

Summary AB 2738 – 8/6/08

Section 1: Defense control

- Section 2782(c) amended: Provides that contract provisions in contracts entered into after 1/1/09 for residential construction which purport to indemnify or insure, including the cost to defend, the builder or GC by a sub against liability for CD claims are unenforceable to extent claims arise out of, pertain to or relate to negligence of builder or GC or their agents or other contractors, defects in design furnished by those persons or to extent claims don't arise out of, pertain to or relate to sub's scope of work in contract
- Section 2782(d): Parties can mutually agree as to timing or immediacy of defense duty and provisions for reimbursement of defense fees and costs so long as don't violate above. Sub will not owe defense or indemnity duty until written tender from builder or GC including all info builder or GC received from claimants relating to claims caused by that sub's scope of work.
- Upon tender, subcontractor is entitled to either:
 - (1) defend the claim with counsel of its choice and control defense for any claim or portion of claim to which defense duty applies. Sub must provide written notice of this election w/in 90 days of tender receipt. Defense by sub must be a complete defense of the builder or GC of all claims or portions of claim to extent alleged to be caused by sub, including vicarious liability claims against builder or GC resulting from sub's scope of work, actions or omissions. Or
 - (2) pay a reasonable allocated share of the builder or GC's defense fees and costs on an ongoing basis during pendency of claim, within 30 days of receipt of invoice, subject to reallocation. Builder or GC must allocate share to itself to extent claims are alleged to be caused by its work, actions or omissions and to each sub to extent a claim is alleged to be caused by sub's work, actions or omissions, regardless of whether they were tendered to or are participating in defense. Any amount not collected from a sub may not be collected from any another sub.
- Section 2782(e): If sub fails to timely or adequately perform its duties under (d)(1) above, builder or GC may seek compensatory and consequential damages and attorneys fees. If sub fails to perform under (d)(2) above, builder and GC may seek resulting compensatory and consequential damages as well as interest on defense and indemnity costs from date incurred and for reasonable attorneys' fees and costs incurred to recover these amounts. Builder or GC bears burden of proof of sub's failure and resulting damages. If upon sub's request, builder or GC fails to reallocate defense fees within 30 days following final resolution of claim, sub may seek resulting compensatory and consequential damages, as well as interest

on the fees, from date of final resolution of claim and reasonable attorneys' fees incurred in connection therewith. Sub bears burden of proof of failure to reallocate fees and resulting damages. Parties free to mutually agree to reasonable contract provisions for damages if any party fails to elect for or perform its obligations herein.

- Section 2782(f): Retains rights of builder, GC or sub to seek equitable indemnity.

Section 2: Wrap-Ups and SIR/deductible contributions:

- Adds Section 2782.9 (new section).
- Section 2789.9(a): Contract provisions entered into after 1/1/09 for residential projects on which a wrap-up or consolidated insurance program is applicable that require an enrolled and participating sub or other participant to indemnify or defend another for any claim or action covered by the program, arising out of that project, are unenforceable.
- Section 2782.9(b): If contract provision is unenforceable pursuant to this section, party may seek equitable indemnity against another party for a claim or action unless there is coverage for the claim/action under the wrap-up.
- Builder or GC may require a reasonably allocated contribution from sub or other participant to SIR or deductible required under wrap-up if maximum amount and method of calculation of participant's contribution are disclosed in sub/participant's contract and contribution is reasonably limited so that each participant may have some financial obligation in event of claim alleged to be caused by that participant's scope of work.
- Contribution may only be collected when and as such SIR or deductible is incurred by builder or GC and in an amount that bears reasonable and proportionate relationship to alleged liability arising from the claims alleged to be caused by sub's scope of work.
- Total amount collected from subs can't exceed actual SIR or deductible due and payable by builder or GC.

Section 3: Wrap-Ups and Premium Contribution:

- Adds Section 2782.95
- Section 2782.95(a): For any wrap up or consolidated insurance program that insures a private residential work of improvement that first commences construction after 1/1/09, owner, builder or GC must disclose total amount or method of calculation of any credit or compensation for premium required from sub for that policy in the contract documents.

- Section 2782.95(b): Contract documents must disclose, if and to the extent known: (1) limits; (2) scope of coverage; (3) policy term; (4) basis upon which deductible or occurrence is triggered; (5) if rolling wrap, number of units, if any, indicated on policy application; and (6) good faith estimate of amount of available limits as of date of disclosure obtained from the insurer. Disclosures made pursuant to (5) and (6) are recognized to be based upon information at a given moment in time and may not accurately reflect the actual number of units covered nor amount of insurance available, if any, when a later claim is made. These disclosures are presumptively made in good faith if the disclosure under (5) is the same as that contained in the application to the wrap-up insurer and the disclosure under (6) was obtained from the wrap-up insurer or broker. The presumptions may be overcome only by a showing that the insurer, broker, builder or general contractor intentionally misrepresented the facts

- Section 2782.95(c): On written request, a copy of policy must be provided, if available, showing (1) – (4) above or binder or declaration of coverage if policy not available at time of request. Any participant receiving a copy of policy, binder or declaration may not disclose other than to participant's broker or attorney or if required by law.

- Section 2782.95(d): If total amount or method of calculation of premium credit or compensation to be charged to participant is not disclosed prior to time sub submits its bid, sub is not legally bound by bid unless given the opportunity to increase bid up to the amount equal to the difference between the amount the participant included, if any, for insurance in the original bid and the amount of the actual bid credit required by the owner, builder or general contractor. This provision doesn't apply if the owner, builder or general contractor did not require the sub to offset the original bid amount with a deduction for the wrap up insurance policy or program.

Section 4: Wrap Ups and Public Works or Commercial Projects:

- Adds Section 2782.96
- Section 2782.96(a): If owner, builder or GC obtains a wrap up or consolidated insurance program for public work or any other project other than residential construction that is put out for bid after 1/1/09, total amount or method of calculation of any credit or compensation for premium required from sub for that policy must be disclosed in bid documents
- Section 2782.96(b): Named insured must disclose in contract documents, to extent known: (1) the policy limits; (2) known exclusions; and (3) the length of time the policy is intended to remain in effect.
- On written request, once available named insured must provide copy of policy to all those covered under policy. Until policy is available, named insured can also satisfy disclosure requirements by providing copy of binder or declaration. Any participant receiving a copy of policy, binder or declaration may not disclose other than to participant's broker or attorney or if required by law.
- Section 2782.96(c): Disclosure requirements do not apply to policy purchased by owner, builder or GC that provides additional coverage beyond that contained in original wrap-up if no credit or compensation for premium is required of the sub for the additional policy.