

AMENDED IN SENATE MAY 2, 2011  
AMENDED IN SENATE MARCH 25, 2011

**SENATE BILL**

**No. 474**

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**Introduced by Senator Evans**

February 17, 2011

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~~An act to amend Section 2782 of the Civil Code, relating to indemnity.~~ *An act to amend Section 2782 of, and to add Section 2782.05 to, the Civil Code, relating to indemnity.*

LEGISLATIVE COUNSEL'S DIGEST

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

*Existing law provides that provisions in construction contracts that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss arising from the sole negligence or willful misconduct of the promisee or the promisee's agents 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. Existing law excepts from these provisions agreements to indemnify with professional engineers and geologists, among others. Existing law prescribes different requirements and prohibitions for residential construction contracts entered on and after January 1, 2009.*

*This bill would provide, for construction contracts executed on and after January 1, 2012, that are not for residential construction, that any provision in a contract purporting to indemnify, hold harmless, or defend another person against actual or claimed liability, damage, or expense arising, in whole or in part, from the negligence, willful misconduct, defective design, violation of law, or other fault of that*

*person or that person's agents, employees, independent contractors, subcontractors, or representatives is against public policy and is void and unenforceable. The bill would require that California law be applied to these contracts regardless of any choice-of-law rules that might otherwise apply. The bill would except certain contractual provisions and types of insurance from its provisions. The bill would provide that waiver of these provisions is contrary to public policy, void, and unenforceable.*

~~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.~~

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. *The Legislature finds and declares all of the*
- 2     *following:*
- 3     (i) *It is in the best interests of this state and its citizens and*
- 4     *consumers to ensure that every construction business in the state*
- 5     *is financially responsible under the tort liability system for losses*
- 6     *that it, as a business, may cause.*
- 7     (b) *The duty of a business to be responsible for its own*
- 8     *negligence should be nondelegable, except through contracts for*
- 9     *insurance.*
- 10    (c) *Developers and construction businesses in recent years have*
- 11    *begun to use contract provisions to shift the financial responsibility*
- 12    *for their negligence to others, thereby circumventing one of the*
- 13    *fundamental foundations of tort law.*
- 14    (d) *If all businesses, large and small, are responsible for their*
- 15    *own actions, then construction companies will be able to obtain*
- 16    *adequate insurance, the quality of construction will be improved,*
- 17    *and workplace safety will be enhanced.*

1 (e) Construction businesses must be able to obtain liability  
2 insurance in order to meet their responsibilities.

3 (f) The provisions of this act will promote competition and safety  
4 in the construction industry, thereby benefiting California  
5 consumers.

6 (g) The intent of this act is to create an economic climate that  
7 will promote safety in construction and ensure fairness among  
8 businesses.

9 **SECTION 1.**

10 *SEC. 2.* Section 2782 of the Civil Code is amended to read:

11 2782. (a) (1) Except as provided in Sections 2782.1, 2782.2,  
12 2782.5, and 2782.6, provisions, clauses, covenants, or agreements  
13 contained in, collateral to, or affecting any construction contract  
14 and that purport to indemnify the promisee against liability for  
15 damages for death or bodily injury to persons, injury to property,  
16 or any other loss, damage or expense arising from the sole  
17 negligence or willful misconduct of the promisee or the promisee's  
18 agents, servants, or independent contractors who are directly  
19 responsible to the promisee, or for defects in design furnished by  
20 those persons, are against public policy and are void and  
21 unenforceable; provided, however, that this section shall not affect  
22 the validity of any insurance contract, workers' compensation, or  
23 agreement issued by an admitted insurer as defined by the  
24 Insurance Code.

25 (2) *This subdivision shall apply only to contracts executed before*  
26 *January 1, 2012. On and after January 1, 2012, Section 2782.05*  
27 *shall apply to all construction contracts executed on and after*  
28 *January 1, 2012, that are not for residential construction or*  
29 *otherwise excepted by the provisions of that section.*

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

36 (c) For all construction contracts, and amendments thereto,  
37 entered into after January 1, 2009, for residential construction, as  
38 used in Title 7 (commencing with Section 895) of Part 2 of  
39 Division 2, ~~and for commercial construction as provided in~~  
40 ~~subdivision (i)~~, all provisions, clauses, covenants, and agreements

1 contained in, collateral to, or affecting any construction contract,  
2 and amendments thereto, that purport to insure or indemnify,  
3 including the cost to defend, the builder, as defined in Section 911,  
4 or the general contractor or contractor not affiliated with the  
5 builder, as described in subdivision (b) of Section 911, by a  
6 subcontractor against liability for claims of construction defects  
7 are unenforceable to the extent the claims arise out of, pertain to,  
8 or relate to the negligence of the builder or contractor or the  
9 builder's or contractor's other agents, other servants, or other  
10 independent contractors who are directly responsible to the builder,  
11 or for defects in design furnished by those persons, or to the extent  
12 the claims do not arise out of, pertain to, or relate to the scope of  
13 work in the written agreement between the parties. This section  
14 shall not be waived or modified by contractual agreement, act, or  
15 omission of the parties. Contractual provisions, clauses, covenants,  
16 or agreements not expressly prohibited herein are reserved to the  
17 agreement of the parties. Nothing in this subdivision shall prevent  
18 any party from exercising its rights under subdivision (a) of Section  
19 910. This subdivision shall not affect the obligations of an  
20 insurance carrier under the holding of *Presley Homes, Inc. v.*  
21 *American States Insurance Company* (2001) 90 Cal.App.4th 571.  
22 Nor shall this subdivision affect the obligations of a builder or  
23 subcontractor pursuant to Title 7 (commencing with Section 895)  
24 of Part 2 of Division 2.

25 (d) Subdivision (c) does not prohibit a subcontractor and builder  
26 or general contractor from mutually agreeing to the timing or  
27 immediacy of the defense and provisions for reimbursement of  
28 defense fees and costs, so long as that agreement does not waive  
29 or modify the provisions of subdivision (c) subject, however, to  
30 paragraphs (1) and (2). A subcontractor shall owe no defense or  
31 indemnity obligation to a builder or general contractor for a  
32 construction defect claim unless and until the builder or general  
33 contractor provides a written tender of the claim, or portion thereof,  
34 to the subcontractor which includes all of the information provided  
35 to the builder or general contractor by the claimant or claimants,  
36 including, but not limited to, information provided pursuant to  
37 subdivision (a) of Section 910, relating to claims caused by that  
38 subcontractor's scope of work. This written tender shall have the  
39 same force and effect as a notice of commencement of a legal  
40 proceeding. If a builder or general contractor tenders a claim for

1 construction defects, or a portion thereof, to a subcontractor in the  
2 manner specified by this provision, the subcontractor shall elect  
3 to perform either of the following, the performance of which shall  
4 be deemed to satisfy the subcontractor's defense obligation to the  
5 builder or general contractor:

6 (1) Defend the claim with counsel of its choice, and the  
7 subcontractor shall maintain control of the defense for any claim  
8 or portion of claim to which the defense obligation applies. If a  
9 subcontractor elects to defend under this paragraph, the  
10 subcontractor shall provide written notice of the election to the  
11 builder or general contractor within a reasonable time period  
12 following receipt of the written tender, and in no event later than  
13 90 days following that receipt. Consistent with subdivision (c),  
14 the defense by the subcontractor shall be a complete defense of  
15 the builder or general contractor of all claims or portions thereof  
16 to the extent alleged to be caused by the subcontractor, including  
17 any vicarious liability claims against the builder or general  
18 contractor resulting from the subcontractor's scope of work, but  
19 not including claims resulting from the scope of work, actions, or  
20 omissions of the builder, general contractor, or any other party.  
21 Any vicarious liability imposed upon a builder or general contractor  
22 for claims caused by the subcontractor electing to defend under  
23 this paragraph shall be directly enforceable against the  
24 subcontractor by the builder, general contractor, or claimant.

25 (2) Pay, within 30 days of receipt of an invoice from the builder  
26 or general contractor, no more than a reasonable allocated share  
27 of the builder's or general contractor's defense fees and costs, on  
28 an ongoing basis during the pendency of the claim, subject to  
29 reallocation consistent with subdivision (c), and including any  
30 amounts reallocated upon final resolution of the claim, either by  
31 settlement or judgment. The builder or general contractor shall  
32 allocate a share to itself to the extent a claim or claims are alleged  
33 to be caused by its work, actions, or omissions, and a share to each  
34 subcontractor to the extent a claim or claims are alleged to be  
35 caused by the subcontractor's work, actions, or omissions,  
36 regardless of whether the builder or general contractor actually  
37 tenders the claim to any particular subcontractor, and regardless  
38 of whether that subcontractor is participating in the defense. Any  
39 amounts not collected from any particular subcontractor may not  
40 be collected from any other subcontractor.

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

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

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

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

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

3 *SEC. 3. Section 2782.05 is added to the Civil Code, to read:*

4 *2782.05. (a) Provisions, clauses, covenants, or agreements*  
5 *contained in, collateral to, or affecting a contract or agreement,*  
6 *except as provided in subdivision (c), whether executed in this*  
7 *state or without, for the design, construction, alteration,*  
8 *renovation, repair, or maintenance of a building, structure,*  
9 *highway, road, bridge, water line, sewer line, oil line, gas line,*  
10 *appurtenance, or other improvement to public or private real*  
11 *property located in the state, including any erection, moving,*  
12 *lifting, demolition, or excavation that requires a promisor to*  
13 *indemnify, release, hold harmless, insure, or defend another person*  
14 *against actual or claimed liability, damage, or expense arising,*  
15 *in whole or in part, from the negligence, willful misconduct,*  
16 *defective design, violation of law, or other fault of that person or*  
17 *that person's agents, employees, independent contractors,*  
18 *subcontractors, or representatives are against public policy and*  
19 *are void and unenforceable.*

20 *(b) A provision in a contract described in subdivision (a) that*  
21 *requires the purchase of additional insured coverage, or any*  
22 *coverage endorsement or provision within an insurance policy*  
23 *providing additional insured coverage, primary or noncontributing*  
24 *coverage or waivers, is void and unenforceable to the extent that*  
25 *it requires or provides coverage the scope of which is prohibited*  
26 *under this section for an agreement to indemnify, hold harmless,*  
27 *or defend.*

28 *(c) This section does not apply to:*

29 *(1) Contracts for residential construction, as used in Title 7*  
30 *(commencing with Section 895) of Part 2 of Division 2.*

31 *(2) Any wrap-up insurance policy or program, except as*  
32 *provided by this section.*

33 *(3) A cause of action for breach of contract or warranty that*  
34 *exists independently of an indemnity obligation.*

35 *(4) A provision in a construction contract that requires the*  
36 *promisor to purchase or maintain insurance covering the acts or*  
37 *omissions of the promisor.*

38 *(5) Indemnity provisions contained in loan and financing*  
39 *documents, other than construction contracts to which the*  
40 *contractor and a contracting project owner's lender are parties.*

- 1     (6) *General agreements of indemnity required by sureties as a*
- 2     *condition of execution of bonds for construction contracts.*
- 3     (7) *The benefits and protections provided by the workers’*
- 4     *compensation laws.*
- 5     (8) *The benefits or protections provided by the governmental*
- 6     *immunity laws.*
- 7     (d) *This section does not apply to a construction contract*
- 8     *provision that requires a promisor to purchase:*
- 9         (1) *Owners and contractors protective liability insurance.*
- 10        (2) *Railroad protective liability insurance.*
- 11        (3) *Contractors all-risk insurance.*
- 12        (4) *Builders all-risk or named perils property insurance.*
- 13     (e) *This section applies only to liability under a construction*
- 14     *contract entered into on or after January 1, 2012.*
- 15     (f) *Notwithstanding any choice-of-law rules that would apply*
- 16     *the laws of another jurisdiction, the law of California shall apply*
- 17     *to every contract to which this section applies.*
- 18     (g) *Any waiver of the provisions of this section is contrary to*
- 19     *public policy and is void and unenforceable.*