

AMENDED IN SENATE JUNE 10, 2008

AMENDED IN ASSEMBLY MAY 19, 2008

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL

No. 2738

Introduced by Assembly Member Jones

February 22, 2008

An act to amend Section 2782 of, and to add Sections 2782.9 and 2782.95 to, the Civil Code, relating to indemnity.

LEGISLATIVE COUNSEL'S DIGEST

AB 2738, as amended, Jones. Indemnification: construction contracts.

(1) Existing law provides that, except as specified, all agreements affecting any residential construction contract and amendments to such a contract entered into after January 1, 2008, that purport to indemnify the general contractor or contractor not affiliated with the builder by a subcontractor against liability for claims of construction defects or other injury to property arising from, pertaining to, or relating to the negligence of the nonaffiliated general contractor or nonaffiliated contractor or their other agents, servants, or independent contractors who are directly responsible to the nonaffiliated general contractor or nonaffiliated contractor, or for defects in design furnished by those persons, or for claims that are unrelated to the scope of the work in the agreement, are unenforceable.

A similar provision applies with respect to construction contracts for residential construction entered into after January 1, 2006, that purport to indemnify the builder by a subcontractor against liability for claims of construction defects.

This bill would delete the provisions applicable to construction contracts entered into on or after January 1, 2008, that purport to indemnify the general contractor or contractor not affiliated with the builder. The bill would revise the provisions applicable to contracts entered into after January 1, 2006, to instead apply to contracts entered into after January 1, 2009, and to apply to agreements that purport to insure or indemnify the builder or the general contractor or contractor not affiliated with the builder, as described. ~~The bill would also provide that the claims are enforceable only to the extent caused by the negligence or fault of the subcontractor.~~ The bill would provide that if a builder or contractor tenders a claim, or a portion thereof, to a subcontractor, the subcontractor shall be entitled to defend the claim with counsel of its choice, and the subcontractor shall maintain control of the defense for any claim or portion of claim to which the defense obligation applies. The bill would state the intent of the Legislature with respect to a subcontractor's control of the defense of a claim arising out of the subcontractor's work, the inclusion of violations of functionality standards in a subcontractor's defense and indemnity obligation, and the builder's right to seek equitable indemnity against a subcontractor. *The bill would provide that a builder, general contractor, or subcontractor has the right to seek equitable indemnity for construction defect claims pursuant to these provisions.*

(2) Existing law defines a wrap-up insurance policy as an insurance policy, or series of policies, written to cover risks associated with a work of improvement and covering 2 or more contractors or subcontractors that work on the work of improvement.

This bill would provide that all agreements for a residential construction project ~~on~~ to which a wrap-up insurance policy is applicable which require a subcontractor to indemnify, hold harmless, or defend another for any general liability claim or action, or workers' compensation claim or action, are unenforceable, as specified. The bill would state the intent of the Legislature that, to the extent any contractual provision is deemed unenforceable pursuant to these provisions, any party may pursue an equitable indemnity claim against another party, and that nothing in these provisions shall prohibit a builder or general contractor from requiring a reasonably allocated contribution from a subcontractor or other participant to a self-insured retention or deductible in specified circumstances. The bill would also provide that if an owner, builder, or general contractor obtains a wrap-up insurance policy or other consolidated insurance program for a work of

improvement and requires that any subcontractor provide a credit or compensation for that policy to the owner or original contractor, the credit or compensation required and the coverage provided shall be clearly delineated in the bid documents, and the owner or original contractor may not require that the insured subcontractors under the wrap-up policy credit or compensate the owner or original contractor an amount greater than the amount the owner or original contractor paid to provide that subcontractor coverage under the wrap-up policy.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 2782 of the Civil Code is amended to
2 read:

3 2782. (a) Except as provided in Sections 2782.1, 2782.2,
4 2782.5, and 2782.6, provisions, clauses, covenants, or agreements
5 contained in, collateral to, or affecting any construction contract
6 and that purport to indemnify the promisee against liability for
7 damages for death or bodily injury to persons, injury to property,
8 or any other loss, damage or expense arising from the sole
9 negligence or willful misconduct of the promisee or the promisee's
10 agents, servants, or independent contractors who are directly
11 responsible to the promisee, or for defects in design furnished by
12 those persons, are against public policy and are void and
13 unenforceable; provided, however, that this section shall not affect
14 the validity of any insurance contract, workers' compensation, or
15 agreement issued by an admitted insurer as defined by the
16 Insurance Code.

17 (b) Except as provided in Sections 2782.1, 2782.2, and 2782.5,
18 provisions, clauses, covenants, or agreements contained in,
19 collateral to, or affecting any construction contract with a public
20 agency that purport to impose on the contractor, or relieve the
21 public agency from, liability for the active negligence of the public
22 agency are void and unenforceable.

23 (c) For all construction contracts, and amendments thereto,
24 entered into after January 1, 2009, for residential construction, as
25 used in Title 7 (commencing with Section 895) of Part 2 of
26 Division 2, all provisions, clauses, covenants, and agreements
27 contained in, collateral to, or affecting any construction contract,

1 and amendments thereto, that purport to insure or indemnify,
2 including the cost to defend, the builder, as defined in Section 911,
3 or the general contractor or contractor not affiliated with the
4 builder, as described in subdivision (b) of Section 911, by a
5 subcontractor against liability for claims of construction defects
6 are unenforceable to the extent the claims arise out of, pertain to,
7 or relate to the negligence of the builder or contractor or the
8 builder's or contractor's other agents, other servants, or other
9 independent contractors who are directly responsible to the builder,
10 or for defects in design furnished by those persons, or to the extent
11 the claims do not arise out of, pertain to, or relate to the scope of
12 work in the written agreement between the parties. This section
13 shall not be waived or modified by contractual agreement, act, or
14 omission of the parties. Contractual provisions, clauses, covenants,
15 or agreements not expressly prohibited herein are reserved to the
16 agreement of the parties. ~~The claims are enforceable only to the~~
17 ~~extent caused by the negligence or fault of the subcontractor.~~
18 *Nothing in this subdivision shall prevent any party from exercising*
19 *its rights under subdivision (a) of Section 910.*

20 (d) Subdivision (c) does not prohibit a subcontractor and builder
21 or general contractor from mutually agreeing to the timing or
22 immediacy of the defense and provisions for reimbursement of
23 defense fees and costs, so long as that agreement does not waive
24 or modify the provisions of subdivision (c). However, if a builder
25 or contractor tenders a claim, or a portion thereof, to a
26 subcontractor pursuant to this provision, the subcontractor shall
27 be entitled to defend the claim with counsel of its choice, and the
28 subcontractor shall maintain control of the defense for any claim
29 or portion of claim to which the defense obligation applies.
30 Subdivision (c) shall not affect the obligations of an insurance
31 carrier under the holding of *Presley Homes, Inc. v. American States*
32 *Insurance Company* (2001) 90 Cal.App.4th 571. Subdivision (c)
33 shall not affect the builder's or subcontractor's obligations pursuant
34 to ~~Chapter 4 (commencing with Section 910) of Title 7~~ *Title 7*
35 *(commencing with Section 895)* of Part 2 of Division 2.

36 (e) Notwithstanding subdivisions (c) and (d), it is the intent of
37 the Legislature to do all of the following:

38 (1) Allow a subcontractor to elect whether to control the defense
39 of a claim tendered to it by a builder arising out of the
40 subcontractor's work, or to participate in funding the builder's

1 defense while ensuring a standard for controlling the extent and
2 cost of that defense, and to provide a mechanism for imposing
3 adverse consequences against subcontractors or their insurers who
4 fail to respond to and perform their obligations under a tender.

5 (2) Ensure that a subcontractor’s defense and indemnity
6 obligation includes any violations of functionality standards
7 pursuant to standards set forth in Chapter 2 (commencing with
8 Section 896) of Title 7 of Part 2 of Division 2 arising out of the
9 subcontractor’s work.

10 (3) Provide that if an attempt by a builder to seek contractual
11 defense and indemnity against a subcontractor fails, the builder
12 shall have the right to seek equitable indemnity against that
13 subcontractor.

14 *(f) A builder, general contractor, or subcontractor shall have*
15 *the right to seek equitable indemnity for any claim governed by*
16 *this section.*

17 *(g) Nothing in this section limits, restricts, or prohibits the right*
18 *of a builder, general contractor, or subcontractor to seek equitable*
19 *indemnity against any supplier, design professional, or product*
20 *manufacturer.*

21 *(h) As used in this section, “construction defect” means a*
22 *violation of the standards set forth in Sections 896 and 897.*

23 SEC. 2. Section 2782.9 is added to the Civil Code, to read:

24 2782.9. (a) All contracts, provisions, clauses, amendments, or
25 agreements contained therein for a residential construction project
26 on which a wrap-up insurance policy, as defined in subdivision
27 (b) of Section 11751.82 of the Insurance Code, or other
28 consolidated insurance program, is applicable, that require a
29 subcontractor to indemnify, hold harmless, or defend another for
30 any general liability claim or action, or workers’ compensation
31 claim or action, if it is covered by that program, arising out of that
32 project are unenforceable. This section shall not be waived or
33 modified by contractual agreement, act, or omission of the parties.

34 (b) It is the intent of the Legislature that, to the extent any
35 contractual provision is deemed unenforceable pursuant to this
36 section, any party may pursue an equitable indemnity claim against
37 another party. The Legislature further intends that nothing in this
38 section shall prohibit a builder or general contractor from requiring
39 a reasonably allocated contribution from a subcontractor or other
40 participant to a self-insured retention or deductible, when and as

1 any such self-insured retention or deductible is incurred by the
2 builder or general contractor, as long as the contribution of
3 subcontractors is reasonably limited.

4 SEC. 3. Section 2782.95 is added to the Civil Code, to read:

5 2782.95. If an owner, builder, or general contractor obtains a
6 wrap-up insurance policy or other consolidated insurance program
7 for a work of improvement and requires that any subcontractor
8 provide a credit or compensation for that policy to the owner or
9 original contractor, then the following shall apply:

10 (a) The credit or compensation required shall be clearly
11 delineated in the bid documents.

12 (b) The coverage provided through the wrap-up insurance policy,
13 including length of time the policy is in effect, shall be clearly
14 delineated in the bid documents.

15 (c) The owner or original contractor may not require that the
16 insured subcontractors under the wrap-up policy credit or
17 compensate the owner or original contractor an amount greater
18 than the amount the owner or original contractor paid to provide
19 that subcontractor coverage under the wrap-up policy.