

AMENDED IN ASSEMBLY AUGUST 2, 2010

AMENDED IN ASSEMBLY JUNE 23, 2010

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 ~~Sections 2778 and~~ *Section 2782.8* of the Civil Code, relating to indemnity.

LEGISLATIVE COUNSEL'S DIGEST

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

Existing law ~~contains specified rules that are to be applied in the interpretation of a contract for indemnity. Pursuant to these rules, the person that is required to provide indemnification is bound, upon the request of the person that is required to be indemnified, to defend actions or proceedings brought against the person that is required to be indemnified prior to a finding of liability. Existing law further 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 *further* provide, ~~for~~ *with respect to* all contracts and amendments to contracts entered into ~~on or after January 1, 2011, with~~

~~by a public agency, as defined, for design professional services, that 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 the duty defend to under an indemnity agreement are unenforceable. This bill would provide that the obligations of a design professional to indemnify a public agency for damages determined to be caused by negligence, recklessness, or willful misconduct to be proportionate to the actual liability of the design professional. This bill would provide that if a public agency includes indemnity language in a contract for the services of a design professional, those provisions shall only be enforceable if the language of the contract is in conformance with these provisions.~~

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 2782.8 of the Civil Code is amended to  
2     read:

3     2782.8. (a) For all contracts, and amendments thereto, entered  
4     into on or after January 1, 2007, with a public agency for design  
5     professional services, all provisions, clauses, covenants, and  
6     agreements contained in, collateral to, or affecting any such  
7     contract, and amendments thereto, that purport to indemnify,  
8     including the *duty and the cost to defend*, the public agency by a  
9     design professional against liability for claims against the public  
10    agency, are unenforceable, except for claims that arise out of,  
11    pertain to, or relate to the negligence, recklessness, or willful  
12    misconduct of the design professional. This section shall not be  
13    waived or modified by contractual agreement, act, or omission of  
14    the parties. Contractual provisions, clauses, covenants, or  
15    agreements not expressly prohibited herein are reserved to the  
16    agreement of the parties.

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

18    (1) “Public agency” includes any county, city, city and county,  
19    district, school district, public authority, municipal corporation,  
20    or other political subdivision, joint powers authority, or public  
21    corporation in the state. Public agency does not include the State  
22    of California.

23    (2) “Design professional” includes all of the following:

1 (A) An individual licensed as an architect pursuant to Chapter  
2 3 (commencing with Section 5500) of Division 3 of the Business  
3 and Professions Code, and a business entity offering architectural  
4 services in accordance with that chapter.

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

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

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

18 (c) This section shall only apply to a professional service  
19 contract, or any amendment thereto, entered into on or after January  
20 1, 2007.

21 ~~SECTION 1. Section 2778 of the Civil Code is amended to~~  
22 ~~read:~~

23 ~~2778. In the interpretation of a contract of indemnity, the~~  
24 ~~following rules are to be applied, unless a contrary intention~~  
25 ~~appears:~~

26 ~~(a) Upon a finding of indemnity against liability, expressly, or~~  
27 ~~in other equivalent terms, the person that is to be indemnified is~~  
28 ~~entitled to recover upon becoming liable.~~

29 ~~(b) Upon a finding of indemnity against claims, demands,~~  
30 ~~damages, or costs, expressly, or in other equivalent terms, the~~  
31 ~~person that is to be indemnified is not entitled to recover, without~~  
32 ~~payment of the underlying claims, demands, damages, or costs.~~

33 ~~(c) An indemnity action or proceeding against claims, demands,~~  
34 ~~or liability, expressly, or in other equivalent terms, embraces the~~  
35 ~~costs of defense against the claims, demands, or liability incurred~~  
36 ~~in good faith, and in the exercise of a reasonable discretion.~~

37 ~~(d) The person that is responsible for indemnifying is bound,~~  
38 ~~on request of the person that is to be indemnified, to defend actions~~  
39 ~~or proceedings brought against the person that is to be indemnified~~  
40 ~~in respect to the matters embraced by the indemnity contract, but~~

1 the person that is to be indemnified has the right to conduct those  
2 defenses, if he or she chooses to do so. This subdivision does not  
3 apply to contracts for design professional services, as defined in  
4 Section 2782.8.

5 (e) ~~If, after a request for indemnification, the person responsible~~  
6 ~~for indemnifying neglects to defend the person that is to be~~  
7 ~~indemnified, a recovery against the person that is to be indemnified,~~  
8 ~~is conclusive against the person that is responsible for~~  
9 ~~indemnification.~~

10 (f) ~~If the person that is responsible for indemnification, whether~~  
11 ~~a principal or a surety in the agreement, has not received reasonable~~  
12 ~~notice of the action or proceeding against the person that is to be~~  
13 ~~indemnified, or is not allowed to control its defense, judgment~~  
14 ~~against the person that is to be indemnified is only presumptive~~  
15 ~~evidence against the person that is responsible for indemnification.~~

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

20 SEC. 2.— Section 2782.8 of the Civil Code is amended to read:

21 2782.8. (a) ~~For all contracts, and amendments thereto, entered~~  
22 ~~into on or after January 1, 2007, with a public agency for design~~  
23 ~~professional services, all provisions, clauses, covenants, and~~  
24 ~~agreements contained in, collateral to, or affecting any such~~  
25 ~~contract, and amendments thereto, that purport to indemnify,~~  
26 ~~including the cost and duty to defend, the public agency by a design~~  
27 ~~professional against liability for claims against the public agency,~~  
28 ~~are unenforceable, except for claims that are caused by the~~  
29 ~~negligence, recklessness, or willful misconduct of the design~~  
30 ~~professional. This section shall not be waived or modified by~~  
31 ~~contractual agreement, act, or omission of the parties. Contractual~~  
32 ~~provisions, clauses, covenants, or agreements not expressly~~  
33 ~~prohibited herein are reserved to the agreement of the parties.~~

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

35 (1) ~~“Public agency” includes any county, city, city and county,~~  
36 ~~district, school district, public authority, municipal corporation,~~  
37 ~~or other political subdivision, joint powers authority, or public~~  
38 ~~corporation in the state. Public agency does not include the State~~  
39 ~~of California.~~

40 (2) ~~“Design professional” includes all of the following:~~

1 ~~(A) An individual licensed as an architect pursuant to Chapter~~  
2 ~~3 (commencing with Section 5500) of Division 3 of the Business~~  
3 ~~and Professions Code, and a business entity offering architectural~~  
4 ~~services in accordance with that chapter.~~

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

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

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

18 ~~(e) A design professional that enters into a contract, which is~~  
19 ~~subject to this section, that contains an indemnity provision has~~  
20 ~~no duty to provide a defense for a claim against a public agency~~  
21 ~~for damages unless the damages are determined to be caused by~~  
22 ~~the negligence, recklessness, or willful misconduct of the design~~  
23 ~~professional.~~

24 ~~(d) If there is an adjudication that the design professional~~  
25 ~~engaged in negligent, reckless, or willful misconduct, the design~~  
26 ~~professional's duty to indemnify the public agency for damages~~  
27 ~~or liabilities, including the cost of providing a defense, caused by~~  
28 ~~the negligence, recklessness, or willful misconduct of the design~~  
29 ~~professional shall be proportionate to the actual liability of the~~  
30 ~~design professional.~~

31 ~~(e) If a public agency elects to include an indemnity provision~~  
32 ~~in a request for proposal, an invitation to bid, or other solicitation~~  
33 ~~document as part of the procurement of the services of a design~~  
34 ~~professional, the indemnity language of the contract shall only be~~  
35 ~~enforceable if the language is in compliance with this section.~~

36 ~~(f) (1) This section shall only apply to a professional service~~  
37 ~~contract, or any amendment thereto, entered into on or after January~~  
38 ~~1, 2007.~~

1     ~~(2) The amendments made to this section by the bill amending~~  
2     ~~this subdivision shall only apply to a professional service contract,~~  
3     ~~or any amendment thereto, entered into on or after January 1, 2011.~~

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