

# New California Law Shields Design Professionals from Defense Obligations to Public Entities Until and Unless They are Found Negligent

*SB 972, which applies to all contracts entered into on or after January 1, 2011, provides refuge from burdensome liability to California construction design professionals entering into contracts with public agencies.*

## Significance

In 2008, the California Supreme Court ruled in *Crawford v. Weather Shield Manufacturing, Inc.*,<sup>1</sup> that subcontractors had a duty to defend a general contractor regardless of the subcontractor's actual negligence. Further, in 2010, a California Court of Appeal in *UDC v. CH2M Hill*,<sup>2</sup> reiterated the Supreme Court's ruling in *Crawford*. Signed into law September 30, 2010, SB 972 eases the burden of these two California court decisions by imposing a duty to defend only upon construction design professionals who are actually liable for negligence or breach of contract as to a public agency; for claims in which the design professional is not liable, the design professional's duty to defend will not be triggered.

This new law is significant for construction design professionals who, since *Crawford* and *UDC*, have had difficulty obtaining insurance to cover opposing party's attorney's fees. With the passage of SB 972, design professionals should have an easier time obtaining insurance coverage and

will be more likely to entertain projects involving public works.

## SB 972

SB 972 was written by California Democratic Senator Lois Wolk, and strongly supported by the American Council of Engineering Companies of California, to amend California Civil Code section 2782.8. In writing the legislation, Wolk sought to ease the burdens of *Crawford* and *UDC* and to uphold the purpose of AB 573, a measure that prohibits public agencies from holding design professionals responsible for defects that are not the result of the design professional's negligence or willful misconduct. In addition, Wolk sought to make insurance for construction design professionals more accessible by limiting the instances in which design professionals would be exposed to liability.

Under current law, construction design professionals are under a duty to defend the public agency with which they contracted regardless of whether the professional was negligent or breached the contract. The new law, however, will apply to all contracts entered into on or after January 1, 2011 by construction design professionals with public agencies whereby professional construction services are provided. The new law applies to both

contracts and to amendments to contracts on or after January 1, 2011. Specifically, SB 972 provides that all provisions, clauses, covenants and agreements contained in, collateral to, or affecting these contracts or amendments to the contracts, that require, or purport to require, the construction design professional to defend the public agency under an indemnity agreement, are unenforceable. The duty to defend will only be triggered for claims that arise out of, pertain to, or are related to the negligence, recklessness, or willful misconduct of a construction design professional.

*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.* However, should a design professional fail to "timely and adequately" perform the duty to defend after a finding of negligence by the design professional, this law provides that the

public agency would have the right to pursue a claim against the design professional for any resulting damages, any interest on the defense, indemnity costs, and reasonable attorney's fees incurred to recover these amounts.

Though SB 972 eases the burdensome duty to defend by construction design professionals engaging in contracts with public agencies, SB 972 does not exclude the possibility that the parties will mutually agree to reasonable contractual provisions for damages if any party fails to elect for, or perform, its obligations as outlined in SB 972.

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1 *Crawford v. Weather Shield Mfg., Inc.*, 44 Cal.4th 541 (2008).

2 *UDC-Universal Development v. CH2M Hill*, 181 Cal.App.4th 10 (Ct. App. 2010).



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