



Duty to Defend

Passage of Senate Bill 496 and What That Means to the Design Profession in California

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From a Design Professional's standpoint, California has historically had some of the worst indemnity laws in the country. Unless it is expressly stated to the contrary, the duty to defend an upstream party is immediate. It is separate from the duty to indemnify and the Design Professional can end up being responsible for 100% of the upstream party's legal fees even if the Design Professional was determined to have done nothing wrong. This is a huge burden and one that is uninsurable under most if not all Professional Liability policies written for Design Professionals.

This will change for contracts signed on or after January 1, 2018. Senate Bill 496 was signed into law by Governor Brown on April 28, 2017. It amends Section 2782.8 of the Civil Code as it pertains to a Design Professional's obligation to defend an upstream party. To read the text of SB 496, please click [here](#).

Most importantly this new law limits the cost to defend an upstream party to the design professional's proportionate percentage of fault. To quote from the Bill, a Design Professional will only be on the hook for the legal fees of another if "the claims against the indemnitee arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. In no event shall the cost to defend charged to the design professional exceed the design professional's proportionate percentage of fault."

In addition, this section of the Civil Code now applies to both public and private contracts with the exception of contracts entered into with the State of California. Previously this section only applied to Public Contracts other than the state of California.

Like most laws, there is still some uncertainty. While it appears to eliminate the immediate duty to defend, it does not specifically state that. Another question is whether the cost to defend will be insurable.

I've discussed this with several attorneys and Professional Liability claims adjusters. The consensus opinion is that this will eliminate the immediate obligation to defend an upstream party. This doesn't mean that a demand for defense won't be made, but if it is, it will likely be denied by the insurance company, but we will now have a statute to back up that denial.

The second question pertains to whether or not legal fees awarded by a court or trier of fact, in deference to this law, would be covered damages. While some insurance companies may try to deny coverage by citing the contractual exclusion in the Professional Liability Policy, in my opinion, the majority of insurance companies would cover these costs since they are negligence based.

Like most laws, this one will have to be tested in court to determine how it will actually apply. Regardless, SB 496 appears to be a major win for California's Design Professionals. While it is not perfect (very few laws are), it should lessen the burden that the current indemnity laws are imposing as it pertains to the Duty to Defend.