

CSJVRMA Risk Management Bulletin

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Avoiding Problematic Indemnity Clauses

A common issue found in our clients' contracts is an overreach of indemnity requirements for certain projects. California Civil Code § 2782 places clear restrictions on the extent of indemnity that can be required of a design professional or a construction contractor. **Overreaching contractual requirements can result in the nullification of the entire indemnity agreement**, possibly leaving the agency with no protection from its consultant/contractor.

DESIGN PROFESSIONALS

Included in Civil Code § 2782.8's definition of "Design Professional" are architects, engineers, land surveyors and landscape designers. The code requires that the agency's indemnity obligation be restricted to the design professional's "negligence, recklessness or willful misconduct." Further, "in no event shall the cost to defend charged to the design professional exceed the design professional's proportionate percentage of fault," otherwise the indemnity clause shall be found "unenforceable." Translated: if your agency's contract language demands indemnity beyond these parameters, **the full indemnity agreement may be deemed invalid by the courts.**

To prevent this costly mistake from occurring, staff recommends members use indemnity clauses that adhere to § 2782 and also accommodate the limited indemnity coverage provided by most professional liability policies. Please contact us for sample templates you can utilize in your contracts.

CONSTRUCTION CONTRACTS

Similarly, Civil Code § 2782(b) restricts the level of indemnity a public agency can require of a construction company. Specifically, it provides that an indemnity provision requiring a general contractor to indemnify a public agency for the agency's active negligence **is void and unenforceable.**

We can avoid this outcome by clearly stating in the contract's indemnity clause that the contractor is not required to indemnify the member for the member's active negligence. In the exceptions portion of the indemnity clause, use "except when caused by the **active negligence** of the City" instead of "except when caused by the **sole negligence** of the City." This narrows the contractor's indemnity obligation and will clarify the member's intent to not violate § 2782(b). We can provide sample language for this scenario, as well.

Following these simple strategies can offset troublesome consequences down the road. Any questions or points of discussion can be directed to Risk Manager Joe Costamagna at joseph.costamagna@sedgwick.com.

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