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THIRD READING

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Bill No: SB 496  
Author: Cannella (R) and De León (D)  
Amended: 4/5/17  
Vote: 21

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PRIOR VOTES NOT RELEVANT

SENATE JUDICIARY COMMITTEE: 6-1, 4/17/17 (Pursuant to Senate Rule 29.10)

AYES: Jackson, Anderson, Hertzberg, Monning, Stern, Wieckowski  
NOES: Moorlach

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**SUBJECT:** Indemnity: design professionals

**SOURCE:** Author

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**DIGEST:** This bill provides that a design professional, as defined, shall only have the duty to defend an indemnitee for claims against the indemnitee that arise out of, pertain to, or relate to, the negligence, recklessness, or willful misconduct of the design professional, as specified. This bill states that all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any contract for design professional services that purport to require a design professional to indemnify or defend claims against an indemnitee except as specified above shall be unenforceable. This bill specifies that a design professional's cost to defend an indemnitee shall not exceed the design professional's proportionate percentage of fault, but that in the event one or more defendants is unable to pay its share of defense costs, the design professional shall meet and confer with the other parties regarding unpaid defense costs, as specified. This bill specifies that the above provisions shall not pertain to contracts where a project-specific general liability policy insures all project participants or to written design-build joint venture agreements. This bill specifies that as used therein "indemnitee" does not include any agency of the State of California.

*Senate Floor Amendments of 4/5/17* delete the prior version of the bill, which dealt with regulatory boards within the Department of Consumer Affairs, and instead add the current language.

### **ANALYSIS:**

Existing law:

- 1) Provides that specified rules are to be applied in the interpretation of a contract of indemnity, unless a contrary intention appears. Pursuant to these rules, an indemnity against claims, or demands, or liability, embraces the costs of defense against such claims, demands, or liability. (Civ. Code Sec. 2778.)
- 2) Provides that 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. However, the person indemnified has the right to conduct those defenses, if he or she chooses to do so. (Civ. Code Sec. 2778.)
- 3) States that, unless otherwise provided, a duty to defend under the above provisions arises out of an indemnity obligation as soon as the litigation commences, and regardless of whether the indemnitor (the person indemnifying) is ultimately found negligent. (*Crawford v. Weather Shield* (2008) 44 Cal.4th 541; *see also UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10.)
- 4) States that for all contracts, and amendments thereto, 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 any such contract, and amendments thereto, that purport to indemnify, including the duty and 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. (Civ. Code Sec. 2782.8.)
- 5) Specifies, for purposes of the above provision, that “design professional” includes all of the following:
  - An individual licensed as an architect, and a business entity offering architectural services, as specified;

- An individual licensed as a landscape architect, and a business entity offering landscape architectural services, as specified;
- An individual registered as a professional engineer, and a business entity offering professional engineering services as specified; and
- An individual licensed as a professional land surveyor, and a business entity offering professional land surveying services, as specified.

This bill:

- 1) States that all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any contract for design professional services and amendments thereto, entered into on or after January 1, 2018, that purport to indemnify, including the duty and the cost to defend, an indemnitee by a design professional against liability for claims against the indemnitee are unenforceable, except as specified.
- 2) Specifies, notwithstanding the above, that a design professional may contract to indemnify an indemnitee for claims against the indemnitee that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional.
- 3) States that a design professional's cost to defend an indemnitee shall not exceed the design professional's proportionate percentage of fault, but that in the event one or more defendants is unable to pay its share of defense costs due to bankruptcy or dissolution, the design professional shall meet and confer with other parties regarding unpaid defense costs.
- 4) Specifies that its provisions pertaining to the duty and cost to defend shall not apply to either of the following:
  - any contract for design professional services, or amendments thereto, where 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; or
  - a design professional who is a party to a written design-build joint venture agreement.
- 5) Specifies that its provisions shall apply only to a professional service contract, or any amendment thereto, entered into on or after January 1, 2018.

- 6) Specifies, for purposes of the above provisions, that “indemnitee” does not include any agency of the State of California.
- 7) Makes other technical and clarifying changes.

## **Background**

During the past several years, the Legislature has enacted a number of measures intended to address the use of certain types of risk shifting in indemnity agreements, particularly those that appear in contracts for residential construction and public works. In 2005, AB 758 (Calderon, Chapter 394, Statutes of 2005) was enacted to address alleged abuses of “Type I” indemnification clauses in contracts imposed on subcontractors by builders. These clauses typically required the subcontractor to assume liability for the builder’s negligence and misconduct, beyond what the subcontractor would be obligated to pay under tort law in the absence of the Type I agreement. Under AB 758, all provisions contained in residential construction contracts entered into after January 1, 2006, that purport to indemnify the builder by a subcontractor against liability for claims of construction defects are unenforceable to the extent the claims pertain to, or relate to the negligence of the builder or his or her agents. These provisions of existing law may not be waived or modified by contractual agreement, act, or omission of the parties.

The following year, the Legislature built upon AB 758 by enacting AB 573 (Wolk, Chapter 455, Statutes of 2006) in response to concerns that local public agencies were requiring broad indemnity agreements in contracts with design professionals. Those agreements were generally requiring the design professional to hold the public agency harmless against the conduct of the public agency or other third parties in a public works project. AB 573 provided that, for contracts entered into on or after January 1, 2007, with a public agency for design professional services, all provisions that purport to indemnify the public agency 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.

That same year, the Legislature enacted SB 138 (Calderon, Chapter 32, Statutes of 2007), which provided that in residential construction contracts, provisions that purported to require subcontractors to indemnify a general contractor or contractor not affiliated with the builder would be unenforceable to the extent they related to the negligence of the non-affiliated general contractor or contractor. SB 138 sought to end a practice in residential construction contracting where existing laws

limiting risk shifting agreements were being circumvented through hiring an unaffiliated general contractor or contractor to act in the builder's stead in contracting with subcontractors.

Subsequently, AB 2738 (Jones, Chapter 467, Statutes of 2008) was enacted as a follow up to AB 758 due to concerns that builders had been circumventing the intent of AB 758 by requiring subcontractors to pay for the builder's defense costs that had no relation to the contractor's work. AB 2738, among other things, provided that a subcontractor would have no defense or indemnity obligation to a builder or general contractor for a construction defect claim unless, and until, the builder or general contractor provides a written tender of the claim to the subcontractor which includes all of the information provided to the builder or general contractor by the claimant or claimants relating to claims caused by that subcontractor's scope of work.

Finally, SB 972 (Wolk, Chapter 510, Statutes of 2010) was enacted to address issues left unresolved by prior legislation with respect to a design professional's exposure to liability for defense costs in indemnity agreements contained in contracts with public agencies. SB 972 provided, with respect to contracts and solicitation documents between design professionals and public agencies, that all provisions which purport to require the design professional to defend the public agency under an indemnity agreement, including the duty and the cost to defend, 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 extends liability protections for design professionals beyond those enacted in SB 972. Specifically, this bill provides that in contracts for design professional services, a design professional may only have the duty to defend an indemnitee for claims against the indemnitee that arise out of, pertain to, or relate to, the negligence, recklessness, or willful misconduct of the design professional, and that the design professional's cost to defend an indemnitee shall not exceed the design professional's proportionate percentage of fault, as specified.

## **Comments**

The author writes:

A contractual "Duty to Defend" provides that an engineering or architecture firm will pay for attorney's fees and costs incurred by a client when sued. There is no way to insure against this. Professional liability insurance is

available to architects and engineers, but only for damages that result from their own negligence.

This bill is a fair compromise. It preserves the design professional's uninsurable first-dollar defense indemnity obligation while no longer exposing them to unlimited liability. They would still be responsible for their own defense costs, but in the event they are not found to be at fault, then agreements requiring them to pay clients' defense costs are unenforceable.

**FISCAL EFFECT:** Appropriation: No Fiscal Com.: No Local: No

**SUPPORT:** (Verified 4/17/17)

American Council of Engineering Companies, California  
American Institute of Architects, California Council  
California Council, American Society of Landscape Architects  
California Geotechnical Engineering Association  
State Building and Construction Trades Council of California  
Structural Engineers Association of California

**OPPOSITION:** (Verified 4/17/17)

Association of California Healthcare Districts  
Association of California School Administrators  
California Apartment Association  
California Association of Joint Powers Authority  
California Association of Recreation and Park Districts  
California Association of Sheet Metal and Air Conditioning Contractors, National Association  
California Building Industry Association  
California Business Properties Association  
California Fire Chiefs Association  
California School Boards Association  
California Special Districts Association  
Coalition for Adequate School Housing  
Community College Facility Coalition  
Construction Employers' Association  
Corona-Norco Unified School District  
Costa Mesa Sanitary District  
County School Facilities Consortium  
Eastern Municipal Water District  
Fire Districts Association of California

Kinneloa Irrigation District  
Los Angeles Unified School District  
Midpeninsula Regional Open Space District  
Three Valleys Municipal Water District

Prepared by: Christian Kurpiewski / JUD. /  
4/17/17 16:08:20

**\*\*\*\* END \*\*\*\***