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## Current State of Indemnity in California Construction Contracts

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Historically, California law permitted Type 1 indemnity provisions in construction contracts. Type 1 indemnity provisions require a party to indemnify and defend another from any claim arising out of or related to the indemnitor's scope of work, including the active negligence or misconduct of the indemnified party. Only sole negligence or willful misconduct of the indemnitee could not be indemnified.

Over the last several years, the Legislature began restricting the ability to contract for Type 1 indemnity in construction contracts stating that contractors should be responsible for any loss they cause. Initially, such restriction only applied to residential construction subcontracts. Recently enacted SB 474 now prohibits Type 1 indemnity in construction contracts entered into after January 1, 2013, with several limited exceptions.

### **Subcontractor's Indemnity Obligations on Non-Residential Projects**

Under SB 474, construction subcontracts executed on or after January 1, 2013, may not require a subcontractor to indemnify, defend or insure a general contractor, construction manager or other subcontractor for (1) claims of personal injury or property damage or other loss to the extent that the claims relate to the active negligence or willful misconduct of the indemnified parties, (2) claims that arise from any defects in designs provided by the indemnified parties or (3) claims that do not arise out of the subcontractor's scope of work set forth in the subcontract. Civil Code §2782.05(a). Any contractual provision attempting to waive these provisions is contrary to public policy and is void and unenforceable. Civil Code §2782.05(d).

However, Civil Code §2782.05(a) does not apply to (1) contracts for the construction of residential units for sale to the public (discussed below); (2) direct contracts with a public agency (discussed below); (3) direct contracts with the owner of privately owned property (discussed below); (4) a wrap up insurance policy or program (which typically prohibit lawsuits between contractors covered by the wrap up policy); (5) causes of action for breach of contract or warranty; (6) contractual insurance requirements for the subcontractor; (7) indemnity provisions in construction loan contracts; (8) indemnity provisions in surety bonds; (9) benefits and protections under workers compensation and governmental immunity laws; (10) contractual provisions requiring certain construction risk insurance policies; and (11) contracts with design professionals.

In summary, general contractors, subcontractors and construction managers may not obtain indemnity for their own active negligence or willful misconduct nor may they obtain a defense against allegations of their active negligence or willful misconduct. However, indemnity may still be required for the owner or general contractor's "passive negligence". We expect that the determination of what constitutes "passive negligence" will be the subject of future litigation. With regards to additional insured obligations, general contractors, construction managers and subcontractors may still require that they be named as additional insureds, but they may only require coverage for the acts and omissions of the party naming them as additional insureds.

### **Subcontractor's Indemnity Obligations for Contracts Related to the Construction of Residential Units for Sale**

Civil Code §2782(d) applies to contracts entered into after January 1, 2009 and prohibits Type 1 indemnity from subcontractors in contracts related to the construction of residential units to be made available to the public for sale. Specifically, the subcontractor cannot be required to indemnify, defend or insure a builder (defined as an individual or entity involved in the construction and sale of residential units to the public), general contractor, or their agents and other subcontractors for (1) claims of construction defects to the extent that the claims relate to the negligence of the indemnified parties or their agents and other independent contractors, (2) claims arising from any defects in designs provided by the indemnified parties or (3) claims that do not arise out of the subcontractor's scope of work set forth in the subcontract. Civil Code §2782(d). The parties may not waive this prohibition by contract and any contractual provision that violates Civil Code §2782(d) is unenforceable and void. This prohibition of Type 1 indemnity does not apply to personal injury claims arising from the construction of residential units for sale to the public.

### **Subcontractor's Defense Obligations**

Civil Code §§2782(d) and 2782.05(e) provide the statutory framework related to the timing of a subcontractor's defense obligation and the requirements for reimbursement of an indemnified party's defense costs. To trigger an obligation to defend, the indemnified party must first provide the subcontractor with a written tender of the claim, which includes all of the information provided by the claimant(s). Upon receipt of a tender pursuant to Civil Code §§2782(e) or 2782.05(e) the subcontract must elect whether to (1) defend the indemnified party with counsel of its own choice or (2) reimburse the reasonable allocated share of the indemnified party's defense costs within 30 days after receipt of an invoice. If a subcontractor elects to defend the builder or general contractor (option 1) it must provide a complete defense of all claims or portions of claims to the extent caused by the subcontractor. However, the subcontractor is not obligated to defend claims resulting from the scope of work or actions or omissions of the indemnified parties or their subcontractors. If the subcontractor opts to reimburse defense costs (option 2) any payments made are subject to reallocation after final determination of responsibility by judgment or settlement. An indemnified party may be entitled to recover compensatory and consequential damages, attorney's fees and interest at 24% per annum in an action to enforce a subcontractor's defense obligations.

### **Indemnity Obligations in Direct Contracts with Public Agency**

Civil Code §2782(b) provides that in contracts entered into on or after January 1, 2013, a public agency may not impose liability for its own active negligence on any contractor, subcontractor or supplier.

## **Indemnity Obligations in Direct Contracts with Owners of Private Works**

Civil Code §2782(c) provides that, in contracts executed on or after January 1, 2013, an owner of a private project may not impose liability for its own active negligence on a general contractor, subcontractor or supplier. However, homeowners contracting for home improvement work on a single family residence and owners that are also acting as a general contractor, subcontractor or supplier on the project are exempt from this law and may contract for Type 1 indemnity.

For more information regarding the recent changes to California's indemnity laws, please contact Joseph M. Sweeney, Esq., Kristen E. Green, Esq. or Scott A. Mangum, Esq.

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