



SB-496 and Design Professional Indemnities in California: Not a Free Pass, but a Major Step Forward

California Governor Jerry Brown recently signed into law Senate Bill 496 (“SB-496”) representing a major step forward in reducing the uninsurable burden of indemnity provisions and the duty to defend for most public and private contracts signed by design professionals in California. Dealey Renton (DRA) was proud to support ACEC California as they led lobbying efforts over the past few years to enact this bill.

Historically, indemnity provisions in design professional agreements have created insurability issues as professional liability insurers are unwilling to provide coverage for the duty to defend or liabilities not attributable to negligence.

FOR CONTRACTS ENTERED INTO, ON, OR AFTER JANUARY 1, 2018, SB-496 AMENDS CALIFORNIA CIVIL CODE 2782.8 AND CONTAINS THREE KEY POINTS:

1. Civil Code 2782.8 now applies to all contracts (except those involving State of California entities). Indemnification clauses (public and private) are unenforceable except to the extent they arise from, pertain to, or relate to the negligence, recklessness, or willful misconduct of the Design Professional.
2. Design Professionals can no longer be ultimately obligated to pay the indemnitees’ defense costs beyond their proportionate share of fault.
3. Design Professionals may still be legally responsible to pay for the ‘up-front’ duty to defend of an indemnitee.

What is the practical impact for design professionals? Insurability of contractual indemnification clauses has been a critical risk management issue for design professionals. Civil Code 2782.8 now applies to all contracts (except for State of California entities), and indemnification obligations must be founded upon negligence, an essential element triggering professional liability insurance coverage. Certain professional liability insurers provide coverage for an indemnitee’s defense to the extent of negligence as determined by a court of competent jurisdiction. Unfortunately, we are not aware of any professional liability policy which will insure the immediate duty to defend.

As noted, SB-496 does not address the up-front duty to defend demands and therefore needs to be the subject of careful negotiation. We are hopeful that with this new law, contract negotiations will be more productive relative to this issue. The best negotiation result would be a contractual declaration that the design professional has no obligation to defend. A fallback position could be contract language clarifying a design professional’s defense obligation applies only ‘after the fact’, for example:

Consultant has no obligation to pay for any of the indemnitees’ defense related cost prior to a final determination of liability or to pay any amount that exceeds Consultant’s finally determined percentage of liability based upon the comparative fault of Consultant.

DRA continues to work closely with professional liability insurers to modify policy language to insure indemnitee’s defense costs to the extent of the proportionate negligence of the design professional. While certain insurers have already amended their policy wording, more will undoubtedly follow in the coming months.

LASTLY, THERE ARE A FEW EXCEPTIONS CONTAINED IN SB-496:

1. Under scenarios where a defendant(s) has gone bankrupt or dissolved the business, all parties agree to meet and confer regarding unpaid defense costs.
2. The duty and cost to defend provisions do not apply to participants of Design Build Joint Venture Agreements or to projects where an Owner Controlled Insurance Program (OCIP) provides insurance coverage for the design team.

SB-496 is a big step along the road to securing fair allocation of risk between design professionals and their clients. While other states have enacted anti-indemnity legislation, California has long remained as one of the most difficult contract environments. DRA is pleased with this outcome and are optimistic that the passage of SB-496 will ultimately reduce design professionals' future uninsurable risk.

If you have any questions about these comments, please contact your DRA representative.

ABOUT DEALEY, RENTON & ASSOCIATES

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