

Subcontractors' Defense Obligations Limited to Basic Comparative Fault Principles

Some residential builders attempted to circumvent the rules against Type I indemnity clauses by requiring subcontractors to pay for all defense costs, including those that did not bear any relation to the subcontractor's scope of work. Civil Code §2782 was amended to make a subcontractor's defense obligation subject to basic comparative fault principles.

Subdivision (d) now provides that a subcontractor owes no contractual defense or indemnity obligation to a builder or general contractor unless that builder or general contractor tenders the claim and all information relevant to it in writing to the subcontractor. Once written tender is made, the subcontractor may either

- 1) Provide a complete defense only against claims alleged to have been caused by the subcontractor; OR
- 2) Pay a reasonably allocated share of the builder's or general contractor's defense fees on an ongoing basis, subject to a reallocation, based upon comparative fault principles upon final resolution of the claim. If the subcontractor fails to elect either option, the builder or general contractor may pursue a claim against the subcontractor for compensatory and consequential damages, including attorney fees.

Nevertheless, claims for equitable indemnity based on comparative fault and not on contractual liability generally may be asserted despite the revisions to §2782.

AB 2738, amending Civil Code § 2782

Wrap-up Insurance Programs Limit Contractual Indemnity

Wrap-up insurance policies typically are taken out by a builder and are designed to cover multiple contractors and subcontractors against risks associated with a construction project. New Civil Code §2782.9 prohibits the builder from imposing contractual indemnity obligations on a subcontractor when a residential project is covered by a wrap-up insurance program.

But, any party may make equitable indemnity claims for damages if the claims are not covered by the wrap-up policy. The builder or general contractor may require subcontractors or other participants to pay a reasonable share of the self-insured retention or deductible of the wrap-up policy. However, the maximum amount of the each participant's contribution and the method of collection must be disclosed in the contract with the participant. The contribution may only be collected when the deductible or self-insured retention is incurred by the builder or general contractor and only in an amount that is reasonable and proportionate to the claim. Contributions may not exceed the deductible or self-insured retention due.

Certain disclosures now are also required when wrap-up policies are in place for public or private construction projects. The party that obtained the wrap-up policy is required to disclose the total amount or method of calculating any credit or compensation for the policy premium sought from the subcontractor. The policy limits, scope of coverage, term and other specified information regarding the coverage also must be provided.

AB 2738, adding Civil Code §§2782.9, 2782.95 and 2782.96