Negotiating Indemnity Provisions in Contracts with Design Professionals

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Who's Responsible?

Negotiating Indemnity Agreements with Design Professionals

By Michael Conneran, Hanson Bridgett LLP

One of the most important components of a successful public construction project is the work of the professionals who design the project. An error by a designer can result in significant cost exposure for the city implementing the project. These costs may arise through construction claims from the contractor or personal injury claims resulting from an unsafe condition. Since cities generally have the upper hand in contract negotiations of this type, they have historically sought to allocate risk to other participants in public projects—the contractor and the design professionals—through favorable indemnity provisions. In this way, cities feel they are able to reduce their exposure. In response, contractors and designers have successfully lobbied for the adoption of "anti-indemnity" laws that restrict the extent to which public agencies can require contractors and designers to bear the cost of claims brought as a result of the public project. In California, these statutes appear as Civil Code Sections 2782(b)[1] (contractors) and 2782.8 (designers),[2] which limit the basis upon which parties to public contracts can be held responsible to only those claims resulting from their own negligence or intentional misconduct.

Until recently, these laws have focused on the "duty to indemnify," a legal concept meaning to "make good the loss of another." (*Rossmoor Sanitation Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.) By definition, that duty is triggered only after the loss has been incurred. Often ignored is a second, related duty, the "duty to defend." While the two duties are often addressed together in contracts ("Party x shall indemnify and defend…") they can, and often do, operate independently. In California, these two concepts are linked by Section 2778, which requires that a party with an indemnity obligation also provide a defense of claims. Two recent court decisions[3] have altered the accepted understanding of the way in which the duty to defend, as imposed by Section 2778, operates in the non-insurance context. These decisions caused significant concern within the design community, and resulted in the introduction and passage of Senate Bill 978 in the 2009 session of the Legislature. That bill added language to the existing Section 2782.8 seeking to limit the defense obligation of design professionals. The amendment, which has sparked widely differing interpretations and reactions, has complicated the task of municipal lawyers in negotiating contracts with design professionals.

The purpose of this paper is to describe the legal background of these two cases and the new statute that they inspired in an attempt to sort through the divergent views as to their meaning. In particular, it explores the unique issues that arise under the typical professional

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[1] All statutory references are to the California Civil Code unless otherwise indicated.

[2] In this paper, references to "designer" or "design professional" refer to the entire range of professionals set forth in Civil Code 2782.8(c)(2), including licensed architects, licensed landscape architects, registered professional engineers and licensed professional land surveyors.

[3] *Crawford v. Weather Shield Mfg. Inc.* ((2008) 44 Cal.4th 541) (*Crawford*) and *UDC-Universal Development v. CH2M Hill* ((2010) 181 Cal.App.4th 1) (*UDC*).

liability insurance policy. In the end, it provides some practical tips for practitioners in negotiating indemnity provisions, particularly with design professionals. In order to assist those who are not already confirmed "indemnity nerds," we will first undertake a review of the basic elements of indemnity law, an understanding of which is essential to unraveling the nuances of this legislation.

I. The Basics of Indemnity

Indemnity is a "contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." (Section 2772.) Indemnity is perhaps best understood as a tool to allocate risk between parties. While the allocation is often done through express contractual terms, there are instances in which an obligation to indemnify can be implied from the terms of a contract or through the circumstances of a relationship. The focus of this paper, however, is on express contractual indemnity.

California courts have, for ease of analysis, attempted to group indemnity clauses into specific categories. In an oft-cited decision, the court in *MacDonald & Kruse v. San Jose Steel Co.* (1972) 29 Cal.App.3d 413, established three "types" of indemnity clauses. "Type I" involves language in which the party providing the indemnity (the "indemnitor") agrees to protect the party receiving that protection (the "indemnitee") for all claims, including those caused by the negligence of either the indemnitor or indemnitee. This is the strongest of the three types of clauses. One requirement to achieve such broad coverage is that the obligation must be stated in explicit terms in order to be enforced. A second category of indemnity is "Type II," in which the indemnitor protects against only its own negligence. This is often called a "general" indemnity clause. One feature of such a clause is that the protection can be voided by the indemnitee's "active" negligence.[4] In other words, if the indemnitee is actively negligent, the indemnitor is off the hook, at least as far as any obligation based on the contractual language. The final category in the *MacDonald* scheme is "Type III," in which the indemnity extends only to the negligence of the indemnitor. Such a clause can be voided by even passive negligence on the part of an indemnitee. While the categories set forth in *MacDonald* provide a handy way of viewing indemnity clauses, another leading case, *Rossmoor,* holds that in the end courts interpreting indemnity provisions must look to the actual intent of the parties. In most instances, when public agencies enter into contracts, they normally use Type I or II clauses. However, cognizant of the cautionary language of *Rossmoor*, they must ensure that the language of the contract clearly expresses the desired intent.

II. Special Treatment Given to Design Professionals Under CC 2782.8

Presumably in response to being required to indemnify public entities for their own negligence (or perhaps that of third parties), design professionals successfully lobbied for the enactment of AB 573, which was adopted in 2006 and is codified as Section 2782.8.[5] Tracking

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[4] Active negligence normally involves some affirmative act that creates or causes a situation that results in injury or knowledge of such a situation and a failure to act to remedy it. Passive negligence involves no direct act or knowledge, but a failure to fulfill a duty (such as a duty to inspect) that would have prevented the injury. See *Markley v Beagle* (1967) 66 Cal.2d 951.

[5] One of the official legislative reports on AB 573 had this title (in all caps): "SHOULD PUBLIC AGENCIES BE ALLOWED TO IMPOSE CONTRACT PROVISIONS ON DESIGN PROFESSIONALS MAKING THEM RESPONSIBLE FOR THE WRONGFUL ACTS OF THE PUBLIC AGENCY ITSELF OR OTHER PERSONS, SUCH AS SUBCONTRACTORS CHOSEN
(footnote continued)

similar language applicable to contractors on public projects in Section 2782, this section provided that:

> (a) 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 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 section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties.

Many design professionals felt that AB 573 would provide them with a significant amount of protection from being held responsible for claims that arose out of negligence other than their own. However, as was noted in a paper presented to the League shortly after the enactment of AB 573, it is not clear that the actual wording of the provision provides the breadth of protection that the proponents envisioned.[6] This stems from the words "claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional" which can be read to mean any claim that includes such conduct will need to be covered, regardless of whether there is any passive negligence on the part of the public agency or fault on the part of a third party. It also does not appear that AB 573 was meant to create a "proportional fault" arrangement, given the rejection of an earlier version of the bill that contained the words "to the extent caused by" before the word "negligence" in the passage quoted above.[7]

III. The Problematic Defense Obligation

Some of the comfort that design professionals took in the passage of AB 573 may have stemmed from the inclusion of the language mentioning the "cost to defend." Some prior case law, and widespread expectations, held that potential indemnitors who were not negligent could not be required to bear the cost of defending indemnitees. This belief, in part, was based on cases such as *Regan Roofing v. Superior Court (*(1994) 24 Cal.App.4th 425), which supported the conclusion that the duty to defend was tied to the duty to indemnify, unless a contrary intent appeared in the language of the contract.[8]

BY THE PUBLIC AGENCY, OVER WHOM THE DESIGN PROFESSIONAL HAS NO CONTROL AND IS NOT OTHERWISE LEGALLY RESPONSIBLE?" (Report to Assembly Committee on Judiciary, August 17, 2006)

[6] Roland Nickles, "Architect and Engineer Design Liability and AB 573: Big Deal or Ho Hum," presented at the Spring 2007 City Attorney Conference.

[7] *Id*.

[8] As we shall see however, *Regan Roofing* was a decision involving a ruling on summary judgment and should not have been viewed as a full decision on the issue of the availability of a defense in the absence of negligence on the part of the indemnitor.

A clear indication that California law may require a broader duty of defense that was not strictly required by the language of the contract itself arose in a case that did not involve a design professional, *Crawford v. Weather Shield Mfg. Inc*. (2008) 44 Cal.4th 541. The *Crawford* case arose in a context familiar to design professionals, a standard construction defect matter. In such situations, each subcontractor or supplier is often required by the developer, as a condition of participating in the job, to sign an indemnity agreement prepared by (and quite favorable to) the developer. In this matter, the owners of 122 finished homes in the subdivision, which was developed by J. M. Peters Co. (JMP), sued the developer and a host of subcontractors, including Weather Shield Manufacturing, Inc., which had supplied windows that had allegedly leaked. JMP cross-complained against all of the subcontractors, seeking, among other remedies, declaratory relief with respect to the indemnity and defense obligations that were in contract language drafted by JMP and included in each subcontract. Although most of the subcontractors settled, the claim against Weather Shield went to trial and the jury found against JMP, but in favor of Weather Shield, on the claims related to window problems, based on theories of negligence and breach of warranty. The court then heard JMP's cross-complaint and ruled that, based on the language of the indemnity clause in Weather Shield's contract with JMP, Weather Shield was not obligated to indemnify JMP for window-related claims since it was not found to have been negligent, but that Weather Shield nevertheless had an independent and immediate duty to defend JMP and was liable for those costs.

When the Court of Appeal upheld this ruling, in a divided opinion, Weather Shield appealed to the California Supreme Court, which granted review based on the limited issue of whether a subcontractor that agreed to defend "a suit or action" against the developer relating to the subcontractor's work was obligated to provide a defense to a suit against the developer even if the subcontractor was found not to have been negligent. In a decision issued in July 2008, the Supreme Court found that a party to a contract that includes an indemnity provision may be required to provide a defense even if that party is ultimately found not to be negligent. (44 Cal.4th at 547) Many who read the Court of Appeal decision in *Crawford* attributed the holding to the one-sided language of the particular sub-contract, which, having been drafted by the developer, was particularly strong in its requirement of a defense. Such a holding would have followed cases such as *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, which accord great weight to the intent of the parties to an indemnity agreement. They took some comfort in the belief that a tightly-drafted agreement would avoid that result. However, although the Supreme Court's opinion did note the specific language of the indemnity provision in the JMP/Weather Shield contract,[9] in the end the decision relied on two subsections of Section 2778. The court stated that, while subsection (3) provides that a duty to indemnify includes a duty to defend, subsection (4) requires that an indemnitor provide a defense "upon the indemnitee's request." "[S]ubdivision 4 of Section 2778, by specifying an indemnitor's duty 'to defend' the indemnitee upon the latter's request, places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemnitee's defense, if tendered, against all claims 'embraced by the indemnity.'" (*Crawford, supra,*44 Cal.4th at 557.) The court noted that this obligation was "distinct and separate from the contractual obligation to pay an indemnitee's defense costs, after the fact, as part of the indemnity owed

[9] "[W]e agree with the Court of Appeal majority that, even if strictly construed in Weather Shield's favor, the provisions expressly, and unambiguously, obligated Weather Shield to defend, from the outset, any suit against JMP insofar as the suit was "founded upon" claims *alleging* damage or loss arising from Weather Shield's negligent role in the Huntington Beach residential project." [Emphasis original.] (*Crawford, supra,* 44 Cal.4th at 353.)

under the agreement." (*Id.* at 558.) Thus the court, while recognizing the ability of parties to negotiate contrary provisions from the terms that would be imposed in the absence of such language, clearly held that the duty to defend "arises immediately upon a proper tender of defense by the indemnitee." (*Id.* at 559.)[10]

Concerns regarding the impact of *Crawford*, particularly among design professionals, were later magnified by a subsequent decision, *UDC-Universal Development v. CH2M Hill* (2010) 181 Cal.App.4th 10, which not only applied *Crawford* to a situation involving a design professional, but held that its reasoning should be applied retroactively. In *UDC*, as in *Crawford*, the matter arose as a result of a complaint by homeowners against a developer. CH2M Hill, which had provided engineering services to the developer, was not named in the initial action, but was later joined as a "Roe" defendant in a cross-complaint brought by the developer. Although no finding of negligence on the part of CH2M Hill was ever made in the matter, the court, relying on *Crawford*, found that that were sufficient claims of potential negligence to trigger a duty on the part of the engineer to defend the developer and that this duty arose prior to any determination on the issue of negligence on the part of the engineer. Thus, based on *Crawford* and *UDC*, the lesson is clear: absent a contrary intent in the agreement, a signatory to an indemnity clause, even if not itself negligent, has an independent defense obligation that is separate from the indemnity obligation and arises upon a tender of a claim that alleges potential negligence on the part of the indemnitor.

This obligation to provide an immediate defense raised particular concerns for design professionals, given the fact that the standard professional liability insurance policy does not cover the up-front cost of defending a third party. Therefore, the import of *Crawford* and *UDC* is that design professionals are now exposed to an unexpected and uninsured risk—the legal obligation to defend claims against third parties--that is not necessarily related to wrongdoing on their part, but arises merely upon the allegation of such wrongdoing.

In order to fully understand the meaning of *Crawford* and *UDC*, it is helpful to look to a different context in which the duty of defense plays a significant role—insurance and bad faith. In fact, the Supreme Court's decision in *Crawford* starts out with a lengthy discussion of the duties of indemnity and defense in the insurance context.[11] One of the primary things a party seeks in purchasing insurance is to obtain protection from legal liability. In most cases, the threat of such liability comes in the form of a lawsuit, which, to avoid incurring a default judgment, a defendant must respond to promptly, preferably through legal counsel provided by the insurer. As Justice Mosk has stated: "To defend meaningfully, the insurer must defend immediately. [Citation] To defend immediately, it must defend entirely." (*Buss v. Superior Court* ((1997)16 Cal.4th 35, 49.) California courts have provided for tort damages to be available to insureds against insurers who breach the covenant of good faith and fair dealing by failing to provide an up-front defense when a claim is tendered. These "bad faith" cases have caused insurers to take their defense obligations quite seriously, by either accepting a defense obligation, accepting it with a reservation of rights to later seek reimbursement under certain circumstances, or seeking immediate declaratory relief to extract themselves from the obligation to defend a matter.

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[10] See Gilson Reicken, "The Duty to Defend Under Non-Insurance Indemnity Agreements: Crawford v. Weather Shield Manufacturing, Inc. and its Troubling Consequences for Design Professionals" (50 Santa Clara Law Review 825.).

[11] 44 Cal.4th 552-568.

While they clearly do not entitle a party in a non-insurance context to tort damages, the holdings of *Crawford* and *UDC* essentially require the indemnitor to provide an "insurance-like" defense. While that may be something that most subcontractors can provide through the contractual liability coverage of the standard commercial general liability policy, design professionals face a much different situation, at least with regard to claims arising under their professional liability policies. These policies do not contain coverage for contractually-assumed liabilities (such as the cost of providing a defense to claims brought against the professional's client), but only cover the actual damages that are ultimately collected if due to the professional's negligence or misconduct. This may include the client's defense costs (if the damages caused by the professional's negligence included legal defense costs incurred by the client), as would appear to be required by Civil Code 2778(3). However, the immediate defense obligation that the *Crawford* court found under Section 2778(4) would not initially be funded by a professional liability policy. From the perspective of the professional liability insurer, it has no obligation to pay for the defense costs of its insured's client, although such amount could ultimately be covered if included as part of the damages that resulted from the professional's negligence or misconduct.

Thus, the defense obligation imposed by Section 2778 puts the design professional who provides an indemnity in a very uncomfortable situation, as they have no coverage to fund the cost of the defense. As a result, design professionals asked to provide an indemnity in the wake of *Crawford* and *UDC*, may either: (1) decline to sign the contract (or decline to respond to a solicitation for services that contains a contract including an indemnity), (2) seek to revise the contract term to avoid or limit the defense obligation through express contractual language, or (3) accept the contract term and assume a financial risk for which they have no ready source of funding (other than their own funds).[12] From the perspective of the design professional, *Crawford* and *UDC* threaten to make designers the defenders of all claims on a project, even when they were not negligent and even when they cannot get insurance to cover the exposure.

IV. The Attempted Legislative Fix

The reaction from the design professional community to *Crawford* and *UDC* was immediate.[13] Through their professional organization, the California chapter of the American Council of Engineering Companies (ACEC) (formerly known as CELSOC) they proposed legislation (SB 972 (Wolk)) to limit the defense obligation to situations in which the negligence of design professional is proven. The bill went through a number of amendments – first attempting to excise the offending sections of 2778 (which coincidentally have been on the books since 1872), then seeking to add a new section 2787.85 (to limit the obligation to pay defense costs to the percentage fault of the designer, which was later revised to merely require that the designer be given a notice of tender to trigger the obligation). In the end, the effort merely added text to 2782.8 to the effect that the duty to defend will be coextensive with the duty to indemnify, but retaining the existing broad language (which was added by AB 573) defining the scope of the indemnity obligation. In a letter to the Senate Journal dated August 31, 2010, the bill's author,

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[12] This may not be the case for design/build contracts, where in most cases the Commercial General Liability policy is altered to cover design work (and only when the design/build contractor uses a third party design firm with its own professional liability coverage). But this is an unusual situation.

[13] It should be noted that subcontractors have also obtained a legislative fix through SB 474, which is effective on January 1, 2013.

Senator Lois Wolk (D-Davis), noted that the legislation was intended to respond to *Crawford* and *UDC* and to:

> ensure that the intent and purpose of AB 573 is upheld. Nothing in these amendments is intended to affect the existing ability of public agencies to negotiate or enter into contracts with design professionals that include defense and indemnity provisions with respect to claims arising from the actual or alleged negligence, recklessness or willful misconduct of a design professional.

The passage of SB 972 has sparked a wide variety of interpretations, some claiming that, in and of itself, the new language bars any obligation to defend prior to proof of negligence on the part of the design professional. Others argue that the change has little practical effect by failing to alter the requirement that a defense be provided immediately. Properly understood, the statute creates a frustrating tension for the design professional–an immediate obligation to defend any claim that might involve negligence, with the prospect of having no obligation should the design professional ultimately be found not to have been negligent. Given this awkward arrangement, the reaction was predictable–widespread confusion, combined with perhaps some deliberate obfuscation. One commentator, ignoring the continued presence of Section 2778(3) and (4) and the holding in *Crawford*, incorrectly analyzed the statute this way: "Under the new law, the design professional's duty to defend and indemnify will only arise after the design professional is found to be negligent." Others correctly noted that while the ultimate obligations of design professionals to defend and indemnify will be measured based on the existence of negligence, the duty to defend will be triggered immediately upon the tender of a claim that alleges negligence on the part of the design professional.

V. Options for Negotiating Indemnity Arrangements with Design Professionals

Given the importance of the issues discussed above and the imperfect legislative attempts to address them, it should be no surprise that there remains a significant difference of opinion between professionals and public agencies regarding the appropriate indemnity terms for professional service contracts. Perhaps more than ever before, design professionals are pushing back on the standard indemnity language proffered by cities. While cities should certainly continue to insist on the language that they prefer, they may also want to be prepared to navigate the likely response that they will receive from design professionals and, when appropriate (or necessary), consider accepting some compromise language.

Before examining specific contract terms, it is worth noting a common logistical issue—what happens when a city tenders the defense of a claim to a design professional? As has been the case even before *Crawford* and *UDC* clarified the timing of the defense obligation, many design professionals will simply ignore a tender of a defense, choosing to wait out the determination of the claim against their client, rather than risk advancing defense costs out of their pocket which they may not be able to recover. The holdings in *Crawford* and *UDC*, while clarifying the legal rule regarding the duty to defend, added no additional incentives for designers to provide a defense upon receipt of a tender, other than perhaps to be able to control the costs. Lacking a right to seek tort damages for bad faith, the only options for a city are to fund its own defense and seek later reimbursement or pursue a declaratory relief action to obtain injunctive relief to force the professional to take up the defense immediately.

Absent any handy contractual (or judicial) incentives to require a professional to accept a tender, this issue of timing is always going to be a tough one to enforce, since the professional has no insurance coverage to fund an up front defense and can hold out the hope that they will

be absolved of any liability in the end (unless, of course, they are named a party to the litigation, in which case they are in the fight from the beginning). From the city's perspective, while it may be possible to draft contract language with punitive consequences for a designer who ignores a tender, it is unlikely that most designers would sign such an agreement. From the design professional's perspective, rather than face an uncertain landscape in which they might be forced to ignore their client's request for a defense, a popular approach has been to seek to avoid the defense obligation altogether by demanding contract language that expressly disclaims a defense obligation on their part. If it were to accept such language, a city could presumably recover its defense costs if it ultimately prevails on its negligence claim against the professional, as these could be a component of their damages that resulted from the professional's malpractice, although it would not provide reimbursement for the costs of defending for the negligence of unrelated third parties. If a city was inclined to be this cooperative, a term could be added to any provision that otherwise disclaims the duty to defend to specifically authorize a subsequent recovery of defense costs in the event of proven negligence, which tracks what should be covered under the typical professional liability policy. This represents a concession by the city, since under *UDC* it could seek to have the professional cover the defense even in the absence of proven liability on their part.

One provision that attempts to capture the full extent of protection permitted under the statute reads as follows:

> To the fullest extent permitted by law, the Consultant shall (1) immediately defend and (2) indemnify the City, and its councilmembers, officers, and employees from and against all liabilities, regardless of nature or type that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the Consultant, or its employees, agents, or subcontractors. Liabilities subject to the duties to defend and indemnify include, without limitation, all claims, losses, damages, penalties, fines, and judgments; associated investigation and administrative expenses; defense costs, including but not limited to reasonable attorneys' fees; court costs; and costs of alternative dispute resolution. The Consultant's obligation to indemnify applies unless it is finally adjudicated that the liability was caused by the sole active negligence or sole willful misconduct of an indemnified party. If it is finally adjudicated that liability is caused by the comparative active negligence or willful misconduct of an indemnified party, then Consultant's indemnification obligation shall be reduced in proportion to the established comparative liability.
>
> The duty to defend is a separate and distinct obligation from Consultant's duty to indemnify. Consultant shall be obligated to defend, in all legal, equitable, administrative, or special proceedings, with counsel approved by the City, the City and its councilmembers, officers, and employees, immediately upon tender to Consultant of the claim in any form or at any stage of an action or proceeding, whether or not liability is established. An allegation or determination that persons other than Consultant are responsible for the claim does not relieve Consultant from its separate and distinct obligation to defend under this section. The obligation to defend extends through final judgment, including exhaustion of any appeals. The defense obligation includes an obligation to provide independent defense counsel if Consultant asserts that liability is caused in whole or in part by the negligence or willful misconduct of the indemnified party. If it is finally adjudicated that liability was caused by the comparative active negligence or willful misconduct of an indemnified party, Consultant may submit a claim to the

> City for reimbursement of reasonable attorneys' fees and defense costs in proportion to the established comparative liability of the indemnified party.

This provision also addresses the potential claim that, in the presence of proven negligence on the part of an indemnitee, the indemnitor's obligations are discharged upon the finding of negligence on the part of the city. This language also provides that if there needs to be an allocation of defense costs, the designer can seek reimbursement of defense costs from the city should the city be found to be negligent, but might have to bear the costs of defense for that portion attributable to the negligence of third parties.

It is not surprising that design professionals (and the insurers they are getting guidance from) push to have language included in their contracts that is more favorable to them, particularly in light of the insurance issue. Some professionals will say that forcing them to bear the costs of an up front defense of claims that may ultimately be found to be the responsibility of other parties is essentially "a free insurance policy with no premium, no deductible and no limit." One way to forestall that pushback is to highlight the indemnity terms in the request for proposals and require proposers to acknowledge their acceptance of the term. That works in some cases, but the professionals often cleverly find ways to reopen the indemnity terms once they are identified as the preferred proposer. For cities willing to be flexible, there are some workable approaches that can be used to achieve closure with a sophisticated design professional who is unwilling to accept language that provides the city with the most complete protection under the law. If a professional insists on a disclaimer of the immediate duty to defend and particularly if the city has the ability to initially fund its own defense, perhaps the city can afford to allow the designer to delay any obligation to take up the initial defense. In that instance, language that applies the full range of indemnity coverage permissible under 2782.8 (as opposed to the "to the extent" language that excludes claims based on the fault of third parties) but disclaims an immediate duty to defend, may be a reasonable way to proceed. If the initial funding of the defense is by others, this allows the designer to keep their exposure within the scope of their insurance coverage.[14] An example of such language is as follows:

> Irrespective of any language to the contrary in this Agreement, the Consultant has no duty to provide or to pay for an up-front defense against unproven claims or allegations, but shall reimburse those reasonable attorneys fees incurred by the City to the extent caused by the negligence, recklessness, or willful misconduct of Consultant or its employees, agents or subcontractors.

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[14] Cities may wish to clarify their ability to recoup defense costs from designers once fault is proven. Cities may also want to add language to require that the designer cooperate, at no additional cost to the city, in the defense of any claims. That would allow the designer to avoid out-of-pocket costs for attorneys, but prevent them from billing the city for their time spent helping to defend what is arguably a joint claim. Another idea would be to anticipate the need for a joint defense agreement to protect the confidentiality of communications between the city and the professional. One complication in a joint defense effort, however, is the potential for a conflict between the city and designer to require the need for separate counsel. These issues may be too involved to include in an initial agreement, but certainly are issues that arise in these situations. Depending upon the context of the contract (and perhaps the potential for litigation) they may, on occasion, be appropriate for inclusion in the initial professional services contract.

In the end, each city will need to decide, on a case by case basis, what compromises it is willing to make. Some cities have indicated that they have been successful in getting designers to accept a broad defense obligation. In some cases that be the result of working with a major firm that has the assets to fund a defense in the absence of insurance coverage. In others, it may be that a design firm simply decides to take the risk that they will not have to answer the call to provide a defense, an effort they may not have the assets to fund.

VI. Conclusion

The changing statutory language governing the permissible scope of indemnity language in contracts between public entities and design professionals has complicated an already complex situation. City attorneys are best able to assist their cities by understanding the basic concepts of indemnity, knowing the current statutory restrictions on indemnification and being cognizant of the nuances of the insurance coverage available to the professionals with whom they are negotiating. In the end, the size and scope of the contract, as well as the nature of the design professional's work, may need to be considered in deciding what language to accept. It is possible that at some point the insurance market may provide policies that better meet the respective needs of designers and the cities they serve. For now, however, it appears that designers and their insurers believe that legislation is the best way to solve their risk exposure in dealing with public agencies. While the courts may not have much more to say in this area, it is certainly conceivable that more legislative efforts may be made to address these issues. These efforts are likely to come from the design profession and will not likely be favorable to public entities. Therefore, it is important to be vigilant in monitoring proposed legislation that may attempt to alter the status quo.

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