



# Learning When to Waive Good-Bye

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RLI Design Professionals  
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# Course Description

## To Waive or Not To Waive – That is the Question!

Understanding and evaluating common waivers in professional services contracts.

This course will review important waiver provisions in design contracts, the risk they pose, and the actions that design professionals can take to manage and mitigate their liability.

# Learning Objectives

## Participants in this session will:

- 1** Identify common waiver clauses in design contracts;
- 2** Discuss important considerations when negotiating or drafting waiver provisions;
- 3** Discover ways to preserve contractual rights and mitigate exposure to risks inherent in waiver clauses; and
- 4** Learn how to recognize legal issues regarding the enforceability of waivers.

# What is a Waiver?

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# What is a Waiver?

## Waiver

relinquishment of a present or future right, claim, or privilege.

Express v. Implied

Conditional v. Unconditional

Unilateral v. Bilateral

Active v. Passive

# Express v. Implied

## Express Waiver

Written or oral statement of a party's intent to relinquish their right, claim or privilege.

## Implied Waiver

Waiver by conduct indicating a party's intent to relinquish their right, claim, or privilege.



# Sample Waiver Disclaimer Language



Failure by either party to enforce any provision of this Agreement shall not be deemed a waiver of such provision or modification of this Agreement. A waiver of any breach of a provision of this Agreement shall not be deemed a waiver of any subsequent breach and shall not be construed to be a modification of the terms of this Agreement.



# Unilateral v. Bilateral

## Unilateral Waiver

Waiver by one party to the contract, without receiving a reciprocal waiver from the other party.

## Bilateral Waiver

Waiver by both parties to the contract; reciprocal waivers.

# Example

Unilateral v. Bilateral

## Unilateral Waiver

Waiver is not reciprocated.

“Design Professional waives consequential damages for claims, disputes, or other matters...”

“Design Professional and Owner waive consequential damages for claims, disputes, or other matters...”

AIA B101-2017 § 8.1.3

## Bilateral Waiver

Both parties mutually agree to waive their respective rights against each other.

# Conditional v. Unconditional

## Conditional Waiver

Waiver is conditioned on the occurrence of an event or act by another.

## Unconditional Waiver

Waiver occurs absent any condition or stipulation.

# Example

## Conditional v. Unconditional

### Conditional Waiver

Waiver is conditioned on receipt of payment from Client.

“Design Professional waives and releases...to the extent of each payment received from Client.”

“Design Professional hereby waives and releases all lien rights to the fullest extent permitted by law...”

### Unconditional Waiver

Waiver occurs absent any condition or stipulation.

# Active v. Passive

## Active Waiver

Waiver triggered by affirmative action.

“Acceptance of final payment shall constitute a waiver and release by Design Professional of all claims for damages or additional compensation...”

“Failure to raise a claim regarding payment amount within 3 days of receiving said payment, constitutes a waiver of such claims...”

## Passive Waiver

Waiver triggered by silence or inaction.

# Analysis

## **1** Rights and privileges

What rights and privileges do you lose by agreeing to the terms of this provision/contract?

## **2** Liability

What is your exposure to liability?

## **3** Discussion points

Identify discussion points for your contract negotiations to manage and mitigate your exposure.

# Ownership Rights

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# Ownership Rights Analysis

## Waiver of Ownership Rights

Waive rights to documents, materials, and other instruments of service used and created in connection with the project.

### **1** Rights and privileges

Right to ownership and reuse, payment, involvement in use of documents.

### **2** Liability

Liability for damages arising out of reuse or misuse without your involvement.

### **3** Discussion points

See slide 22.

# Quiz



Client shall be the owner of all designs, drawings, documents, plans, specifications, maps, calculations, computer files, programs or models...whether draft or final, hard copy or digitalized, and whether maintained in electronic format or otherwise, made, conceived, developed, or prepared by or for the benefit of Design Professional in connection with the performance of its services under the Agreement.



# Answer

“

Client shall be the owner of all designs, drawings, documents, plans, specifications, maps, calculations, computer files, programs or models...whether draft or final, hard copy or digitalized, and whether maintained in electronic format or otherwise, made, conceived, developed, or prepared by or for the benefit of Design Professional in connection with the performance of its services under the Agreement.

”

# Case Law

**Strutt Group Incorporated**

Project Owner



**Nelson-Salabes, Incorporated (NSI)**

Design Professional

**Project Suspended**

**Morningside Development, LLC**

New Project Owner



**EDG Architects**

New Design Firm

Design firm awarded \$736k in damages when a new project owner terminates the firm and continues to use their designs without the firm's involvement in the project.

# License to Use



The Architect’s Drawings, Specifications or other documents shall not be used by the Owner or others on other projects, for additions to this Project, or for completion of this Project by others unless the Architect is adjudged to be in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect.



# Sample Ownership Language



§ 7.2 The Architect and Architect's consultants shall be deemed authors and owners of their respecting Instruments of Services...and retain all common law, statutory and other reserved rights, including copyrights...

§ 7.3 The Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service...



## Ownership Rights Sample Language

AIA B101-2017 §§ 7.2 & 7.3

# Waiver of Ownership Rights

Mitigate risk by clarifying the following:

Rights are granted only when paid in full

Documents are project-specific; not for reuse

Reuse without your involvement at Client's sole risk

Permitted to retain one record copy

# Lien Rights

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# Lien Rights Analysis

## Waiver of Lien

Waive rights to file claim against the real property on which design professional has bestowed labor or furnished material for the value of those services.

- 1**  
**Rights and privileges** Right to file liens and recover money owed.
- 2**  
**Liability** Non-payment for services duly rendered.
- 3**  
**Discussion points** Conditional waiver of liens.

# Lien Rights for Design Professionals

Lien rights for design professionals differ by state.

No Lien Rights

No lien rights entirely.

Modified Lien Rights

Lien rights subject to regulations specific to design professionals.

Same Lien Rights

Same lien rights as those available to contractors.

# Quiz

“

Design Professional hereby agrees and acknowledges that its rights to file a construction lien are hereby waived and released.

”

# Answer

“

Design Professional hereby agrees and acknowledges that its rights to file a construction lien are hereby waived and released.

”

# Sample Contract Language

“

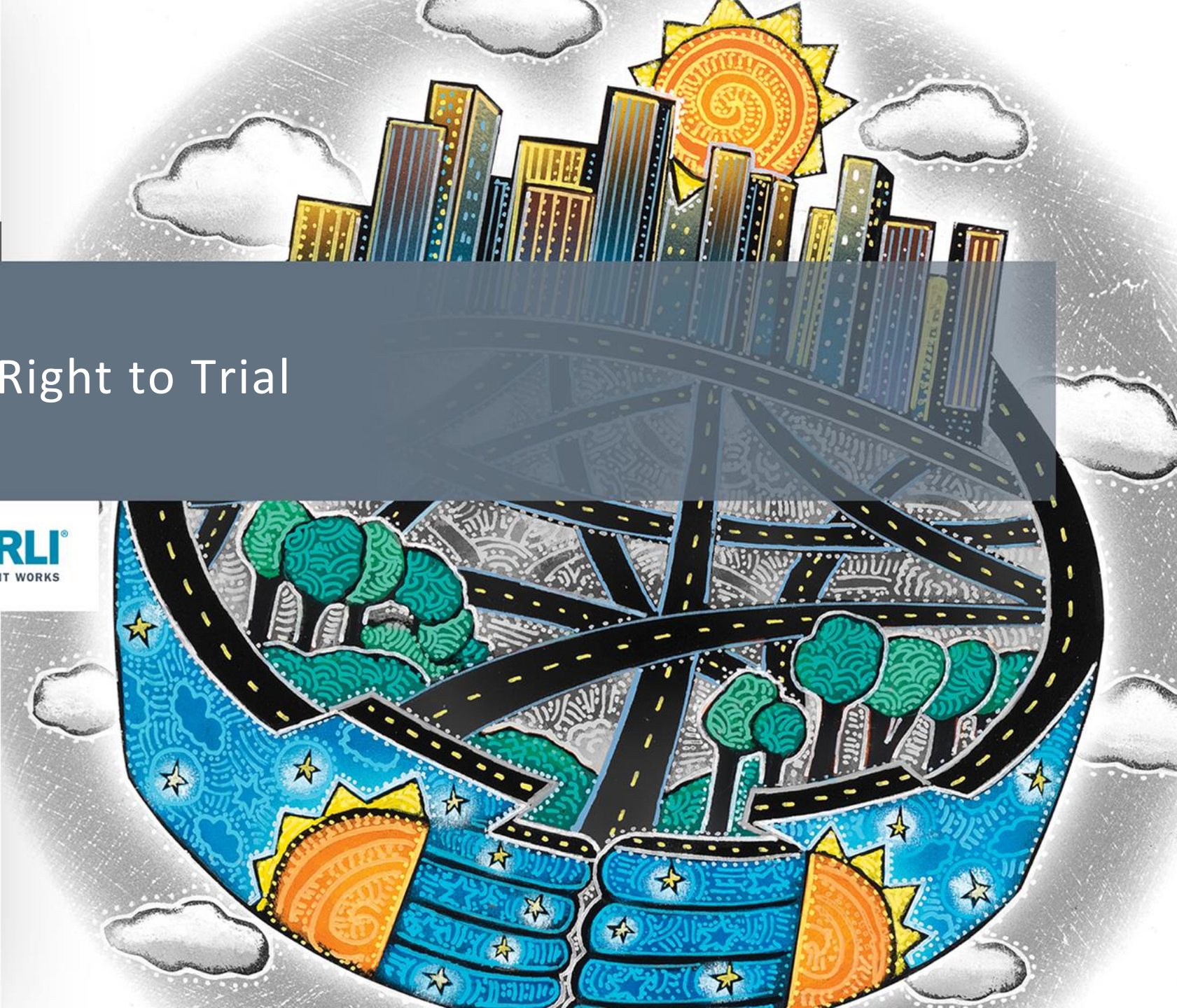
Design professional hereby agrees and acknowledges that its rights to file a construction lien...are hereby waived and released **in consideration for, upon receipt of, and to the extent of all payments received** by Design Professional hereunder.

”

**Lien Waiver  
Sample Language**

# Right to Trial

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# Mandatory Arbitration Clause Analysis

## Waiver of Right to Trial

Waive right to seek resolution of disputes through litigation.

### **1** Rights and privileges

Right to resolve disputes through litigation and availability of the appeals process.

### **2** Liability

Time, cost, governing law, and appeals process.

### **3** Discussion points

Bilateral waiver.

# Dispute Resolution

## 3 Common methods of dispute resolution

Mediation

Arbitration

Litigation



# Conditions to Waiver of Trial Rights

To mitigate risk, consider the following:

Mediation as an alternative

## RLI Policy

If any **Claim** made against the **Insured** and reported to the Insurer during the **Policy Period** is **resolved**, with the Insurer's consent and agreement, **through the use of Mediation**, the Insured's Deductible as respects the Claim shall be reduced by fifty percent (50%) subject to a maximum reduction of \$12,500.

Attach conditions to trial waiver

# Conditions to Arbitration

## **Bilateral/reciprocal waiver**

Is mandatory arbitration reciprocal?

## **Choice of arbitrator**

Who chooses the arbitrator? Is mutual agreement required?

## **Choice of venue**

Who chooses the location? Is mutual agreement required?

## **Applicable rules**

Construction Industry Arbitration Rules of the American Arbitration Association? Judicial Arbitration and Mediation Services (“JAMS”)?

# Quiz



Any controversy or claim between the Client and Design Professional arising out of, or related to this Agreement, or the breach thereof, shall be settled by binding arbitration if the Client, in its sole discretion, elects to arbitrate the controversy or claim in lieu of litigation. The election to arbitration shall be solely in the discretion of the Client, and if Client elects to arbitrate, the Design Professional expressly consents to arbitration...



# Answer

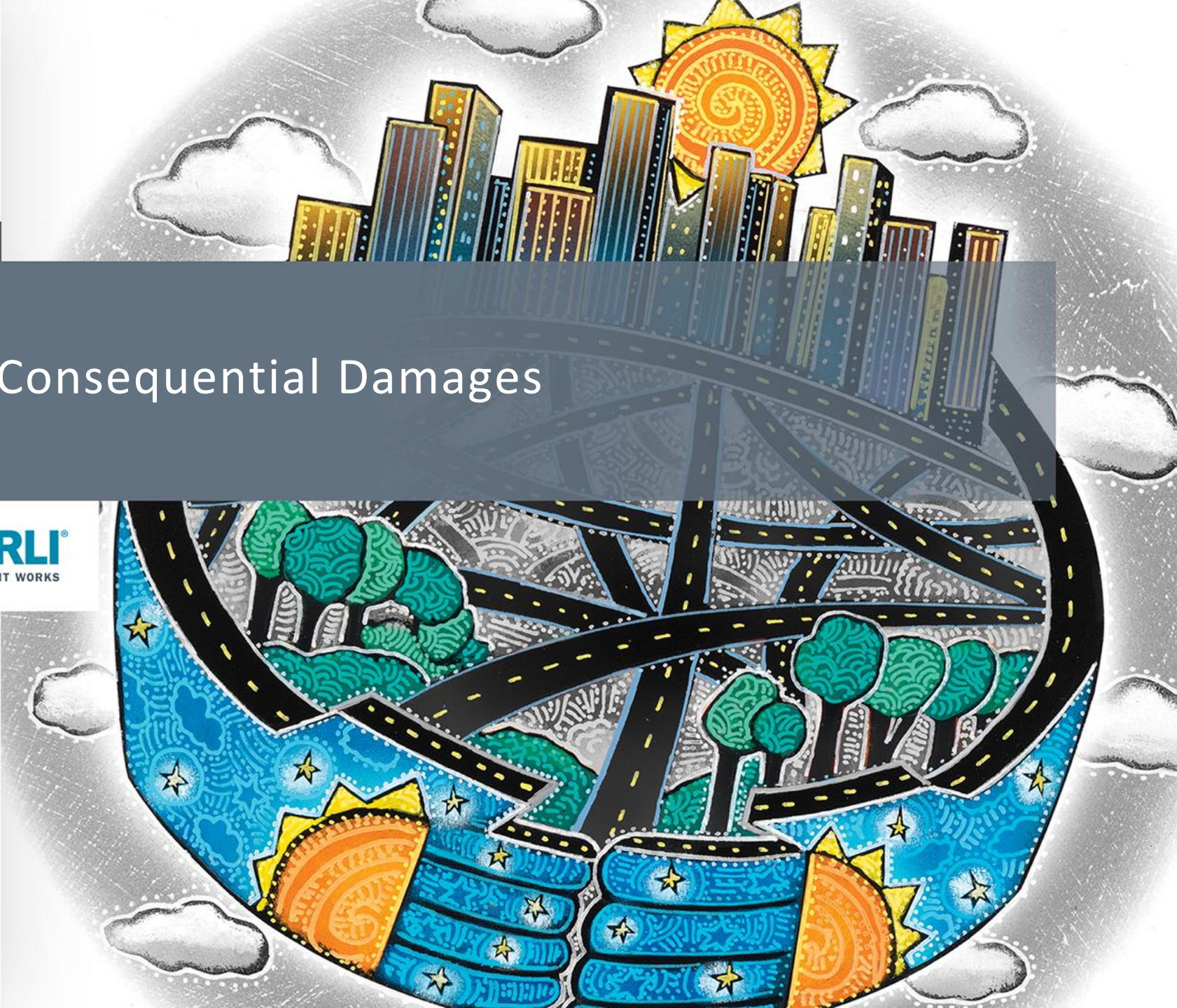
“

Any controversy or claim between the Client and Design Professional arising out of, or related to this Agreement, or the breach thereof, shall be settled by binding arbitration if the Client, in its sole discretion, elects to arbitrate the controversy or claim in lieu of litigation. The election to arbitration shall be solely in the discretion of the Client, and if Client elects to arbitrate, the Design Professional expressly consents to arbitration...

”

# Consequential Damages

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# Consequential Damages Analysis

## Waiver of Consequential Damages

Waive right to seek recovery of foreseeable damages in the event of a breach of contract by Client.

### 1 Rights and privileges

Right to recover foreseeable damages indirectly resulting from Client's breach of contract.

### 2 Liability

Liability for indirect damages caused by Client's breach of contract (including but not limited to lost profits, lost opportunity, etc).

### 3 Discussion points

Bilateral waiver.

# Examples

Lost Profits

Loss of Use

Loss of Rent

Interest and Finance Charges

Additional Labor Costs

Material Escalation Costs

Depreciation

Loss of Productivity and Efficiency

# Hypothetical

Delayed completion of an apartment building.

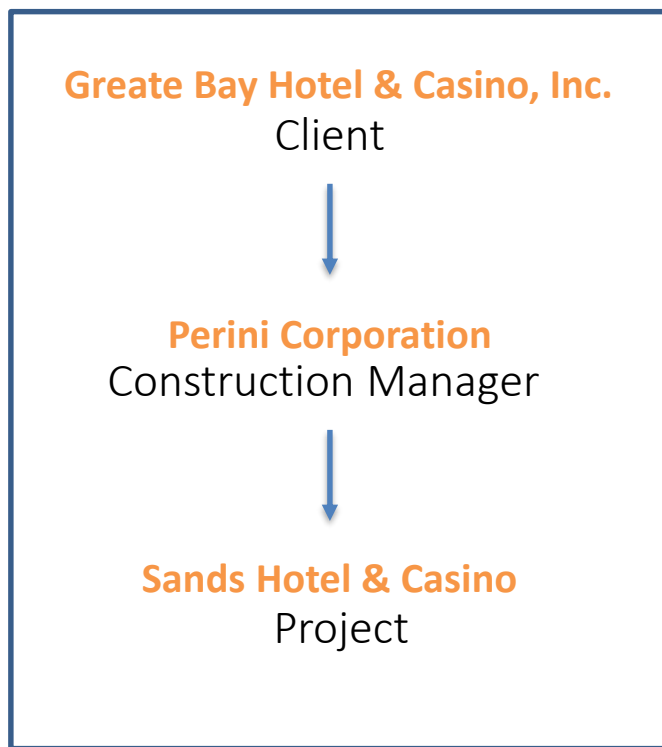


Delayed completion of a retail location.



# Case Law

Four month delay resulted in **\$14.5 million awarded in lost profit damages** to Owner, where the contract with Plaintiff was for \$600,000.



“Reasonably foreseeable” because Perini was aware of:

- 1) Purpose of project;
- 2) Client’s desire and need to finish the project before the summer season;
- 3) Client’s plan to delay the project until the following year if untimely completed; and
- 4) High stakes involved in the Atlantic City casino-construction industry.

# Sample Contract Language

“

The **Architect and Owner waive consequential damages** for claims, disputes, or other matters in question, arising out of or relating to this agreement...”

”

**Consequential  
Damages  
Sample Language**

AIA B101-2017 § 8.1.3

# Subrogation Rights

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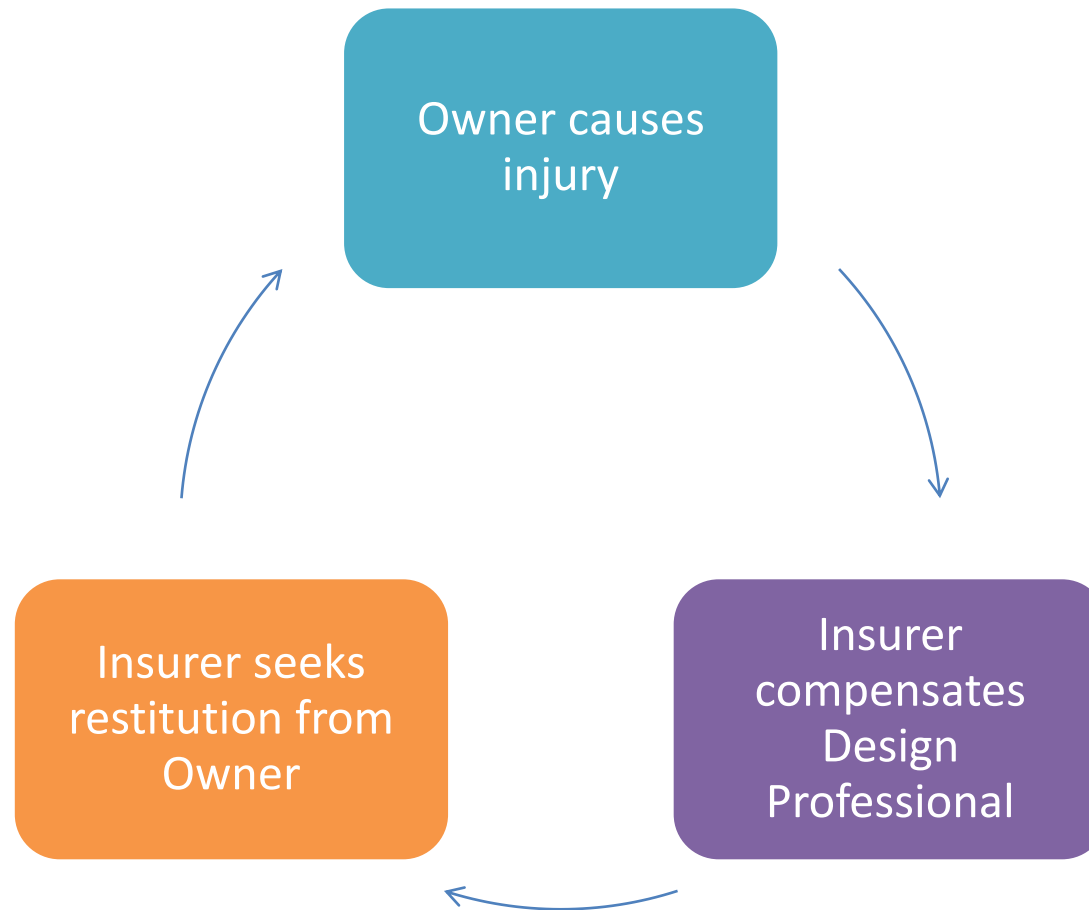
# Waiver of Subrogation Analysis

## Waiver of Subrogation

Waive right for someone to “step into your shoes” and pursue recovery.

- 1 Rights and privileges** Right for insurance to seek reimbursement from responsible party.
- 2 Liability** Can affect insurance premiums and coverage.
- 3 Discussion points** Bilateral waiver.

# Waiver of Subrogation



Insurer “steps into the shoes of” Insured

# Quiz



Design Professional, and all of its insurers, shall agree to waive all rights of recovery or subrogation against the Client, its directors, officers, employees, agents, successors and assigns, and the Client's insurance companies arising out of any claims for injury(ies) or damages resulting from the services performed by or on behalf of Design professional.



# Answer

“

Design Professional, and all of its insurers, shall agree to waive all rights of recovery or subrogation against the Client, its directors, officers, employees, agents, successors and assigns, and the Client's insurance companies arising out of any claims for injury(ies) or damages resulting from the services performed by or on behalf of Design professional.

”

# Insuring Agreement

## RLI Policy

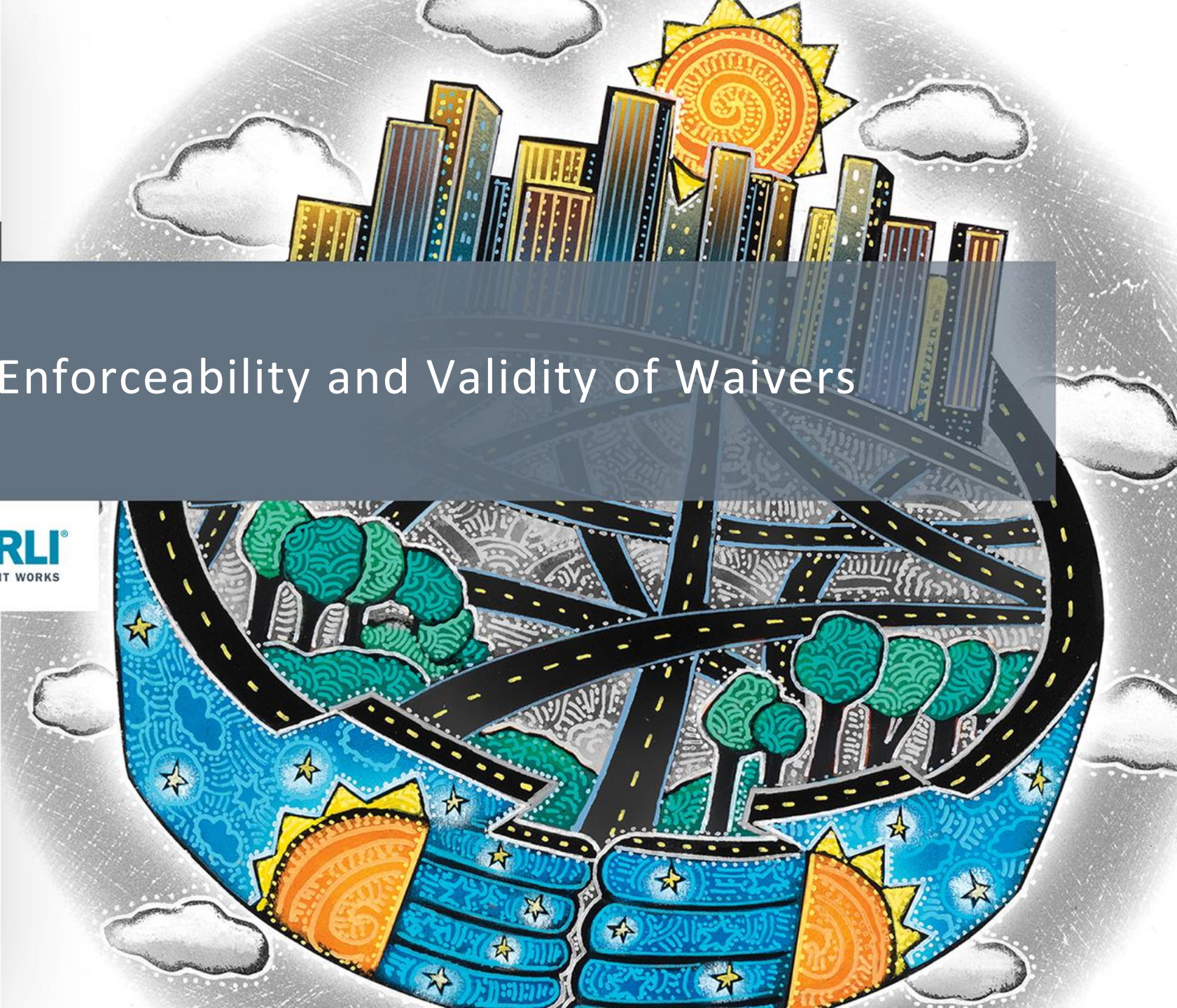
In the event of any payment under this Policy, the Insurer and the **Insured** may have the right to recover all or part of any payment the Insurer or the **insured makes under this Policy**...The **Insured must do nothing to impair** [right of subrogation]

...The **Insurer waives its rights of subrogation under this Policy against clients of the Insured** as respects **Claim(s)** arising from **Professional Services** under the client's contract requiring waiver of subrogation but only to the extent required by written contract.



# Enforceability and Validity of Waivers

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# Enforceability/Validity Analysis

## Enforceability/Validity

Generally, a court may find a waiver to be unenforceable or invalid for one of three reasons

### 1 Unjust result

Enforcement of the waiver would lead to an unjust result.  
A common argument under this rationale is unenforceability due to “unconscionability”.

### 2 Public policy

Enforcement of the waiver would violate public policy.

### 3 Statutory restriction

Enforcement of the waiver is prohibited by law.

# Case Law

Eric Lucier and Karen Haley

Clients



Cambridge Associates, Ltd

Professionals

“

...Client agrees that, to the fullest extent permitted by law, CAL's total liability to Client for any and all injuries, claims, losses, expenses, damages or expenses arising out of this Agreement from an cause or causes shall not exceed the total amount of \$500 or 50% of fees actually paid to CAL by Client, whichever sum is smaller...

”

Limitation of liability clause found unenforceable due to unconscionability and as against public policy.

# State Law Example

## Prohibition Against Jury Trial Waivers

“Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable...”

N.C. Gen. Stat. § 22B-10 (2018)

# Remember

## **1** Rights and privileges

What rights and privileges do you lose by agreeing to the terms of this provision/contract?

## **2** Liability

What is your exposure to liability?

## **3** Discussion points

Identify discussion points for your contract negotiations to manage and mitigate your exposure.

## **4** Advice of attorney

Consult with an experienced and knowledgeable attorney.

Thank you for your time!

# QUESTIONS?

**This concludes The American Institute of Architects  
Continuing Education Systems Program**

**Jennifer Walton, Operations Representative**

**[Jennifer.Walton@rlicorp.com](mailto:Jennifer.Walton@rlicorp.com)**

**Mika Dewitz-Cryan, Client Solutions Manager**

**[Mika.Dewitz-Cryan@rlicorp.com](mailto:Mika.Dewitz-Cryan@rlicorp.com)**

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