

AMENDED IN SENATE MAY 12, 2010

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.~~

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, *with a public agency, as defined*, 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.~~  
16    ~~(d) The person indemnifying is bound, on request of the person~~  
17    ~~indemnified, to defend actions or proceedings brought against the~~  
18    ~~latter in respect to the matters embraced by the indemnity, but the~~  
19    ~~person indemnified has the right to conduct those defenses, if he~~  
20    ~~or she chooses to do so. This subdivision does not apply to~~

1 ~~contracts for design professional services as defined in Sections~~  
2 ~~2782.8 and 2782.85.~~

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

6 ~~(f) If the person indemnifying, whether a principal or a surety~~  
7 ~~in the agreement, has not reasonable notice of the action or~~  
8 ~~proceeding against the person indemnified, or is not allowed to~~  
9 ~~control its defense, judgment against the latter is only presumptive~~  
10 ~~evidence against the former.~~

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

15 ~~SEC. 2.~~

16 *SECTION 1.* Section 2782.85 is added to the Civil Code, to  
17 read:

18 2782.85. (a) ~~For~~ *Notwithstanding subdivision (d) of Section*  
19 *2778, for all contracts, and amendments to contracts, entered into*  
20 *on or after January 1, 2011, with a public agency for design*  
21 *professional services, all provisions, clauses, covenants, and*  
22 *agreements contained in, collateral to, or affecting these contracts*  
23 *or amendments to contracts that purport to require an immediate*  
24 *defense under an indemnity agreement are unenforceable, except*  
25 *for the defense obligations set forth as provided for in subdivisions*  
26 *(c), (d), and (e). This section shall not be waived or modified by*  
27 *contractual agreement, act, or omission of the parties. Contractual*  
28 *provisions, clauses, covenants, or agreements not expressly*  
29 *prohibited by this section are reserved to the agreement of the*  
30 *parties.*

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

32 (1) “Design professional” includes all of the following:

33 (A) An individual licensed as an architect pursuant to Chapter  
34 3 (commencing with Section 5500) of Division 3 of the Business  
35 and Professions Code, and a business entity offering architectural  
36 services in accordance with that chapter.

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

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

5 (D) An individual licensed as a professional land surveyor  
6 pursuant to Chapter 15 (commencing with Section 8700) of  
7 Division 3 of the Business and Professions Code, and a business  
8 entity offering professional land surveying services in accordance  
9 with that chapter.

10 (2) “Design professional services” includes all contractual  
11 services offered or performed by a design professional.

12 (3) “Public agency” includes any county, city, city and county,  
13 district, school district, public authority, municipal corporation,  
14 or other political subdivision, joint powers authority, or public  
15 corporation in the state. Public agency does not include the State  
16 of California.

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

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

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

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

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

1 ~~rate set forth in subdivision (g) of Section 3260, and the design~~  
2 ~~professional shall bear the burden of proof to establish both the~~  
3 ~~failure to reallocate the fees and any resulting damages.~~  
4 ~~(f)~~  
5 (e) A public agency, private entity, or design professional shall  
6 have the right to seek equitable indemnity for any claim governed  
7 by this section.  
8 ~~(g)~~  
9 (f) Nothing in this section shall prohibit the parties from  
10 mutually agreeing to reasonable contractual provisions for damages  
11 if any party fails to elect for or perform its obligations as stated in  
12 this section.  
13 ~~(h)~~  
14 (g) Nothing in this section limits, restricts, or prohibits the right  
15 of the indemnified party or the design professional to seek equitable  
16 indemnification against any entity other than the indemnified party  
17 or design professional.  
18 ~~(i)~~  
19 (h) This section shall not apply to claims ~~which~~ *that* are the  
20 subject of ~~subdivision~~ *subdivisions* (c) to (h), inclusive, of Section  
21 2782.