

# CLIENT NEWS BRIEF

## Governor Signs Bill Limiting Design Professionals' Duty to Indemnify Against Liability

The law regarding what obligations a design professional may assume to defend and indemnify a client against liability has been amended once again, and the resulting changes will affect the terms that can be included in design professionals' contracts. On April 28, 2017, Governor Jerry Brown signed into law Senate Bill (SB) 496, which partially limits the duty of design professionals to defend and indemnify a client against liability for claims arising from a design professional's services.

A contractual duty to defend requires that a party – in this case, a design professional – pay attorney fees and costs incurred by a client facing a lawsuit over alleged defects in the design professional's work. In recent years, some design professionals have argued that "duty to defend" clauses are burdensome for them, because most professional liability insurance policies cover damages resulting from the insured's own negligence but not defense costs, meaning that a design professional could be forced to pay such costs out of their own pocket. The law on what can be required in such contracts has changed several times over the past decade, and the latest changes are unlikely to satisfy the design professionals who object to these clauses.

Since January 1, 2007, California Civil Code section 2782.8 has provided that defense and indemnity terms in contracts between non-state public agencies and design professionals are unenforceable unless limited to claims that arise out of, pertain to or relate to the negligence, recklessness or willful misconduct of the design professional. This limitation cannot be contracted around, as all solicitation documents between a public agency and a design professional are deemed to incorporate these provisions by reference. A design professional is defined as a licensed architect, landscape architect or land surveyor or a registered engineer.

SB 496 makes these provisions applicable to all contracts for design professional services entered into on or after January 1, 2018, regardless of whether the other party is deemed a public agency. The new law also limits the cost to defend that a design professional must bear to the design professional's proportionate percentage of fault. In the event that one or more defendants is unable to pay its share of defense costs due to bankruptcy or dissolution of a business, the new law requires the design professional to meet and confer with the other parties regarding unpaid defense costs.

Under SB 496, the requirements of section 2782.8 do not apply when a project-specific general liability policy insures all project participants for general liability exposures on a primary basis and also covers all design professionals for their legal liability arising out of their professional services on a primary basis. This type of insurance coverage, however, is rare. Section 2872.8 also does not apply to design-build joint venture agreements.

It is important to note that both before and after the enactment of SB 496, Civil Code section 2782.8 permits public agencies to require a design professional

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to defend and indemnify against the professional's own negligence. A carefully tailored defense and indemnity clause remains an important protection that agencies can include in their contracts with design professionals.

For more information about SB 496 or design professionals' duty to indemnify, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

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