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SIGNIFICANT CHANGES TO THE NORTH CAROLINA ANTI-INDEMNITY STATUTE

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North Carolina recently amended its “anti-indemnity” statute, which generally applies to construction-related contracts and agreements with design professionals. At a high level, the new law places additional restrictions on the scope of indemnity clauses in these types of agreements. This is a notable change for owners, designers, and contractors because indemnity provisions are often used to allocate the risk of loss or damages that may arise in connection with construction projects or design agreements.

The most substantial change may be that the new law now prohibits contractual provisions requiring design professionals to defend others against claims allegedly caused by the *professional negligence* of either party to the agreement or their derivative parties. Under the revised statute, a party may still use an indemnity clause to recover attorneys’ fees and other litigation costs actually incurred in defending against *third-party claims*, but only upon a determination that the fees and costs were proximately caused by the fault of the party required to pay such costs or the fault of others for whom that party is responsible. While unclear, such a recovery will likely not be permitted absent a final order or judgment establishing such fault.

The amended statute is broadly drafted to cover construction-related contracts and agreements with design professionals, but certain agreements and claims are specifically excluded from its scope, including insurance contracts, workers’ compensation, other agreements issued by insurers, and lien or bond claims asserted under Chapter 44A of the General Statutes. With the exception of those specific carve outs, the new law applies to construction-related contracts and agreements with design professionals “entered into, amended, or renewed” on or after August 1, 2019. The statute is silent as to whether execution of a standard change order after that date constitutes an amendment for purposes of the statute. This issue, along with other ambiguities, is likely to be considered by the courts over the next few years.

In light of the new law, owners, contractors, and design professionals may want to revise their stock or “boilerplate” indemnity clauses in their form contracts to avoid running afoul of the new law. Additionally, they should consider the potential implications of the new law when evaluating potential change orders after August 1, 2019, since it is not clear whether a change order will qualify as an amendment under the new statute.

If you have questions regarding the matters discussed in this Client Alert, please contact your Smith Anderson **Real Estate Development** lawyer.

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