

Senate Bill No. 474

Passed the Senate September 8, 2011

Secretary of the Senate

Passed the Assembly September 6, 2011

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day
of _____, 2011, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Sections 2782 and 2783 of, and to add Section 2782.05 to, the Civil Code, relating to indemnity.

LEGISLATIVE COUNSEL'S DIGEST

SB 474, 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, 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 a direct contract with a public agency or the owner of private property, as specified, that purport to insure or indemnify, including the cost to defend, a general contractor, construction manager, or other subcontractor, by a subcontractor against liability for claims of death or bodily injury to persons, injury to property, or any other loss, damage, or expense are unenforceable to the extent the claims relate to the active negligence or willful 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 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 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 owned real property to be improved, as specified, 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 are unenforceable to the extent of the active negligence of the owner, including that of its employees. The bill would except from these provisions a homeowner performing improvement projects on his or her own single family dwelling.

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, utility, water, sewer, oil, and gas lines.

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

SECTION 1. The Legislature finds and declares that it is in the best interests of this state and its citizens and consumers to ensure that every construction business in the state is responsible for losses that it, as a business, may cause.

SEC. 2. 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) (1) 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 entered into before January 1, 2013, 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.

(2) 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 entered into on or after January 1, 2013, 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 are void and unenforceable.

(c) (1) Except as provided in subdivision (d) and Sections 2782.1, 2782.2, and 2782.5, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract entered into on or after January 1, 2013, with the owner of privately owned real property to be improved and as to which the owner is not acting as a contractor 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 are unenforceable to the extent of the active negligence of the owner, including that of its employees.

(2) For purposes of this subdivision, an owner of privately owned real property to be improved includes the owner of any interest therein, other than a mortgage or other interest that is held solely as security for performance of an obligation.

(3) This subdivision shall not apply to a homeowner performing a home improvement project on his or her own single family dwelling.

(d) 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.

(e) Subdivision (d) 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 (d) 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 (d), 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 (d), 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.

(f) Notwithstanding any other provision of law, if a subcontractor fails to timely and adequately perform its obligations under paragraph (1) of subdivision (e), 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 (e), 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 (e) 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.

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

(h) 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.

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

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

2782.05. (a) Except as provided in subdivision (b), provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any construction contract and amendments thereto entered into on or after January 1, 2013, that purport to insure or indemnify, including the cost to defend, a general contractor, construction manager, or other subcontractor, by a subcontractor against liability for claims of death or bodily injury to persons, injury to property, or any other loss, damage, or expense are void and unenforceable to the extent the claims arise out of, pertain to, or relate to the active negligence or willful misconduct of that general contractor, construction manager, or other subcontractor, or their other agents, other servants, or other independent contractors who are responsible to the general contractor, construction manager, or other subcontractor, 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 pursuant to the construction contract. 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. This section 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 the rights of an insurance carrier under the holding of *Buss v. Superior Court* (1997) 16 Cal.4th 35.

(b) This section does not apply to:

(1) Contracts for residential construction that are subject to any part of Title 7 (commencing with Section 895) of Part 2 of Division 2.

(2) Direct contracts with a public agency that are governed by subdivision (b) of Section 2782.

(3) Direct contracts with the owner of privately owned real property to be improved that are governed by subdivision (c) of Section 2782.

(4) Any wrap-up insurance policy or program.

(5) A cause of action for breach of contract or warranty that exists independently of an indemnity obligation.

(6) A provision in a construction contract that requires the promisor to purchase or maintain insurance covering the acts or omissions of the promisor, including additional insurance endorsements covering the acts or omissions of the promisor during ongoing and completed operations.

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

(8) General agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts.

(9) The benefits and protections provided by the workers' compensation laws.

(10) The benefits or protections provided by the governmental immunity laws.

(11) Provisions that require the purchase of any of the following:

(A) Owners and contractors protective liability insurance.

(B) Railroad protective liability insurance.

(C) Contractors all-risk insurance.

(D) Builders all-risk or named perils property insurance.

(12) Contracts with design professionals.

(13) Any agreement between a promisor and an admitted surety insurer regarding the promisor's obligations as a principal or indemnitor on a bond.

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

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

(e) Subdivision (a) does not prohibit a subcontractor and a general contractor or construction manager 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 (a) subject, however, to paragraphs (1) and (2). A subcontractor shall owe no

defense or indemnity obligation to a general contractor or construction manager for a claim unless and until the general contractor or construction manager provides a written tender of the claim, or portion thereof, to the subcontractor that includes the information provided by the claimant or claimants relating to claims caused by that subcontractor's scope of work. In addition, the general contractor or construction manager shall provide a written statement regarding how the reasonable allocated share of fees and costs was determined. The written tender shall have the same force and effect as a notice of commencement of a legal proceeding. If a general contractor or construction manager tenders a claim, or portion thereof, to a subcontractor in the manner specified by this subdivision, 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 general contractor or construction manager:

(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 general contractor or construction manager within a reasonable time period following receipt of the written tender, and in no event later than 30 days following that receipt. Consistent with subdivision (a), the defense by the subcontractor shall be a complete defense of the general contractor or construction manager of all claims or portions thereof to the extent alleged to be caused by the subcontractor, including any vicarious liability claims against the general contractor or construction manager resulting from the subcontractor's scope of work, but not including claims resulting from the scope of work, actions, or omissions of the general contractor or construction manager, or any other party. Any vicarious liability imposed upon a general contractor or construction manager for claims caused by the subcontractor electing to defend under this paragraph shall be directly enforceable against the subcontractor by the general contractor, construction manager, or claimant. All information, documentation, or evidence, if any, relating to a subcontractor's assertion that another party is responsible for the claim shall be provided by that subcontractor

to the general contractor or construction manager that tendered the claim.

(2) Pay, within 30 days of receipt of an invoice from the general contractor or construction manager, no more than a reasonable allocated share of the general contractor's or construction manager's defense fees and costs, on an ongoing basis during the pendency of the claim, subject to reallocation consistent with subdivision (a), and including any amounts reallocated upon final resolution of the claim, either by settlement or judgment. The general contractor or construction manager 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 general contractor or construction manager 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.

(f) Notwithstanding any other provision of law, if a subcontractor fails to timely and adequately perform its obligations under paragraph (1) of subdivision (e), the general contractor or construction manager 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 (e), the general contractor or construction manager shall have the right to pursue a claim against the subcontractor for any resulting compensatory damages, interest on defense and indemnity costs, from the date incurred, at the rate set forth in subdivision (g) of Section 3260, consequential damages, and reasonable attorney's fees incurred to recover these amounts. The general contractor or construction manager shall bear the burden of proof to establish both the subcontractor's failure to perform under either paragraph (1) or (2) of subdivision (e) and any resulting damages. If, upon request by a subcontractor, a general contractor or construction manager does not reallocate defense fees to subcontractors within 30 days following final resolution of the claim, the subcontractor shall have the right to pursue a claim against the general contractor or construction

manager for any resulting compensatory damages with interest, from the date of final resolution of the claim, at the rate set forth in subdivision (g) of Section 3260. 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.

(g) For purposes of this section, “construction manager” means a person or entity, other than a public agency or owner of privately owned real property to be improved, who is contracted by a public agency or the owner of privately owned real property to be improved to direct, schedule, or coordinate the work of contractors for a work of improvement, but does not itself perform the work.

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

(i) For purposes of this section, “subcontractor” means a person who has entered into a construction contract either with a contractor to perform a portion of that contractor’s work under a construction contract or with any person to perform a construction contract subject to the direction or control of a general contractor or construction manager.

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

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

(l) This section shall not affect the validity of any existing insurance contract or agreement, including, but not limited to, a contract or agreement for workers’ compensation or an agreement

issued on or before January 1, 2012, by an admitted insurer, as defined in the Insurance Code.

(m) Nothing in this section shall be construed to affect the obligation, if any, of either a contractor or construction manager to indemnify, including defending or paying the costs to defend, a public agency against any claim arising from the alleged active negligence of the public agency under subdivision (b) of Section 2782 or to indemnify, including defending or paying the costs to defend, an owner of privately owned real property to be improved against any claim arising from the alleged active negligence of the owner under subdivision (c) of Section 2782.

(n) Nothing in this section shall be construed to affect the obligation, if any, of either a contractor or construction manager to provide or maintain insurance covering the acts or omissions of the promisor, including additional insurance endorsements covering the acts or omissions of the promisor during ongoing and completed operations pursuant to a construction contract with a public agency under subdivision (b) of Section 2782 or an owner of privately owned real property to be improved under subdivision (c) of Section 2782.

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

2783. As used in Sections 2782 and 2782.5, “construction contract” is defined as any agreement or understanding, written or oral, respecting the construction, surveying, design, specifications, alteration, repair, improvement, renovation, maintenance, removal of or demolition of any building, highway, road, parking facility, bridge, water line, sewer line, oil line, gas line, electric utility transmission or distribution line, railroad, airport, pier or dock, excavation or other structure, appurtenance, development or other improvement to real or personal property, or an agreement to perform any portion thereof or any act collateral thereto, or to perform any service reasonably related thereto, including, but not limited to, the erection of all structures or performance of work in connection therewith, electrical power line clearing, tree trimming, vegetation maintenance, the rental of all equipment, all incidental transportation, moving, lifting, crane and rigging service and other goods and services furnished in connection therewith.

Approved _____, 2011

Governor