

AMENDED IN SENATE APRIL 5, 2010

**SENATE BILL**

**No. 972**

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**Introduced by Senator Wolk**

February 8, 2010

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An act to amend Section 2778 of, *and to add Section 2782.85 to*, the Civil Code, relating to indemnity.

LEGISLATIVE COUNSEL'S DIGEST

SB 972, as amended, Wolk. Indemnity: *design professionals*.

Under existing law, specified rules are to be applied in the interpretation of a contract of indemnity, unless a contrary intention appears. Pursuant to these rules, the person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct those defenses, if he or she chooses to do so.

~~This bill would expand that rule to provide that the person indemnifying has no obligation to defend actions or proceedings prior to a preliminary or final determination of liability, nor in any amount that exceeds the finally determined indemnification percentage of liability based upon the comparative fault of the indemnitor.~~

*Existing law provides, for all contracts, and amendments to contracts, entered into on or after January 1, 2007, with a public agency for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting these contracts, that purport to indemnify, including the cost to defend, the public agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that arise out of, pertain to, or relate*

*to the negligence, recklessness, or willful misconduct of the design professional.*

*This bill would provide, for all contracts, and amendments to contracts, entered into on or after January 1, 2011, for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting these contracts or amendments to contracts that purport to require an immediate defense under an indemnity agreement are unenforceable, except as provided. The bill would provide that a design professional is not required to defend or indemnify the indemnified party unless and until the indemnified party provides a written tender of the claim to the design professional, at which point the design professional may choose to either defend the claim with counsel of its choosing or pay a reasonable allocated share of the indemnified party's defense fees and costs. The bill would allow the indemnified party to recover damages from the design professional if it fails to timely and adequately perform these duties. The bill would provide that a design professional shall not be required to pay defense or indemnity costs in an amount in excess of the finally determined percentage of liability based upon the comparative fault of the design professional.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 2778 of the Civil Code is amended to  
2 read:

3 2778. In the interpretation of a contract of indemnity, the  
4 following rules are to be applied, unless a contrary intention  
5 appears:

6 (a) Upon an indemnity against liability, expressly, or in other  
7 equivalent terms, the person indemnified is entitled to recover  
8 upon becoming liable.

9 (b) Upon an indemnity against claims, demands, damages, or  
10 costs, expressly, or in other equivalent terms, the person  
11 indemnified is not entitled to recover without payment thereof.

12 (c) An indemnity against claims, demands, or liability, expressly,  
13 or in other equivalent terms, embraces the costs of defense against  
14 the claims, demands, or liability incurred in good faith, and in the  
15 exercise of a reasonable discretion.

1 (d) The person indemnifying is bound, on request of the person  
2 indemnified, to defend actions or proceedings brought against the  
3 latter in respect to the matters embraced by the indemnity, but the  
4 person indemnified has the right to conduct those defenses, if he  
5 or she chooses to do so. ~~The person indemnifying has no obligation~~  
6 ~~to defend actions or proceedings prior to a preliminary or final~~  
7 ~~determination of liability, nor in any amount that exceeds the~~  
8 ~~finally determined indemnification percentage of liability based~~  
9 ~~upon the comparative fault of the indemnitor. This subdivision~~  
10 ~~does not apply to contracts for design professional services as~~  
11 ~~defined in Sections 2782.8 and 2782.85.~~

12 (e) If, after request, the person indemnifying neglects to defend  
13 the person indemnified, a recovery against the latter suffered in  
14 good faith, is conclusive in his or her favor against the former.

15 (f) If the person indemnifying, whether a principal or a surety  
16 in the agreement, has not reasonable notice of the action or  
17 proceeding against the person indemnified, or is not allowed to  
18 control its defense, judgment against the latter is only presumptive  
19 evidence against the former.

20 (g) A stipulation that a judgment against the person indemnified  
21 shall be conclusive upon the person indemnifying, is inapplicable  
22 if he or she had a good defense upon the merits, which by want of  
23 ordinary care he or she failed to establish in the action.

24 SEC. 2. Section 2782.85 is added to the Civil Code, to read:

25 2782.85. (a) For all contracts, and amendments to contracts,  
26 entered into on or after January 1, 2011, for design professional  
27 services, all provisions, clauses, covenants, and agreements  
28 contained in, collateral to, or affecting these contracts or  
29 amendments to contracts that purport to require an immediate  
30 defense under an indemnity agreement are unenforceable, except  
31 for the defense obligations set forth in subdivisions (c), (d), and  
32 (e). This section shall not be waived or modified by contractual  
33 agreement, act, or omission of the parties. Contractual provisions,  
34 clauses, covenants, or agreements not expressly prohibited by this  
35 section are reserved to the agreement of the parties.

36 (b) For purposes of this section, the following definitions apply:

37 (1) "Design professional" includes all of the following:

38 (A) An individual licensed as an architect pursuant to Chapter  
39 3 (commencing with Section 5500) of Division 3 of the Business

1 *and Professions Code, and a business entity offering architectural*  
2 *services in accordance with that chapter.*

3 *(B) An individual licensed as a landscape architect pursuant to*  
4 *Chapter 3.5 (commencing with Section 5615) of Division 3 of the*  
5 *Business and Professions Code, and a business entity offering*  
6 *landscape architectural services in accordance with that chapter.*

7 *(C) An individual registered as a professional engineer pursuant*  
8 *to Chapter 7 (commencing with Section 6700) of Division 3 of the*  
9 *Business and Professions Code, and a business entity offering*  
10 *professional engineering services in accordance with that chapter.*

11 *(D) An individual licensed as a professional land surveyor*  
12 *pursuant to Chapter 15 (commencing with Section 8700) of*  
13 *Division 3 of the Business and Professions Code, and a business*  
14 *entity offering professional land surveying services in accordance*  
15 *with that chapter.*

16 *(2) “Design professional services” includes all contractual*  
17 *services offered or performed by a design professional.*

18 *(c) A design professional shall owe no defense or indemnity*  
19 *obligation to the indemnified party for a claim of liability unless*  
20 *and until the indemnified party provides a written tender of the*  
21 *claim or a portion of the claim to the design professional. That*  
22 *written tender shall include all of the information provided to the*  
23 *indemnified party by a claimant or claimants relating to claims*  
24 *caused by the design professional’s services, and shall have the*  
25 *same force and effect as a notice of commencement of a legal*  
26 *proceeding. If an indemnified party tenders a claim subject to this*  
27 *section to a design professional in the manner specified in this*  
28 *subdivision, the design professional shall elect to perform either*  
29 *of the following, the performance of which shall be deemed to*  
30 *satisfy the design professional’s defense obligation to the*  
31 *indemnified party:*

32 *(1) Defend the claim with counsel chosen by the design*  
33 *professional. If a design professional elects to defend the claim*  
34 *pursuant to this paragraph, the design professional shall maintain*  
35 *control of the defense for any claim or portion of the claim to which*  
36 *the defense obligation applies. The design professional shall*  
37 *provide written notice of its election to the indemnified party within*  
38 *90 days after receipt of the written tender. The defense by the*  
39 *design professional shall be a complete defense of the indemnified*

1 party of all claims or portions of claims alleged to have been  
2 caused by the design professional.

3 (2) Pay, within 30 days after its receipt of an invoice from the  
4 indemnified party, no more than a reasonable allocated share of  
5 the indemnified party's defense fees and costs, on an ongoing basis  
6 during the pendency of the claim, subject to reallocation consistent  
7 with this section, and including any amounts reallocated upon  
8 final resolution of the claim, either by settlement or judgment. The  
9 indemnified party shall allocate a share to itself to the extent a  
10 claim or claims are alleged to be caused by its work, actions, or  
11 omissions, and a share to each design professional to the extent  
12 a claim or claims are alleged to have been caused by the design  
13 professional's work, actions, or omissions, and shall allocate a  
14 share to all other parties or entities, whether or not a contractual  
15 party, who the indemnified party believes are potentially liable  
16 for the claim or claims, regardless of whether the indemnified  
17 party tenders the claim to any particular design professional, and  
18 regardless of whether that professional is participating in the  
19 defense. Any amounts not collected from any particular design  
20 professional may not be collected from any other design  
21 professional.

22 (d) Notwithstanding any other provision of law, if a design  
23 professional fails to timely and adequately perform its obligations  
24 under paragraph (1) or (2) of subdivision (c), the indemnified  
25 party shall have the right to pursue a claim against the design  
26 professional for any resulting damages, as well as for interest on  
27 defense and indemnity costs, from the date incurred, at the rate  
28 set forth in subdivision (g) of Section 3260, and for the indemnified  
29 party's reasonable attorney's fees incurred to recover these  
30 amounts. The indemnified party shall bear the burden of proof to  
31 establish both the design professional's failure to meet the  
32 requirements of paragraph (1) or (2) of subdivision (c) and any  
33 resulting damages.

34 (e) A design professional shall not be required to pay defense  
35 or indemnity costs in an amount in excess of the finally determined  
36 percentage of liability based upon the comparative fault of the  
37 design professional. If, upon request by a design professional, the  
38 indemnified party does not reallocate defense fees to design  
39 professionals within 30 days following final resolution of the claim,  
40 then the design professional may pursue a claim against the

1 *indemnified party for any resulting damages, as well as for interest*  
2 *on the fees, from the date of final resolution of the claim, at the*  
3 *rate set forth in subdivision (g) of Section 3260, and the design*  
4 *professional shall bear the burden of proof to establish both the*  
5 *failure to reallocate the fees and any resulting damages.*  
6 *(f) A public agency, private entity, or design professional shall*  
7 *have the right to seek equitable indemnity for any claim governed*  
8 *by this section.*  
9 *(g) Nothing in this section shall prohibit the parties from*  
10 *mutually agreeing to reasonable contractual provisions for*  
11 *damages if any party fails to elect for or perform its obligations*  
12 *as stated in this section.*  
13 *(h) Nothing in this section limits, restricts, or prohibits the right*  
14 *of the indemnified party or the design professional to seek equitable*  
15 *indemnification against any entity other than the indemnified party*  
16 *or design professional.*  
17 *(i) This section shall not apply to claims which are the subject*  
18 *of subdivision (c) to (h), inclusive, of Section 2782.*