

AMENDED IN SENATE MARCH 25, 2011

SENATE BILL

No. 474

Introduced by Senator Evans

February 17, 2011

~~An act relating to construction insurance. An act to amend Section 2782 of the Civil Code, relating to indemnity.~~

LEGISLATIVE COUNSEL'S DIGEST

SB 474, as amended, Evans. ~~Insurance: construction. Commercial construction contracts: indemnity.~~

Existing law, applicable to residential construction contracts entered into after January 1, 2009, makes unenforceable provisions that purport to require a subcontractor to insure or indemnify a builder, or a general contractor or contractor not affiliated with the builder, against liability for claims of construction defects if the claims relate to the negligence of the builder or contractor or the builder's or contractor's other agents, as specified.

This bill would extend these provisions to commercial construction contracts entered into on and after January 1, 2012.

~~Existing law generally regulates insurance.~~

~~This bill would express the intent of the Legislature to enact legislation to govern the use of indemnification and additional-insured provisions in construction contracts in order to provide for the equitable resolution of claims fraud, willful injury, or any other violation of law.~~

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, and for commercial construction as provided in
27 subdivision (i), all provisions, clauses, covenants, and agreements
28 contained in, collateral to, or affecting any construction contract,
29 and amendments thereto, that purport to insure or indemnify,
30 including the cost to defend, the builder, as defined in Section 911,
31 or the general contractor or contractor not affiliated with the
32 builder, as described in subdivision (b) of Section 911, by a
33 subcontractor against liability for claims of construction defects
34 are unenforceable to the extent the claims arise out of, pertain to,
35 or relate to the negligence of the builder or contractor or the
36 builder's or contractor's other agents, other servants, or other
37 independent contractors who are directly responsible to the builder,
38 or for defects in design furnished by those persons, or to the extent

1 the claims do not arise out of, pertain to, or relate to the scope of
2 work in the written agreement between the parties. This section
3 shall not be waived or modified by contractual agreement, act, or
4 omission of the parties. Contractual provisions, clauses, covenants,
5 or agreements not expressly prohibited herein are reserved to the
6 agreement of the parties. Nothing in this subdivision shall prevent
7 any party from exercising its rights under subdivision (a) of Section
8 910. This subdivision shall not affect the obligations of an
9 insurance carrier under the holding of *Presley Homes, Inc. v.*
10 *American States Insurance Company* (2001) 90 Cal.App.4th 571.
11 Nor shall this subdivision affect the obligations of a builder or
12 subcontractor pursuant to Title 7 (commencing with Section 895)
13 of Part 2 of Division 2.

14 (d) Subdivision (c) does not prohibit a subcontractor and builder
15 or general contractor from mutually agreeing to the timing or
16 immediacy of the defense and provisions for reimbursement of
17 defense fees and costs, so long as that agreement does not waive
18 or modify the provisions of subdivision (c) subject, however, to
19 paragraphs (1) and (2). A subcontractor shall owe no defense or
20 indemnity obligation to a builder or general contractor for a
21 construction defect claim unless and until the builder or general
22 contractor provides a written tender of the claim, or portion thereof,
23 to the subcontractor which includes all of the information provided
24 to the builder or general contractor by the claimant or claimants,
25 including, but not limited to, information provided pursuant to
26 subdivision (a) of Section 910, relating to claims caused by that
27 subcontractor's scope of work. This written tender shall have the
28 same force and effect as a notice of commencement of a legal
29 proceeding. If a builder or general contractor tenders a claim for
30 construction defects, or a portion thereof, to a subcontractor in the
31 manner specified by this provision, the subcontractor shall elect
32 to perform either of the following, the performance of which shall
33 be deemed to satisfy the subcontractor's defense obligation to the
34 builder or general contractor:

35 (1) Defend the claim with counsel of its choice, and the
36 subcontractor shall maintain control of the defense for any claim
37 or portion of claim to which the defense obligation applies. If a
38 subcontractor elects to defend under this paragraph, the
39 subcontractor shall provide written notice of the election to the
40 builder or general contractor within a reasonable time period

1 following receipt of the written tender, and in no event later than
2 90 days following that receipt. Consistent with subdivision (c),
3 the defense by the subcontractor shall be a complete defense of
4 the builder or general contractor of all claims or portions thereof
5 to the extent alleged to be caused by the subcontractor, including
6 any vicarious liability claims against the builder or general
7 contractor resulting from the subcontractor’s scope of work, but
8 not including claims resulting from the scope of work, actions, or
9 omissions of the builder, general contractor, or any other party.
10 Any vicarious liability imposed upon a builder or general contractor
11 for claims caused by the subcontractor electing to defend under
12 this paragraph shall be directly enforceable against the
13 subcontractor by the builder, general contractor, or claimant.

14 (2) Pay, within 30 days of receipt of an invoice from the builder
15 or general contractor, no more than a reasonable allocated share
16 of the builder’s or general contractor’s defense fees and costs, on
17 an ongoing basis during the pendency of the claim, subject to
18 reallocation consistent with subdivision (c), and including any
19 amounts reallocated upon final resolution of the claim, either by
20 settlement or judgment. The builder or general contractor shall
21 allocate a share to itself to the extent a claim or claims are alleged
22 to be caused by its work, actions, or omissions, and a share to each
23 subcontractor to the extent a claim or claims are alleged to be
24 caused by the subcontractor’s work, actions, or omissions,
25 regardless of whether the builder or general contractor actually
26 tenders the claim to any particular subcontractor, and regardless
27 of whether that subcontractor is participating in the defense. Any
28 amounts not collected from any particular subcontractor may not
29 be collected from any other subcontractor.

30 (e) Notwithstanding any other provision of law, if a
31 subcontractor fails to timely and adequately perform its obligations
32 under paragraph (1) of subdivision (d), the builder or general
33 contractor shall have the right to pursue a claim against the
34 subcontractor for any resulting compensatory damages,
35 consequential damages, and reasonable attorney’s fees. If a
36 subcontractor fails to timely perform its obligations under
37 paragraph (2) of subdivision (d), the builder or general contractor
38 shall have the right to pursue a claim against the subcontractor for
39 any resulting compensatory and consequential damages, as well
40 as for interest on defense and indemnity costs, from the date

1 incurred, at the rate set forth in subdivision (g) of Section 3260,
2 and for the builder's or general contractor's reasonable attorney's
3 fees incurred to recover these amounts. The builder or general
4 contractor shall bear the burden of proof to establish both the
5 subcontractor's failure to perform under either paragraph (1) or
6 (2) of subdivision (d) and any resulting damages. If, upon request
7 by a subcontractor, a builder or general contractor does not
8 reallocate defense fees to subcontractors within 30 days following
9 final resolution of the claim as described above, the subcontractor
10 shall have the right to pursue a claim against the builder or general
11 contractor for any resulting compensatory and consequential
12 damages, as well as for interest on the fees, from the date of final
13 resolution of the claim, at the rate set forth in subdivision (g) of
14 Section 3260, and the subcontractor's reasonable attorney's fees
15 incurred in connection therewith. The subcontractor shall bear the
16 burden of proof to establish both the failure to reallocate the fees
17 and any resulting damages. Nothing in this section shall prohibit
18 the parties from mutually agreeing to reasonable contractual
19 provisions for damages if any party fails to elect for or perform
20 its obligations as stated in this section.

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

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

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

30 (i) *This section shall apply to commercial construction contracts*
31 *entered into on and after January 1, 2012.*

32 ~~SECTION 1. It is the intent of the Legislature to enact~~
33 ~~legislation to govern the use of indemnification and~~
34 ~~additional-insured provisions in construction contracts in order to~~
35 ~~provide for the equitable resolution of claims fraud, willful injury,~~
36 ~~or any other violation of law.~~