

Assembly Bill No. 2738

Passed the Assembly August 30, 2008

Chief Clerk of the Assembly

Passed the Senate August 20, 2008

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2008, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 2782 of, and to add Sections 2782.9, 2782.95, and 2782.96 to, the Civil Code, relating to indemnity.

LEGISLATIVE COUNSEL'S DIGEST

AB 2738, 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 provide that if a builder or contractor tenders a claim, or a portion thereof, to a subcontractor, the subcontractor shall be entitled to either defend the claim with counsel of its choice or pay, within 30 days of receipt of an invoice from the builder or general contractor, no more than a reasonable allocated share of the builder's or general contractor's defense fees

and costs. 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 impose specified requirements upon any wrap-up insurance policy or other consolidated insurance program that insures a private residential work of improvement that first commences construction after January 1, 2009. The bill would require an owner, builder, or general contractor obtaining the policy or program to disclose the total amount or method of calculation of any credit or compensation for premium required from a subcontractor or other participant for that policy or program, and other, specified information regarding the policy.

The bill would impose similar disclosure requirements if an owner, builder, or general contractor obtains a wrap-up insurance policy or other consolidated insurance program for a public work or any other project other than residential construction that is put out for bid after January 1, 2009.

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

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

2782. (a) Except as provided in Sections 2782.1, 2782.2, 2782.5, and 2782.6, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable; provided, however, that this section shall not affect the validity of any insurance contract, workers' compensation, or

agreement issued by an admitted insurer as defined by the Insurance Code.

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

(c) For all construction contracts, and amendments thereto, entered into after January 1, 2009, for residential construction, as used in Title 7 (commencing with Section 895) of Part 2 of Division 2, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any construction contract, and amendments thereto, that purport to insure or indemnify, including the cost to defend, the builder, as defined in Section 911, or the general contractor or contractor not affiliated with the builder, as described in subdivision (b) of Section 911, by a subcontractor against liability for claims of construction defects are unenforceable to the extent the claims arise out of, pertain to, or relate to the negligence of the builder or contractor or the builder's or contractor's other agents, other servants, or other independent contractors who are directly responsible to the builder, or for defects in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties. 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. Nothing in this subdivision shall prevent any party from exercising its rights under subdivision (a) of Section 910. This subdivision shall not affect the obligations of an insurance carrier under the holding of *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571. Nor shall this subdivision affect the obligations of a builder or subcontractor pursuant to Title 7 (commencing with Section 895) of Part 2 of Division 2.

(d) Subdivision (c) does not prohibit a subcontractor and builder or general contractor from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, so long as that agreement does not waive

or modify the provisions of subdivision (c) subject, however, to paragraphs (1) and (2). A subcontractor shall owe no defense or indemnity obligation to a builder or general contractor for a construction defect claim unless and until the builder or general contractor provides a written tender of the claim, or portion thereof, to the subcontractor which includes all of the information provided to the builder or general contractor by the claimant or claimants, including, but not limited to, information provided pursuant to subdivision (a) of Section 910, relating to claims caused by that subcontractor's scope of work. This written tender shall have the same force and effect as a notice of commencement of a legal proceeding. If a builder or general contractor tenders a claim for construction defects, or a portion thereof, to a subcontractor in the manner specified by this provision, the subcontractor shall elect to perform either of the following, the performance of which shall be deemed to satisfy the subcontractor's defense obligation to the builder or general contractor:

(1) 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. If a subcontractor elects to defend under this paragraph, the subcontractor shall provide written notice of the election to the builder or general contractor within a reasonable time period following receipt of the written tender, and in no event later than 90 days following that receipt. Consistent with subdivision (c), the defense by the subcontractor shall be a complete defense of the builder or general contractor of all claims or portions thereof to the extent alleged to be caused by the subcontractor, including any vicarious liability claims against the builder or general contractor resulting from the subcontractor's scope of work, but not including claims resulting from the scope of work, actions, or omissions of the builder, general contractor, or any other party. Any vicarious liability imposed upon a builder or general contractor for claims caused by the subcontractor electing to defend under this paragraph shall be directly enforceable against the subcontractor by the builder, general contractor, or claimant.

(2) Pay, within 30 days of receipt of an invoice from the builder or general contractor, no more than a reasonable allocated share of the builder's or general contractor's defense fees and costs, on an ongoing basis during the pendency of the claim, subject to

reallocation consistent with subdivision (c), and including any amounts reallocated upon final resolution of the claim, either by settlement or judgment. The builder or general contractor shall allocate a share to itself to the extent a claim or claims are alleged to be caused by its work, actions, or omissions, and a share to each subcontractor to the extent a claim or claims are alleged to be caused by the subcontractor's work, actions, or omissions, regardless of whether the builder or general contractor actually tenders the claim to any particular subcontractor, and regardless of whether that subcontractor is participating in the defense. Any amounts not collected from any particular subcontractor may not be collected from any other subcontractor.

(e) Notwithstanding any other provision of law, if a subcontractor fails to timely and adequately perform its obligations under paragraph (1) of subdivision (d), the builder or general contractor shall have the right to pursue a claim against the subcontractor for any resulting compensatory damages, consequential damages, and reasonable attorney's fees. If a subcontractor fails to timely perform its obligations under paragraph (2) of subdivision (d), the builder or general contractor shall have the right to pursue a claim against the subcontractor for any resulting compensatory and consequential damages, as well as for interest on defense and indemnity costs, from the date incurred, at the rate set forth in subdivision (g) of Section 3260, and for the builder's or general contractor's reasonable attorney's fees incurred to recover these amounts. The builder or general contractor shall bear the burden of proof to establish both the subcontractor's failure to perform under either paragraph (1) or (2) of subdivision (d) and any resulting damages. If, upon request by a subcontractor, a builder or general contractor does not reallocate defense fees to subcontractors within 30 days following final resolution of the claim as described above, the subcontractor shall have the right to pursue a claim against the builder or general contractor for any resulting compensatory and consequential damages, as well as for interest on the fees, from the date of final resolution of the claim, at the rate set forth in subdivision (g) of Section 3260, and the subcontractor's reasonable attorney's fees incurred in connection therewith. The subcontractor shall bear the burden of proof to establish both the failure to reallocate the fees and any resulting damages. Nothing in this section shall prohibit

the parties from mutually agreeing to reasonable contractual provisions for damages if any party fails to elect for or perform its obligations as stated in this section.

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

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

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

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

2782.9. (a) All contracts, provisions, clauses, amendments, or agreements contained therein entered into after January 1, 2009, for a residential construction project on which a wrap-up insurance policy, as defined in subdivision (b) of Section 11751.82 of the Insurance Code, or other consolidated insurance program, is applicable, that require an enrolled and participating subcontractor or other participant to indemnify, hold harmless, or defend another for any claim or action covered by that program, arising out of that project are unenforceable.

(b) To the extent any contractual provision is deemed unenforceable pursuant to this section, any party may pursue an equitable indemnity claim against another party for a claim or action unless there is coverage for the claim or action under the wrap-up policy or policies. Nothing in this section shall prohibit a builder or general contractor from requiring a reasonably allocated contribution from a subcontractor or other participant to the self-insured retention or deductible required under the wrap-up policy or other consolidated insurance program, if the maximum amount and method of collection of the participant’s contribution is disclosed in the contract with the participant and the contribution is reasonably limited so that each participant may have some financial obligation in the event of a claim alleged to be caused by that participant’s scope of work. The contribution shall only be collected when and as any such self-insured retention or deductible is incurred by the builder or general contractor and in an amount that bears a reasonable and proportionate relationship to the alleged liability arising from the claim or claims alleged to be caused by

the participant's scope of work, when viewed in the context of the entirety of the alleged claim or claims. Any contribution shall only be collected from a participant after written notice to the participant of the amount of and basis for the contribution. In no event shall the total amount of contributions collected from participants exceed the amount of any self-insured retention or deductible due and payable by the builder or general contractor for the claim or claims. However, this requirement does not prohibit any legally permissible recovery of costs and legal fees to collect a participant's contribution if the contribution satisfies the requirements of this subdivision and is not paid by the participant when due.

(c) This section shall not be waived or modified by contractual agreement, act, or omission of the parties.

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

2782.95. For any wrap-up insurance policy or other consolidated insurance program that insures a private residential (as that term is used in Title 7 (commencing with Section 895) of Part 2 of Division 2) work of improvement that first commences construction after January 1, 2009, the following shall apply:

(a) The owner, builder, or general contractor obtaining the wrap-up insurance policy or other consolidated insurance program shall disclose the total amount or method of calculation of any credit or compensation for premium required from a subcontractor or other participant for that wrap-up policy in the contract documents.

(b) The contract documents shall disclose, if and to the extent known:

(1) The policy limits.

(2) The scope of policy coverage.

(3) The policy term.

(4) The basis upon which the deductible or occurrence is triggered by the insurance carrier.

(5) If the policy covers more than one work of improvement, the number of units, if any, indicated on the application for the insurance policy.

(6) A good faith estimate of the amount of available limits remaining under the policy as of a date indicated in the disclosure obtained from the insurer.

(7) Disclosures made pursuant to paragraphs (5) and (6) are recognized to be based upon information at a given moment in

time and may not accurately reflect the actual number of units covered by the policy nor the amount of insurance available, if any, when a later claim is made. These disclosures are presumptively made in good faith if the disclosure pursuant to paragraph (5) is the same as that contained in the application to the wrap-up insurer and the disclosure pursuant to paragraph (6) was obtained from the wrap-up insurer or broker. The presumptions stated above shall be overcome only by a showing that the insurer, broker, builder, or general contractor intentionally misrepresented the facts identified in paragraphs (5) or (6).

(c) Upon the written request of any participant, a copy of the insurance policy shall be provided, if available, that shows the coverage terms and items in paragraphs (1) to (4), inclusive, of subdivision (b) above. If the policy is not available at the time of the request, a copy of the insurance binder or declaration of coverage may be provided in lieu of the actual policy. Paragraphs (1) to (4), inclusive, of subdivision (b) may be satisfied by providing the participant with a copy of the binder or declaration. Any party receiving a copy of the policy, binder, or declaration shall not disclose it to third parties other than the participant's insurance broker or attorney unless required to do so by law. The participant's insurance broker or attorney may not disclose the policy, binder, or declaration to any third party unless required to do so by law.

(d) If the owner, builder, or general contractor obtaining the wrap-up insurance policy or other consolidated insurance program does not disclose the total amount or method of calculation of the premium credit or compensation to be charged to the participant prior to the time the participant submits its bid, the participant shall not be legally bound by the bid unless that participant has the right to increase the bid up to the amount equal to the difference between the amount the participant included, if any, for insurance in the original bid and the amount of the actual bid credit required by the owner, builder, or general contractor obtaining the wrap-up insurance policy or other consolidated insurance program. This subdivision shall not apply if the owner, builder, or general contractor obtaining the wrap-up insurance policy or other consolidated insurance program did not require the subcontractor to offset the original bid amount with a deduction for the wrap-up insurance policy or program.

SEC. 4. Section 2782.96 is added to the Civil Code, to read:

2782.96. If an owner, builder, or general contractor obtains a wrap-up insurance policy or other consolidated insurance program for a public work as defined in Section 1720 of the Labor Code or any other project other than residential construction, as that term is used in Title 7 (commencing with Section 895) of Part 2 of Division 2, that is put out for bid after January 1, 2009, the following shall apply:

(a) The total amount or method of calculation of any credit or compensation for premium required from the subcontractor or other participant for that policy shall be clearly delineated in the bid documents.

(b) The named insured, to the extent known, shall disclose to the subcontractor or other participant in the contract documents the policy limits, known exclusions, and the length of time the policy is intended to remain in effect. In addition, upon written request, once available the named insured shall provide copies of insurance policies to all those who are covered by the policy. Until such time as the policies are available, the named insured may also satisfy the disclosure requirements of this subdivision by providing the subcontractor or other participant with a copy of the insurance binder or declaration of coverage. Any party receiving a copy of the policy, binder, or declaration shall not disclose it to third parties other than the participant's insurance broker or attorney unless required to do so by law. The participant's insurance broker or attorney may not disclose the policy, binder, or declaration to any third party unless required to do so by law.

(c) The disclosure requirements in subdivisions (a) and (b) do not apply to an insurance policy purchased by an owner, builder, or general contractor that provides additional coverage beyond what was contained in the original wrap-up policy or other consolidated insurance program if no credit or compensation for premium is required of the subcontractor for the additional insurance policy.

Approved _____, 2008

Governor