for liability. SB 848 provides the best financial remedy for the designer to compensate both public agencies and the private sector and represents an obligation on behalf of designers to stand behind their work. This bill is good for public policy, not bad for it. What good does an uninsured duty to defend obligation provide to private industry or public agencies and their constituents if a designer cannot pay it? Please support this bill.

Sincerely,

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