

AMENDED IN ASSEMBLY JUNE 21, 2011

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~~ *Sections 2782 and 2783* 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, *as defined*, 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 provides that provisions in construction contracts 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.* 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 *and amendments* executed on and after January 1, 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 with a public agency, that purport to insure or indemnify, including the cost to defend, a general contractor, construction manager, or other subcontractor, by a subcontractor against actual or claimed liability for claims of loss, damage, or expense are unenforceable to the extent the claims relate to the negligence or misconduct of that general contractor, construction manager, or other subcontractor, or their other agents, as specified, or for defects in design furnished by those persons, or to the extent the claims do not arise out of the scope of work of the subcontractor in the written agreement between the parties. 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~~ these provisions, including an agreement between a subcontractor and general contractor or construction manager as to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, as specified. The bill would provide that waiver of these provisions is contrary to public policy, void, and unenforceable.

*This bill would provide, for construction contracts entered into on and after January 1, 2013, with a public agency, that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the public agency from, liability for the active negligence of the public agency, including that of its employees, agents, and other independent contractors, are void and unenforceable. The bill also would provide, for construction contracts entered into on and after January 1, 2013, with the owner of privately held real property to be improved and as to which the owner is not acting as a contractor, construction manager, or supplier of materials or equipment to the work, that purport to impose on any contractor, subcontractor, or supplier of goods or services, or relieve the owner from, liability for the active negligence of the owner, including that of its employees, agents, and other independent contractors, are void and unenforceable.*

*This bill would expand the definition of “construction contract” for purposes of these provisions, to include agreements for renovations, and would include agreements respecting, among other things, water, sewer, oil, and gas lines.*

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:

27 2782. (a) ~~(4)~~—Except as provided in Sections 2782.1, 2782.2,  
28 2782.5, and 2782.6, provisions, clauses, covenants, or agreements  
29 contained in, collateral to, or affecting any construction contract  
30 and that purport to indemnify the promisee against liability for  
31 damages for death or bodily injury to persons, injury to property,

1 or any other loss, damage or expense arising from the sole  
2 negligence or willful misconduct of the promisee or the promisee's  
3 agents, servants, or independent contractors who are directly  
4 responsible to the promisee, or for defects in design furnished by  
5 those persons, are against public policy and are void and  
6 unenforceable; provided, however, that this section shall not affect  
7 the validity of any insurance contract, workers' compensation, or  
8 agreement issued by an admitted insurer as defined by the  
9 Insurance Code.

10 ~~(2) (A) Except as provided in subparagraph (B), this subdivision~~  
11 ~~shall apply only to contracts executed before January 1, 2013. On~~  
12 ~~and after January 1, 2013, Section 2782.05 shall apply to all~~  
13 ~~construction contracts executed on and after January 1, 2013, that~~  
14 ~~are not for residential construction or otherwise excepted by the~~  
15 ~~provisions of that section.~~

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

31 (b) (1) Except as provided in Sections 2782.1, 2782.2, and  
32 2782.5, provisions, clauses, covenants, or agreements contained  
33 in, collateral to, or affecting any construction contract with a public  
34 agency *entered into before January 1, 2013*, that purport to impose  
35 on the contractor, or relieve the public agency from, liability for  
36 the active negligence of the public agency are void and  
37 unenforceable.

38 (2) *Except as provided in Sections 2782.1, 2782.2, and 2782.5,*  
39 *provisions, clauses, covenants, or agreements contained in,*  
40 *collateral to, or affecting any construction contract with a public*

1 agency entered into on or after January 1, 2013, that purport to  
2 impose on any contractor, subcontractor, or supplier of goods or  
3 services, or relieve the public agency from, liability for the active  
4 negligence of the public agency, including that of its employees,  
5 agents, and other independent contractors, are void and  
6 unenforceable.

7 (c) Except as provided in subdivision (d) and Sections 2781.1,  
8 2782.2, and 2782.5, provisions, clauses, covenants, or agreements  
9 contained in, collateral to, or affecting any construction contract  
10 entered into on or after January 1, 2013, with the owner of  
11 privately held real property to be improved and as to which the  
12 owner is not acting as a contractor, construction manager, or  
13 supplier of materials or equipment to the work, that purport to  
14 impose on any contractor, subcontractor, or supplier of goods or  
15 services, or relieve the owner from, liability for the active  
16 negligence of the owner, including that of its employees, agents,  
17 and other independent contractors, are void and unenforceable.

18 (e)

19 (d) For all construction contracts, and amendments thereto,  
20 entered into after January 1, 2009, for residential construction, as  
21 used in Title 7 (commencing with Section 895) of Part 2 of  
22 Division 2, all provisions, clauses, covenants, and agreements  
23 contained in, collateral to, or affecting any construction contract,  
24 and amendments thereto, that purport to insure or indemnify,  
25 including the cost to defend, the builder, as defined in Section 911,  
26 or the general contractor or contractor not affiliated with the  
27 builder, as described in subdivision (b) of Section 911, by a  
28 subcontractor against liability for claims of construction defects  
29 are unenforceable to the extent the claims arise out of, pertain to,  
30 or relate to the negligence of the builder or contractor or the  
31 builder's or contractor's other agents, other servants, or other  
32 independent contractors who are directly responsible to the builder,  
33 or for defects in design furnished by those persons, or to the extent  
34 the claims do not arise out of, pertain to, or relate to the scope of  
35 work in the written agreement between the parties. This section  
36 shall not be waived or modified by contractual agreement, act, or  
37 omission of the parties. Contractual provisions, clauses, covenants,  
38 or agreements not expressly prohibited herein are reserved to the  
39 agreement of the parties. Nothing in this subdivision shall prevent  
40 any party from exercising its rights under subdivision (a) of Section

1 910. This subdivision shall not affect the obligations of an  
2 insurance carrier under the holding of *Presley Homes, Inc. v.*  
3 *American States Insurance Company* (2001) 90 Cal.App.4th 571.  
4 Nor shall this subdivision affect the obligations of a builder or  
5 subcontractor pursuant to Title 7 (commencing with Section 895)  
6 of Part 2 of Division 2.

7 ~~(d)~~

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

29 (1) Defend the claim with counsel of its choice, and the  
30 subcontractor shall maintain control of the defense for any claim  
31 or portion of claim to which the defense obligation applies. If a  
32 subcontractor elects to defend under this paragraph, the  
33 subcontractor shall provide written notice of the election to the  
34 builder or general contractor within a reasonable time period  
35 following receipt of the written tender, and in no event later than  
36 90 days following that receipt. Consistent with subdivision~~(e)~~ (d),  
37 the defense by the subcontractor shall be a complete defense of  
38 the builder or general contractor of all claims or portions thereof  
39 to the extent alleged to be caused by the subcontractor, including  
40 any vicarious liability claims against the builder or general

1 contractor resulting from the subcontractor's scope of work, but  
2 not including claims resulting from the scope of work, actions, or  
3 omissions of the builder, general contractor, or any other party.  
4 Any vicarious liability imposed upon a builder or general contractor  
5 for claims caused by the subcontractor electing to defend under  
6 this paragraph shall be directly enforceable against the  
7 subcontractor by the builder, general contractor, or claimant.

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

24 ~~(e)~~

25 (f) Notwithstanding any other provision of law, if a subcontractor  
26 fails to timely and adequately perform its obligations under  
27 paragraph (1) of subdivision ~~(d)~~ (e), the builder or general  
28 contractor shall have the right to pursue a claim against the  
29 subcontractor for any resulting compensatory damages,  
30 consequential damages, and reasonable attorney's fees. If a  
31 subcontractor fails to timely perform its obligations under  
32 paragraph (2) of subdivision ~~(d)~~ (e), the builder or general  
33 contractor shall have the right to pursue a claim against the  
34 subcontractor for any resulting compensatory and consequential  
35 damages, as well as for interest on defense and indemnity costs,  
36 from the date incurred, at the rate set forth in subdivision (g) of  
37 Section 3260, and for the builder's or general contractor's  
38 reasonable attorney's fees incurred to recover these amounts. The  
39 builder or general contractor shall bear the burden of proof to  
40 establish both the subcontractor's failure to perform under either

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

16 ~~(f)~~

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

20 ~~(g)~~

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

25 ~~(h)~~

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

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

29 2782.05. (a) ~~Provisions~~ *Except as provided in subdivision (b),*  
 30 *provisions*, clauses, covenants, ~~or~~ *and* agreements contained in,  
 31 collateral to, or affecting a contract or agreement, ~~except as~~  
 32 ~~provided in subdivision (c), whether executed in this state or~~  
 33 ~~without, for the design, construction, alteration, renovation, repair,~~  
 34 ~~or maintenance of a building, structure, highway, road, bridge,~~  
 35 ~~water line, sewer line, oil line, gas line, appurtenance, or other~~  
 36 ~~improvement to public or private real property located in the state,~~  
 37 ~~including any erection, moving, lifting, demolition, or excavation~~  
 38 ~~that requires a promisor to indemnify, release, hold harmless,~~  
 39 ~~insure, or defend another person against actual or claimed liability,~~  
 40 ~~damage, or expense arising from the negligence, willful~~

1 ~~misconduct, defective design, violation of law, or other fault of~~  
2 ~~that person or that person's agents, employees, independent~~  
3 ~~contractors, subcontractors, or representatives are against public~~  
4 ~~policy and are void and unenforceable. any construction contract~~  
5 ~~and amendments thereto entered into on or after January 1, 2013,~~  
6 ~~that purport to insure or indemnify, including the cost to defend,~~  
7 ~~a general contractor, construction manager, or other~~  
8 ~~subcontractor, by a subcontractor against actual or claimed~~  
9 ~~liability for claims of loss, damage, or expense are unenforceable~~  
10 ~~to the extent the claims arise out of, pertain to, or relate to the~~  
11 ~~negligence or misconduct of that general contractor, construction~~  
12 ~~manager, or other subcontractor, or their other agents, other~~  
13 ~~servants, or other independent contractors who are responsible~~  
14 ~~to the general contractor, construction manager, or other~~  
15 ~~subcontractor, or for defects in design furnished by those persons,~~  
16 ~~or to the extent the claims do not arise out of the scope of work of~~  
17 ~~the subcontractor in the written agreement between the parties.~~  
18 ~~This section shall not be waived or modified by contractual~~  
19 ~~agreement, act, or omission of the parties. Contractual provisions,~~  
20 ~~clauses, covenants, or agreements not expressly prohibited herein~~  
21 ~~are reserved to the agreement of the parties. This subdivision shall~~  
22 ~~not affect the obligations of an insurance carrier under the holding~~  
23 ~~of Presley Homes, Inc. v. American States Insurance Company~~  
24 ~~(2001) 90 Cal.App.4th 571, nor the rights of an insurance carrier~~  
25 ~~under the holding of Buss v. Superior Court (1997) 16 Cal.4th 35.~~

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

34 ~~(e)–~~

35 (b) This section does not apply to:

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

38 (2) ~~Contracts executed by a public entity, as defined in~~  
39 ~~subparagraph (B) of paragraph (2) of subdivision (a) with a public~~  
40 ~~agency and governed by subdivision (b) of Section 2782.~~

- 1     (3) *Contracts with the owner of private property and governed*
- 2 *by subdivision (c) of Section 2782.*
- 3     ~~(3)~~
- 4     (4) Any wrap-up insurance policy or program, except as
- 5 provided by this section.
- 6     ~~(4)~~
- 7     (5) A cause of action for breach of contract or warranty that
- 8 exists independently of an indemnity obligation.
- 9     ~~(5)~~
- 10    (6) A provision in a construction contract that requires the
- 11 promisor to purchase or maintain insurance covering the acts or
- 12 omissions of the promisor.
- 13    ~~(6)~~
- 14    (7) Indemnity provisions contained in loan and financing
- 15 documents, other than construction contracts to which the
- 16 contractor and a contracting project owner’s lender are parties.
- 17    ~~(7)~~
- 18    (8) General agreements of indemnity required by sureties as a
- 19 condition of execution of bonds for construction contracts.
- 20    ~~(8)~~
- 21    (9) The benefits and protections provided by the workers’
- 22 compensation laws.
- 23    ~~(9)~~
- 24    (10) The benefits or protections provided by the governmental
- 25 immunity laws.
- 26    ~~(d) This section does not apply to a construction contract~~
- 27 ~~provision that requires a promisor to purchase:~~
- 28    (11) *Provisions that require the purchase of any of the following:*
- 29    ~~(1)~~
- 30    (A) Owners and contractors protective liability insurance.
- 31    ~~(2)~~
- 32    (B) Railroad protective liability insurance.
- 33    ~~(3)~~
- 34    (C) Contractors all-risk insurance.
- 35    ~~(4)~~
- 36    (D) Builders all-risk or named perils property insurance.
- 37    ~~(e) This section applies only to liability under a construction~~
- 38 ~~contract entered into on or after January 1, 2013.~~
- 39    ~~(f)~~

1 (c) Notwithstanding any choice-of-law rules that would apply  
2 the laws of another jurisdiction, the law of California shall apply  
3 to every contract to which this section applies.

4 ~~(g)~~

5 (d) Any waiver of the provisions of this section is contrary to  
6 public policy and is void and unenforceable.

7 (e) *Subdivision (a) does not prohibit a subcontractor and a*  
8 *general contractor or construction manager from mutually*  
9 *agreeing to the timing or immediacy of the defense and provisions*  
10 *for reimbursement of defense fees and costs, so long as that*  
11 *agreement does not waive or modify the provisions of subdivision*  
12 *(a) subject, however, to paragraphs (1) and (2). A subcontractor*  
13 *shall owe no defense or indemnity obligation to a general*  
14 *contractor or construction manager for a claim unless and until*  
15 *the general contractor or construction manager provides a written*  
16 *tender of the claim, or portion thereof, to the subcontractor that*  
17 *includes all of the information provided by the claimant or*  
18 *claimants relating to claims caused by that subcontractor's scope*  
19 *of work. If a general contractor or construction manager tenders*  
20 *a claim, or portion thereof, to a subcontractor in the manner*  
21 *specified by this subdivision, the subcontractor shall elect to*  
22 *perform either of the following, the performance of which shall*  
23 *be deemed to satisfy the subcontractor's defense obligation to the*  
24 *general contractor or construction manager:*

25 (1) *Defend the claim with counsel of its choice, and the*  
26 *subcontractor shall maintain control of the defense for any claim*  
27 *or portion of claim to which the defense obligation applies. If a*  
28 *subcontractor elects to defend under this paragraph, the*  
29 *subcontractor shall provide written notice of the election to the*  
30 *general contractor or construction manager within a reasonable*  
31 *time period following receipt of the written tender, and in no event*  
32 *later than 30 days following that receipt. Consistent with*  
33 *subdivision (a), the defense by the subcontractor shall be a*  
34 *complete defense of the general contractor or construction*  
35 *manager of all claims or portions thereof to the extent alleged to*  
36 *be caused by the subcontractor, including any vicarious liability*  
37 *claims against the general contractor or construction manager*  
38 *resulting from the subcontractor's scope of work, but not including*  
39 *claims resulting from the scope of work, actions, or omissions of*  
40 *the general contractor or construction manager, or any other*

1 party. Any vicarious liability imposed upon a general contractor  
2 or construction manager for claims caused by the subcontractor  
3 electing to defend under this paragraph shall be directly  
4 enforceable against the subcontractor by the owner, general  
5 contractor, construction manager, or claimant.

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

24 (f) Notwithstanding any other provision of law, if a  
25 subcontractor fails to timely and adequately perform its obligations  
26 under paragraph (1) of subdivision (e), the general contractor or  
27 construction manager shall have the right to pursue a claim against  
28 the subcontractor for any resulting compensatory damages. If a  
29 subcontractor fails to timely perform its obligations under  
30 paragraph (2) of subdivision (e), the general contractor or  
31 construction manager shall have the right to pursue a claim against  
32 the subcontractor for any resulting compensatory damages and  
33 for interest on defense and indemnity costs, from the date incurred,  
34 at the rate set forth in subdivision (g) of Section 3260. The general  
35 contractor or construction manager shall bear the burden of proof  
36 to establish both the subcontractor's failure to perform under  
37 either paragraph (1) or (2) of subdivision (e) and any resulting  
38 damages. If, upon request by a subcontractor, a general contractor  
39 or construction manager does not reallocate defense fees to  
40 subcontractors within 30 days following final resolution of the

1 *claim, the subcontractor shall have the right to pursue a claim*  
2 *against the general contractor or construction manager for any*  
3 *resulting compensatory damages with interest, from the date of*  
4 *final resolution of the claim, at the rate set forth in subdivision (g)*  
5 *of Section 3260. The subcontractor shall bear the burden of proof*  
6 *to establish both the failure to reallocate the fees and any resulting*  
7 *damages. Nothing in this section shall prohibit the parties from*  
8 *mutually agreeing to reasonable contractual provisions for*  
9 *damages if any party fails to elect for or perform its obligations*  
10 *as stated in this section. In any action under this subdivision, the*  
11 *court shall award reasonable attorney's fees and costs to the*  
12 *prevailing party, if any.*

13 *(g) For purposes of this section, "construction manager" means*  
14 *a person who directs, schedules, or coordinates the work of*  
15 *contractors for a work of improvement, but does not itself perform*  
16 *the work.*

17 *(h) For purposes of this section, "general contractor," in*  
18 *relation to a given subcontractor, means a person who has entered*  
19 *into a construction contract and who has entered into a subcontract*  
20 *with that subcontractor under which the subcontractor agrees to*  
21 *perform a portion of that scope of work. Where a subcontractor*  
22 *has itself subcontracted a portion of its work, that subcontractor,*  
23 *along with its general contractor, shall be considered a general*  
24 *contractor as to its subcontractors.*

25 *(i) For purposes of this section, "subcontractor" means a person*  
26 *who has entered into a construction contract either with a*  
27 *contractor to perform a portion of that contractor's work under*  
28 *a construction contract or with any person to perform a*  
29 *construction contract subject to the direction or control of a*  
30 *general contractor or construction manager.*

31 *(j) A general contractor, construction manager, or subcontractor*  
32 *shall have the right to seek equitable indemnity for any claim*  
33 *governed by this section.*

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

38 *SEC. 4. Section 2783 of the Civil Code is amended to read:*

39 *2783. As used in Sections 2782 and 2782.5, "construction*  
40 *contract" is defined as any agreement or understanding, written*

1 or oral, respecting the construction, surveying, design,  
2 specifications, alteration, repair, improvement, *renovation*,  
3 maintenance, removal of or demolition of any building, highway,  
4 road, parking facility, bridge, *water line*, *sewer line*, *oil line*, *gas*  
5 *line*, railroad, airport, pier or dock, excavation or other structure,  
6 *appurtenance*, development or other improvement to real or  
7 personal property, or an agreement to perform any portion thereof  
8 or any act collateral thereto, or to perform any service reasonably  
9 related thereto, including, but not limited to, the erection of all  
10 structures or performance of work in connection therewith, the  
11 rental of all equipment, all incidental transportation, *moving*, *lifting*,  
12 crane and rigging service and other goods and services furnished  
13 in connection therewith.

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