

AMENDED IN SENATE MAY 10, 2016

AMENDED IN SENATE APRIL 18, 2016

SENATE BILL

No. 885

Introduced by Senator Wolk

January 19, 2016

An act to amend Section 2782 of the Civil Code, relating to contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 885, as amended, Wolk. Construction contracts: indemnity.

Existing law makes specified provisions in construction contracts void and unenforceable, including provisions 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.

This bill would specify, with certain exceptions, for construction contracts entered into on or after January 1, 2017, that a design professional, as defined, only has the duty to defend himself or herself from claims or lawsuits that arise out of, or pertain or relate to, negligence, recklessness, or willful misconduct of the design professional. ~~Under the bill, a design professional would not have a duty to defend claims or lawsuits against any other person or entity arising from a construction project, except that person's or entity's reasonable defense costs arising out of the design professional's degree of fault.~~ *The bill would prohibit these provisions from being construed to affect any duty of a design professional to pay a reasonable allocated share of defense fees and costs with respect to claims and lawsuits alleging negligence, recklessness, or willful misconduct of the design*

professional, as specified. The bill would prohibit waiver of these provisions and would provide that any ~~clause in~~ *clause, covenant, or agreement contained in, collateral to, or affecting* a contract that requires a design professional to defend claims or lawsuits against other persons or entities is void and unenforceable. The bill would provide legislative findings and declarations in support of these provisions.

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) Errors and omissions insurance for design professionals does
4 not provide coverage for the defense of claims against other persons
5 and other entities involved in construction projects.

6 (b) Requiring design professionals to defend claims against
7 other persons or other entities involved in construction projects
8 when insurance coverage is not available is unfair and contrary to
9 sound public policy.

10 (c) It is sound public policy for all persons and entities in
11 projects to defend themselves against claims of negligence or error.

12 (d) It is the intent of the Legislature in enacting this act to
13 prohibit indemnity agreements that require design professionals
14 to defend claims made against other persons or other entities
15 involved in construction projects.

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

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

1 agreement issued by an admitted insurer as defined by the
2 Insurance Code.

3 (b) (1) Except as provided in Sections 2782.1, 2782.2, and
4 2782.5, provisions, clauses, covenants, or agreements contained
5 in, collateral to, or affecting any construction contract with a public
6 agency entered into before January 1, 2013, that purport to impose
7 on the contractor, or relieve the public agency from, liability for
8 the active negligence of the public agency are void and
9 unenforceable.

10 (2) Except as provided in Sections 2782.1, 2782.2, and 2782.5,
11 provisions, clauses, covenants, or agreements contained in,
12 collateral to, or affecting any construction contract with a public
13 agency entered into on or after January 1, 2013, that purport to
14 impose on any contractor, subcontractor, or supplier of goods or
15 services, or relieve the public agency from, liability for the active
16 negligence of the public agency are void and unenforceable.

17 (c) (1) Except as provided in subdivision (d) and Sections
18 2782.1, 2782.2, and 2782.5, provisions, clauses, covenants, or
19 agreements contained in, collateral to, or affecting any construction
20 contract entered into on or after January 1, 2013, with the owner
21 of privately owned real property to be improved and as to which
22 the owner is not acting as a contractor or supplier of materials or
23 equipment to the work, that purport to impose on any contractor,
24 subcontractor, or supplier of goods or services, or relieve the owner
25 from, liability are unenforceable to the extent of the active
26 negligence of the owner, including that of its employees.

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

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

34 (d) For all construction contracts, and amendments thereto,
35 entered into after January 1, 2009, for residential construction, as
36 used in Title 7 (commencing with Section 895) of Part 2 of
37 Division 2, all provisions, clauses, covenants, and agreements
38 contained in, collateral to, or affecting any construction contract,
39 and amendments thereto, that purport to insure or indemnify,
40 including the cost to defend, the builder, as defined in Section 911,

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

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

1 be deemed to satisfy the subcontractor's defense obligation to the
2 builder or general contractor:

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

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

38 (f) Notwithstanding any other provision of law, if a
39 subcontractor fails to timely and adequately perform its obligations
40 under paragraph (1) of subdivision (e), the builder or general

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

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

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

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

38 ~~(j) (1) Commencing with contracts entered into on or after~~
39 ~~January 1, 2017, a design professional, as defined in paragraph (2)~~
40 ~~of subdivision (e) of Section 2782.8, shall only have the duty to~~

1 ~~defend himself or herself from claims and lawsuits that arise out~~
2 ~~of, pertain to, or relate to, the negligence, recklessness, or willful~~
3 ~~misconduct of the design professional. A design professional shall~~
4 ~~have no duty to defend claims and lawsuits against other persons~~
5 ~~or entities. A design professional shall be obligated to reimburse~~
6 ~~reasonable defense costs incurred by other persons or entities,~~
7 ~~limited to the design professional's degree of fault, as determined~~
8 ~~by a court, arbitration, or negotiated settlement.~~

9 *(j) (1) Commencing with contracts entered into on or after*
10 *January 1, 2017, a design professional, as defined in paragraph*
11 *(2) of subdivision (c) of Section 2782.8, shall only have the duty*
12 *to defend himself or herself from claims that arise out of, pertain*
13 *to, or relate to the negligence, recklessness, or willful misconduct*
14 *of the design professional. All provisions, clauses, covenants, and*
15 *agreements contained in, collateral to, or affecting any such*
16 *contract that purport to require a design professional to defend*
17 *claims against another party shall be unenforceable.*

18 *(2) Paragraph (1) does not prohibit a design professional from*
19 *mutually agreeing with another party to the timing or immediacy*
20 *of a defense and provisions for reimbursement of defense fees and*
21 *costs, if that agreement does not waive or modify the provisions*
22 *of paragraph (1).*

23 *(3) Paragraph (1) shall not be construed to affect any duty of*
24 *a design professional to pay a reasonable allocated share of the*
25 *defense fees and costs with respect to claims and lawsuits alleging*
26 *negligence, recklessness, or willful misconduct of the design*
27 *professional on an ongoing basis during their pendency, including*
28 *any amounts reallocated upon final resolution of a claim or*
29 *lawsuit, either by settlement or judgment.*

30 ~~(2)~~

31 *(4) The provisions of this subdivision shall not apply to either*
32 *of the following:*

33 *(A) A claim, lawsuit, or arbitration demand where a*
34 *project-specific general liability policy insures all project*
35 *participants for general liability exposures on a primary basis and*
36 *also covers all design professionals for their legal liability arising*
37 *out of their professional services on a primary basis.*

38 *(B) A design professional who is a party to a written*
39 *design-build joint venture agreement.*

40 ~~(3)~~

1 (5) The provisions of this subdivision shall not be waived or
2 modified by contract. Contract provisions in violation of this
3 subdivision are void and unenforceable. The duty of a design
4 professional to defend is limited as provided in this subdivision.

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