ARTICLES

Arising Out Of…Three Words You Should Avoid

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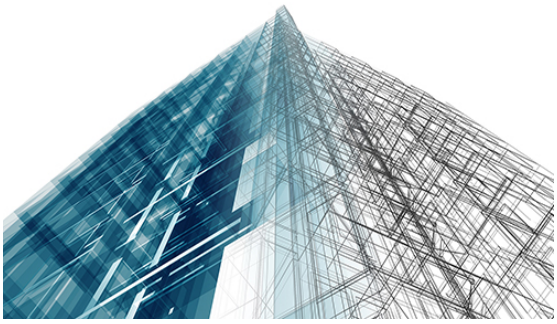

"Engineer shall indemnify client but only to the extent arising from or relating to Engineer's negligence". Sounds innocuous and maybe even reasonable. However, this phrase has serious potential liability implications, ranging from the scope of an indemnification obligation, to breach of contract for failure to secure adequate insurance coverage.

In *Federal Ins.co v. Tri-State Ins. Co (1998)*, the court stated that the majority rule for the phrase, "arising out of" in insurance policies should be given a broad reading such as "originating from" or "growing out of" or "flowing from" or "done in connection with"—that is, it requires some causal connection to the injuries suffered but does not require proximate cause in the legal sense. The broad interpretation of these three words has led to a number of surprising decisions affecting the potential liability of design professionals and the breadth of their insurance coverage.

For instance, in the case of *Penta Corporation v. Town of Newport v. AECOM Technical Services, Inc.* the A/E was required to provide a defense to a third party in a matter for which it had no other liability exposure. The case involved a contract dispute between the owner and its contractor. The dispute did not involve fault on the part of the engineer, but the court reasoned that the engineer owed its client, the town, a duty to defend because of the indemnity language in its contract. The engineer argued that the wording, "but only to the extent arising from" protected it from the obligation to defend. The court relied on the majority rule stated above and made the following distinction, **"Arising out of does not mean that any losses or claims must have been caused by negligence or breach of contract. A claim merely has to involve an alleged negligent act or omission in the performance of the contract".** Thus, inserting the words "to the extent" in front of "arising from" did not alter the broad intent of "arising from".

Consider also the routine task of complying with an insurance specification. A common insurance requirement is that the A/E secure Additional Insured (AI) coverage to the benefit of the owner for claims "arising out of" the A/E's services. Prior to 2004, the Additional Insured endorsement in general use (ISO CG 20-10 edition 11/85) provided in part that the AI is covered for liability "arising out of" the insured's ongoing operations. Numerous court decisions have applied the broad interpretation of "arising out of" in the context of the CG 20-10 endorsement and in many cases, the mere fact the named insured was

performing services for the AI was enough to invoke the “arising out of” language”.

This broad interpretation was not the intent of the endorsement. For that reason “arising out of” was replaced with “caused in whole or in part by your (the named insured’s) acts or omissions” in 2004. The broad coverage application of the 11/85 language is a great potential benefit to the AI and for that reason the 11/85 edition is often a contractual requirement. The problem is that it is very difficult for most A/E firms to secure AI coverage using the 11/85 coverage formula.

Some contracts do not specify the edition date but will require that coverage for the AI be secured for claims “arising out of” the A/E services. If the applicable AI endorsement is a current one, the A/E is possibly in breach of contract for failure to provide the required coverage. Failure to identify and address the “arising out of” language in an indemnity provision or insurance requirement could very well expose the design professional to an unintended obligation or possibly a breach of contract claim.

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