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ARCHITECTS & ENGINEERS NEWSLETTER

OHIO SCHOOL DESIGN MANUAL (OSDM) – DOES IT CREATE DESIGN WARRANTIES?

There has been a lingering issue as to whether the Ohio School Design Manual (OSDM) creates warranties, particularly for roof/envelope design. Section A.2 of Chapter 8 of the OSDM "Systems and Materials" reads in its entirety:

> *School building structures and exterior enclosures shall be designed and constructed of materials that will perform satisfactorily for forty (40) years, with only minor maintenance and repairs, and for one hundred years (100) years before major repairs or replacement of primary structural or exterior enclosure elements is required.*

Older design contracts for school projects contain the following in Section 1.0 "Responsibilities of the Architect":

> *The Architect shall obtain a copy of the [OSDM]. The Architect shall endeavor to ensure that the plans, specifications and materials proposed for use in the [school project] comply with the standards established by the [OSDM] and Commission policies with the exception of any variance approved by the Commission. The Architect agrees that any Variance Requests will be submitted to the Commission 30 days prior to completion of the Design Development Phase.*

The incorporation of the OSDM in the current Ohio Facilities Construction Commission (OFCC) documents is via Exhibit E - Architect/ Engineer special terms and conditions (OSFC Project). OFCC and school districts use Exhibit E and typically include the following:

> *The A/E will obtain a copy of the Ohio School Design Manual ("Design Manual"). The A/E will endeavor to ensure that the plans, specifications and materials proposed for use in the Project comply with the standards established by the Design Manual and Commission policies, with the exception of any variance approved by the Commission. The A/E agrees that any Variance Requests will be submitted to the Commission thirty (30) days before completion of the Design Development Phase.*

The Ohio Statute of Repose provides in O.R.C. 2305.131(D):

> *Division (A)(1) of this section does not prohibit the commencement of a civil action for damages against a person who has expressly warranted or guaranteed an improvement to the real property for a period longer than the period prescribed in division (A)(1) of this section and warranty or guarantee has not expired as of the time of the alleged bodily injury, injury to real personal property, or wrongful death in accordance with the terms of that warranty or guarantee.*

The question that arises is whether the OSDM created a warranty outside the purview of the Statute of Repose per Section (D) above. If materials fail because of roof or envelope issues before forty (40) years, is there a breach of warranty, and thus, a claim is not barred by the Statute of Repose?

In *Board of Education of Martins Ferry City School District v. Colaianni Construction, Inc., 2023-Ohio-2285,* the Seventh District Court of Appeals was confronted with the school district's argument that the designer was bound to the forty (40) year warranty in Section A.2 of Chapter 8 of the OSDM, and thus, the Statute of Repose did not bar the school district's claim. The case involved designing and constructing an elementary school and a middle/high school. The Agreement for Professional Design Services was executed in 2004. The project was substantially complete in January 2008. Water leaks began in the middle/high school almost immediately after the school opened causing damage to the interior of the building. Similar leaks developed in the elementary school shortly thereafter. The school district initiated its lawsuit on April 5, 2019. The trial court dismissed the case ruling that the Statute of Repose barred the school district's claim. The school district appealed, and one of the arguments on appeal was that the OSDM required the designer to provide a forty (40) year warranty and guarantee. The Court of Appeals, in affirming the trial court judgment stated:

> "Here, the alleged incorporation by reference in the design contract reads in relevant part, 'shall endeavor to ensure that the plans, specifications and materials proposed for use in the [school project] comply with the standards established by the [OSDM].' The foregoing statement does not constitute an integration of every provision of the OSDM into the design contract. The term "endeavor" speaks to an effort or a goal rather than a promise or a result. Therefore, the design contract does not clearly communicate that the purpose of the reference to the OSDM is to incorporate the referenced material into the contract. Accordingly, we find that the OSDM was not incorporated by reference into the design contract."

In conclusion, this case is significant because the court did not accept that all aspects of the OSDM Manual were integrated into the contract. Most importantly, the court considered the language in the OSDM and determined that the term "endeavor" does not create a guarantee on behalf of the designer.

ADDITIONAL SERVICES – "CATCH 22"

There are cases in which the Owner alleges additional costs because of errors and omissions, demanding that the designer pay for the additional costs caused by the errors and omissions, regardless of whether the standard of care has been violated. The designer takes issue with some, if not all, of the errors and omissions the Owner is proposing. The designer conveys frustration considering all the additional services provided to the Owner without notice and without an additional invoice.

All the form documents require the designer to advise the Owner and obtain the Owner's consent before performing additional services. Owners are either unaware or do not care that the services being requested are beyond basic services. It is incumbent upon the designer to advise the Owner that the services requested are not within the scope of basic services and will fall within the provisions of additional services and require additional compensation. Section §4.2.1 of the AIA B101-2017 provides.

> Upon recognizing the need to perform the following Additional Services the Architect shall notify the Owner with reasonable promptness and explain facts and circumstance giving rise to the need. The Architect shall not proceed to provide the following Additional Services until the Architect receives the Owner's written authorization.

On projects with challenges, designers often are reluctant to advise the Owner that what is being requested would constitute additional services and compensation. The dilemma is that designers are trying to work through the challenges, some of which may result from errors and omissions that resulted in change orders, and do not want to "stir the pot" by advising the Owner about additional services requiring additional compensation. Designers are problem solvers, not problem creators.

When the Owner raises issues regarding additional costs due to errors and omissions, a bargaining chip is lost when the proper procedure has not been followed for additional services. The designer loses the leverage of using those additional services as a set-off to any claims by the Owner, regardless of how valid or invalid those claims may be. When designers contemplate performing additional services, they must advise the Owner and obtain consent before providing them. The designer can always choose not to bill for those services. However, if the notice/approval requirements are not followed, the designer cannot issue a bill and loses leverage to set off the invoice for additional services against any Owner claims.

Not only is it a good business practice to follow the agreement's requirements to obtain additional compensation, but it is also essential for those projects in which the Owner raises the issue of additional costs due to change orders resulting from errors and omissions. For the above reasons, designers must:

- Be alert when additional services are requested,
- Receive approval from the Owner before the services are performed, and
- Save what may be an important bargaining chip.

ANTI-INDEMNITY STATUTE – OWNER'S RESPONSE

On March 14, 2023, O.R.C. §153.81 became effective prohibiting broad indemnity provisions in public improvement projects. The statute preserves the right to incorporate indemnity provisions in public projects for third-party personal injury and property damage claims but prevents the broader indemnity provision often seen in agreements public authorities use. The broader indemnity provision allows for the recovery of attorney's fees, expenses, damages, and costs incurred by the Owner that arise because of a designer's negligence. Owners are not entitled to these damages unless included in the agreement, usually through a broad indemnity provision. The focus of O.R.C. §153.81 was to prevent the designers from being exposed to these additional damages for public projects.

Public authorities are inserting the statute's language in agreements with designers under sections entitled "Indemnification," stating compliance with the statutory language. However, public authorities are attempting to recapture the ability to recover the very type of damages barred by the statute by including a provision in the agreement under the Standard of Care. One example of such:

> **Architect Standard of Care**
> The Architect shall perform its services consistent with the professional skill and care ordinarily provided by Architects licensed to practice in the State of Ohio, experienced in the design of public facilities and practicing in the same or similar locality under the same or similar circumstance ("Standard of Care"). Architect shall perform services as expeditiously as is consistent with such professional skill and care and orderly progress of the Project. The Architect's failure to comply with the standard of care shall be a material breach of the Agreement. The Architect will reimburse the Owner for its damages and expenses including, but not limited to attorneys and consultant fees and expenses, arising out of, or related to such breach.

The Ohio Legislature was concerned about imposing excessive damages on designers performing services on public projects. Given the severity of broad indemnity provisions, the Ohio Legislature also wanted to ensure designers would not shy away from public projects. There were public policy concerns regarding broad indemnity provisions.

The above-quoted language inserted in the Architect's Standard of Care is an attempt by public authorities to recapture the excessive damages banned by O.R.C. §153.81. Whether the language inserted in the Standard of Care provision would be construed as a violation of O.R.C. §153.81 is not known until decided by a court. At the very least, it violates the spirit and intent of O.R.C. §153.81.

When confronted with provisions that modify the designer's standard of care, the designer must strike the language and advise the public authority that it violates the spirit and intent of O.R.C. §153.81.

DUTY TO DEFEND

Obligation to Defend
An indemnification provision must expressly include any obligation to defend as Ohio courts do not otherwise assume this obligation. Ohio courts do not require a party to defend unless the language of the agreement imposes an expressed duty to defend. *Rayco Mfg. Inc. v. Beard Equipment Co. 9th District Wayne No. 11CA0057.*

Where an indemnity agreement includes the duty to defend, that duty is broader than and distinct from the duty to indemnify, and it is determined by the scope of the claim that potentially or arguably falls within the terms of the indemnity agreement. For instance, if the duty to defend may be triggered by an obligation to indemnify against "all" claims of a certain nature. Indemnity provisions are construed in the same manner as other contractual agreements, which is by determining the intended parties expressed in the language used. *Worth v. Aetna Cas. & Sur. Co. 32 Ohio St.3d 238.* An indemnification provision between two parties is not analogous to situations involving insurance companies where the insurance company has an inherent duty to defend the insured. Rather, the parties have a right to agree to the language used in the indemnification provision in order to protect one party or both from liability for the negligent acts of the other, and the parties are free to negotiate the terms and limitations of the indemnification provision. *Krasyn-Caplan Corp. v. Flow-Tork, Inc. 66 Ohio St.3d 75.*

Obligation to Indemnify Distinguished from Obligation to Defend
In Ohio, the duty to defend is separate and distinct from the duty to indemnify. *W. Lyman Case & Co. v. National City Corp., 667 NE 2d 978.* Indemnity is generally interpreted as imposing an obligation on one party (the indemnitor) to pay or compensate the other party (the indemnitee) for certain legal liabilities or losses, but that obligation does not typically arise until the end of the case when the indemnitee has had a judgment entered against it for damages or has made payments or suffered actual loss. On the other hand, the duty to defend imposes an independent duty to either actively defend or fund the defense brought against the indemnitee that falls within the scope of the indemnification language. The duty to defend is a promise to render, or fund, the service of providing a defense on the indemnitee's behalf - a duty that usually arises as soon as the claim is made against the indemnitee and may continue until the claim has been resolved. The allegations asserted in the claim, not the ultimate merits of the action, give rise to the obligation to defend. Therefore, a party may have to defend the other party even if it is ultimately determined that the underlying claim had no merit.

Indemnification Clauses that May Trigger Duty to Defend
Assuming that the indemnity provision has a duty to defend provision that the parties have agreed to, one must look at the triggering language. The indemnity provision may promise to indemnify against "all losses, liabilities, claims and causes of action of repair and coverable damages" incurred by the indemnified party that "arise from" or "are related to" the indemnifying parties' "breach of contract," for "negligence," or "errors or omissions." Depending on the indemnity language, the indemnification may be broad or narrow. The duty to defend will be tied to the language used. *Allen v. Fifth Third Bank 6th App. Dist. 2014-Ohio-1293.*

O.R.C. §2305.31 - Promisee Indemnified Against Damage Liability
A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees has hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection or from purchasing a construction bond.

Conclusion
Duty to Defend is used in many different settings/contracts – not just construction contracts. It is widely used in commercial contracts for sale of goods and materials. It is also used in bank instruments. It is not against public policy to have duty to defend provisions.

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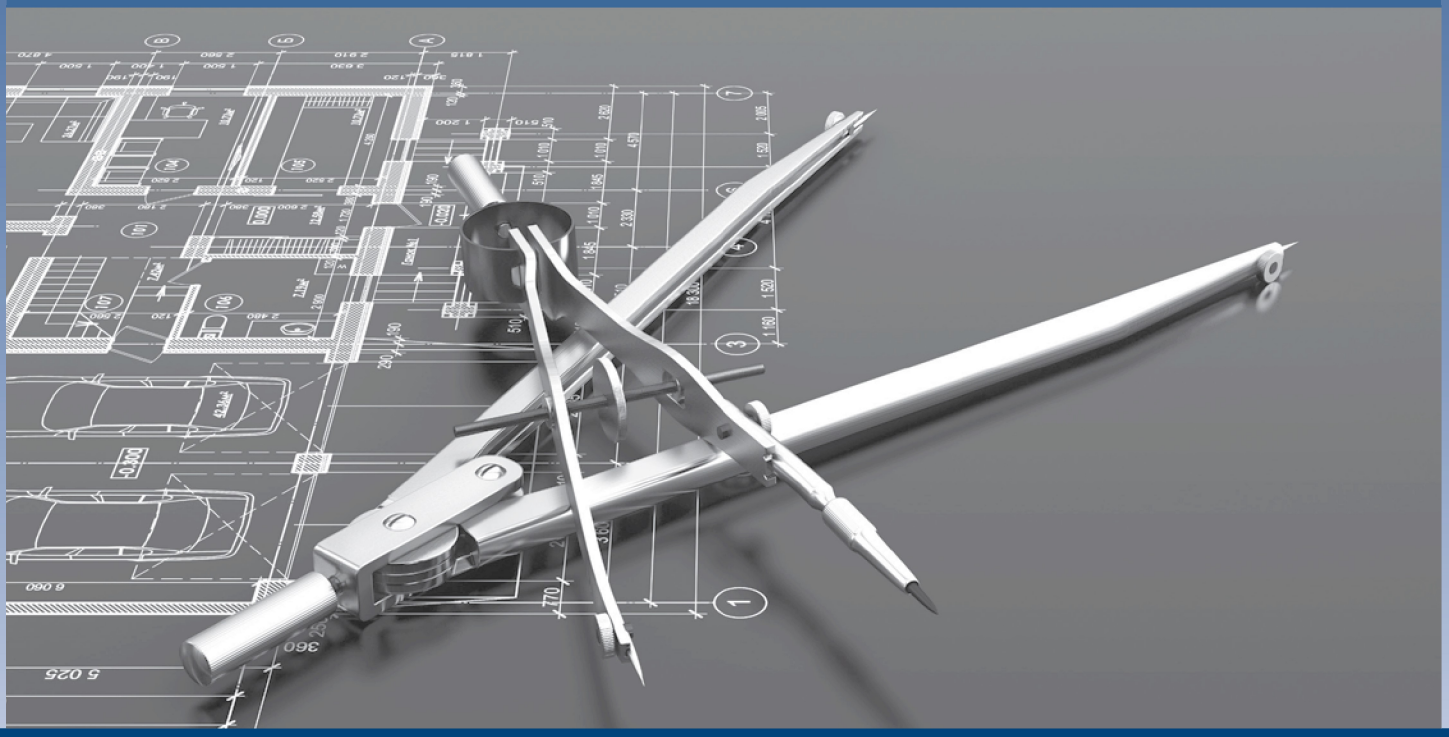

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Weston Hurd is pleased to welcome Kelsey Demel to the Architects & Engineers team. Kelsey received her J.D. in 2023 from the University of Iowa College of Law and her B.A. in 2019 from Miami University.