

AMENDED IN SENATE MAY 24, 2011

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, 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~~ 2013, that are not for residential construction *or executed by a public entity, as defined*, 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.

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 (a) 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.

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

20 (f) The provisions of this act will promote competition and  
21 safety in the construction industry, thereby benefiting California  
22 consumers.

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

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

1 2782. (a) (1) Except as provided in Sections 2782.1, 2782.2,  
2 2782.5, and 2782.6, provisions, clauses, covenants, or agreements  
3 contained in, collateral to, or affecting any construction contract  
4 and that purport to indemnify the promisee against liability for  
5 damages for death or bodily injury to persons, injury to property,  
6 or any other loss, damage or expense arising from the sole  
7 negligence or willful misconduct of the promisee or the promisee's  
8 agents, servants, or independent contractors who are directly  
9 responsible to the promisee, or for defects in design furnished by  
10 those persons, are against public policy and are void and  
11 unenforceable; provided, however, that this section shall not affect  
12 the validity of any insurance contract, workers' compensation, or  
13 agreement issued by an admitted insurer as defined by the  
14 Insurance Code.

15 (2) ~~This~~-(A) *Except as provided in subparagraph (B), this*  
16 *subdivision shall apply only to contracts executed before January*  
17 *1, 2012 2013. On and after January 1, 2012 2013, Section 2782.05*  
18 *shall apply to all construction contracts executed on and after*  
19 *January 1, 2012 2013, that are not for residential construction or*  
20 *otherwise excepted by the provisions of that section.*

21 (B) *Notwithstanding subparagraph (A), this subdivision shall*  
22 *continue to apply to contracts executed by a public entity on and*  
23 *after January 1, 2013, and Section 2782.05 shall not apply. For*  
24 *purposes of this subparagraph, "public entity" means the state,*  
25 *including every state agency, office, department, division, bureau,*  
26 *board, or commission, a city, county, city and county, including a*  
27 *charter city or a charter county, a charter school, district, special*  
28 *district, public authority, political subdivision, public corporation,*  
29 *and nonprofit transit corporation wholly owned by a public agency*  
30 *and formed to carry out the purposes of the public agency. This*  
31 *definition, and the exception provided by this subparagraph, shall*  
32 *be construed broadly and shall include the Regents of the*  
33 *University of California, the Trustees of the California State*  
34 *University, and the Board of Governors of the California*  
35 *Community Colleges.*

36 (b) Except as provided in Sections 2782.1, 2782.2, and 2782.5,  
37 provisions, clauses, covenants, or agreements contained in,  
38 collateral to, or affecting any construction contract with a public  
39 agency that purport to impose on the contractor, or relieve the

1 public agency from, liability for the active negligence of the public  
2 agency are void and unenforceable.

3 (c) For all construction contracts, and amendments thereto,  
4 entered into after January 1, 2009, for residential construction, as  
5 used in Title 7 (commencing with Section 895) of Part 2 of  
6 Division 2, all provisions, clauses, covenants, and agreements  
7 contained in, collateral to, or affecting any construction contract,  
8 and amendments thereto, that purport to insure or indemnify,  
9 including the cost to defend, the builder, as defined in Section 911,  
10 or the general contractor or contractor not affiliated with the  
11 builder, as described in subdivision (b) of Section 911, by a  
12 subcontractor against liability for claims of construction defects  
13 are unenforceable to the extent the claims arise out of, pertain to,  
14 or relate to the negligence of the builder or contractor or the  
15 builder's or contractor's other agents, other servants, or other  
16 independent contractors who are directly responsible to the builder,  
17 or for defects in design furnished by those persons, or to the extent  
18 the claims do not arise out of, pertain to, or relate to the scope of  
19 work in the written agreement between the parties. This section  
20 shall not be waived or modified by contractual agreement, act, or  
21 omission of the parties. Contractual provisions, clauses, covenants,  
22 or agreements not expressly prohibited herein are reserved to the  
23 agreement of the parties. Nothing in this subdivision shall prevent  
24 any party from exercising its rights under subdivision (a) of Section  
25 910. This subdivision shall not affect the obligations of an  
26 insurance carrier under the holding of *Presley Homes, Inc. v.*  
27 *American States Insurance Company* (2001) 90 Cal.App.4th 571.  
28 Nor shall this subdivision affect the obligations of a builder or  
29 subcontractor pursuant to Title 7 (commencing with Section 895)  
30 of Part 2 of Division 2.

31 (d) Subdivision (c) does not prohibit a subcontractor and builder  
32 or general contractor from mutually agreeing to the timing or  
33 immediacy of the defense and provisions for reimbursement of  
34 defense fees and costs, so long as that agreement does not waive  
35 or modify the provisions of subdivision (c) subject, however, to  
36 paragraphs (1) and (2). A subcontractor shall owe no defense or  
37 indemnity obligation to a builder or general contractor for a  
38 construction defect claim unless and until the builder or general  
39 contractor provides a written tender of the claim, or portion thereof,  
40 to the subcontractor which includes all of the information provided

1 to the builder or general contractor by the claimant or claimants,  
2 including, but not limited to, information provided pursuant to  
3 subdivision (a) of Section 910, relating to claims caused by that  
4 subcontractor's scope of work. This written tender shall have the  
5 same force and effect as a notice of commencement of a legal  
6 proceeding. If a builder or general contractor tenders a claim for  
7 construction defects, or a portion thereof, to a subcontractor in the  
8 manner specified by this provision, the subcontractor shall elect  
9 to perform either of the following, the performance of which shall  
10 be deemed to satisfy the subcontractor's defense obligation to the  
11 builder or general contractor:

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

31 (2) Pay, within 30 days of receipt of an invoice from the builder  
32 or general contractor, no more than a reasonable allocated share  
33 of the builder's or general contractor's defense fees and costs, on  
34 an ongoing basis during the pendency of the claim, subject to  
35 reallocation consistent with subdivision (c), and including any  
36 amounts reallocated upon final resolution of the claim, either by  
37 settlement or judgment. The builder or general contractor shall  
38 allocate a share to itself to the extent a claim or claims are alleged  
39 to be caused by its work, actions, or omissions, and a share to each  
40 subcontractor to the extent a claim or claims are alleged to be

1 caused by the subcontractor’s work, actions, or omissions,  
2 regardless of whether the builder or general contractor actually  
3 tenders the claim to any particular subcontractor, and regardless  
4 of whether that subcontractor is participating in the defense. Any  
5 amounts not collected from any particular subcontractor may not  
6 be collected from any other subcontractor.

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

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

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

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

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

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

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

32 (c) This section does not apply to:

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

35 (2) *Contracts executed by a public entity, as defined in*  
36 *subparagraph (B) of paragraph (2) of subdivision (a) of Section*  
37 *2782.*

38 ~~(2)~~

39 (3) Any wrap-up insurance policy or program, except as  
40 provided by this section.

1     ~~(3)~~  
2     (4) A cause of action for breach of contract or warranty that  
3 exists independently of an indemnity obligation.

4     ~~(4)~~  
5     (5) A provision in a construction contract that requires the  
6 promisor to purchase or maintain insurance covering the acts or  
7 omissions of the promisor.

8     ~~(5)~~  
9     (6) Indemnity provisions contained in loan and financing  
10 documents, other than construction contracts to which the  
11 contractor and a contracting project owner’s lender are parties.

12     ~~(6)~~  
13     (7) General agreements of indemnity required by sureties as a  
14 condition of execution of bonds for construction contracts.

15     ~~(7)~~  
16     (8) The benefits and protections provided by the workers’  
17 compensation laws.

18     ~~(8)~~  
19     (9) The benefits or protections provided by the governmental  
20 immunity laws.

21     (d) This section does not apply to a construction contract  
22 provision that requires a promisor to purchase:

- 23         (1) Owners and contractors protective liability insurance.
- 24         (2) Railroad protective liability insurance.
- 25         (3) Contractors all-risk insurance.
- 26         (4) Builders all-risk or named perils property insurance.

27     (e) This section applies only to liability under a construction  
28 contract entered into on or after January 1, ~~2012~~ 2013.

29     (f) Notwithstanding any choice-of-law rules that would apply  
30 the laws of another jurisdiction, the law of California shall apply  
31 to every contract to which this section applies.

32     (g) Any waiver of the provisions of this section is contrary to  
33 public policy and is void and unenforceable.