

A horizontal collage of legal-related images including a scale of justice, a computer keyboard, and a gavel. Overlaid on this collage is the text "JONES DAY COMMENTARY" in white, bold, sans-serif font.

JONES DAY  
**COMMENTARY**

## NAVIGATING THE TREACHEROUS WATERS OF CALIFORNIA'S EXPANDED ANTI-INDEMNITY LAWS FOR CONSTRUCTION PROJECTS

California's long-standing anti-indemnity laws prohibit a public agency from forcing a contractor to indemnify the agency for its "active negligence." That prohibition has now been expanded in new and amended anti-indemnity statutes, which protect subcontractors and suppliers of goods and services (not just contractors) and prevent certain private owners (not just public agencies) from enforcing an indemnity for their own "active negligence" (the meaning of which is discussed below). The new laws apply to provisions contained in or affecting any construction contract entered into on or after January 1, 2013.

The new laws also contain additional protections for subcontractors. Now, in many situations, a subcontractor entering into a construction contract after January 1, 2013 cannot be forced to indemnify or insure another party for that other party's "active negligence or willful misconduct," for defects in the

project's design provided to the subcontractor, or for claims arising outside the scope of the subcontractor's work.

California's new anti-indemnity laws and subcontractor protections are nuanced and depend on whether the project is public or private, whether the project is residential or nonresidential, and the role of the indemnifying and indemnified participants on the project. Unfortunately, these new laws are not always clear and consistent. Construction participants attempting to navigate their way through these new laws may find themselves in treacherous waters fraught with the risk of disputes and litigation. This *Commentary* analyzes the preexisting and new anti-indemnity laws and flags several uncertainties and risks in the hope that construction participants can better navigate these waters.

## CALIFORNIA'S PREEXISTING INDEMNITY PROTECTIONS FOR CONSTRUCTION PROJECTS

In 1967, California enacted Civil Code section 2782 barring indemnity for a party's own "sole negligence" or "willful misconduct." Cal. Civ. Code §2782(a). (All further statutory citations are to the California Civil Code.) That is, any indemnification clause purporting to require a promisor, such as a general contractor ("GC"), construction manager ("CM"), or subcontractor, to indemnify any promisee, such as an owner, for liability for death, bodily injury, injury to property, or any other loss arising from the promisee's sole negligence or willful misconduct is against public policy and void and unenforceable. *Id.* The practical effect of section 2782 is that no one can be forced to indemnify another party for that other party's sole negligence or willful misconduct.

There are, however, several situations where section 2782's anti-indemnity rule does not apply: certain agreements with adjacent land owners (see §2782.1), certain agreements with professional engineers providing inspection services to plants or facilities (see §2782.2), and certain agreements with geologists providing services in connection with hazardous materials (see §2782.6). Additionally, section 2782(a) does not prevent parties to a construction contract from negotiating and agreeing on certain liability limitations, namely the allocation, release, liquidation, exclusion, or limitation of any liability for design defects or for the promisee's liability to the promisor arising out of or relating to the construction contract (see §2782.5).

In 1982, the Legislature amended section 2782 to specify that indemnity agreements that required contractors to indemnify a public agency for the public agency's own "active negligence" are void and unenforceable. §2782(b)(1). (As explained below, the recent amendments have expanded the reach of the protection against having to indemnify another party for its "active negligence.")

In 2008, the Legislature added section 2782(d) to govern residential construction contracts entered into on or after January 1, 2009. As to those contracts, section 2782(d) provides that a clause that purports to require a subcontractor to insure or indemnify (including the cost to defend) a

builder or general contractor is unenforceable (i) for claims of construction defects to the extent the claims arise out of, or relate to, the negligence of the builder or contractor (or their agents), (ii) for defects in design furnished to the subcontractor, and (iii) to the extent the claims do not arise out of, or relate to, the scope of work in the subcontract. This subcontractor protection cannot be waived or modified by the parties' contract, acts, or omissions. *Id.*

## RECENTLY AMENDED SECTION 2782: EXPANDING THE BAR AGAINST INDEMNITY FOR AN OWNER'S ACTIVE NEGLIGENCE

The recent amendments to California's anti-indemnity laws expand the protections for contractors, subcontractors, and suppliers of materials and services against having to indemnify public and private owners for the owners' "active negligence." Specifically, aside from two exceptions discussed below, the amendments invalidate any provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any construction contract entered into on or after January 1, 2013 with a public owner (§2782(b)(2)) or a private owner (§2782(c)(1)) that purports to impose liability on a contractor, subcontractor, or supplier of goods or services, or relieve the owner from liability, to the extent of the owner's "active negligence."

This expansion of protections against indemnity obligations can be seen in two ways. First, as explained above, while the 1982 amendment to section 2782 already invalidated clauses that require a contractor to indemnify a public agency for its own "active negligence" (maintained in §2782(b)(1) for contracts entered into before January 1, 2013), the recent amendments expand that restriction to any provision with a *private* owner, unless the private owner is acting as a contractor or supplier of materials or equipment to the work (§2782(c)(1)), or is a homeowner performing an improvement on his or her single-family dwelling (§2782(c)(3)). If either the (c)(1) or (c)(3) situation exists, section 2782(c)(1)'s anti-indemnity rule does not apply, although other anti-indemnity rules should be considered, such as section 2782(a)'s bar against indemnity for sole negligence or willful misconduct

(see above), or section 2782.05's bar against indemnity for active negligence (see below).

Second, the 1982 amendment to section 2782 prohibited only a contractor from having to indemnify a public agency for its active negligence. Now, the amended statute invalidates clauses requiring contractors, subcontractors, or suppliers of goods or services to indemnify public and private owners for the owners' active negligence. §2782(b)(2) (public owners), (c)(1) (private owners).

However, two types of agreements are exempted from these anti-indemnity rules, both for public and private projects under 2782(b)(1), (b)(2), and (c): certain agreements with adjacent land owners (see §2782.1), and certain agreements with professional engineers providing inspection services to plants or facilities (see §2782.2).

Additionally, these anti-indemnity rules do not prevent parties to a construction contract from negotiating and agreeing on certain liability limitations, namely the allocation, release, liquidation, exclusion, or limitation of any liability for design defects or for the promisee's liability to the promisor arising out of or relating to the construction contract. §2782.5.

## **RECENTLY ENACTED SECTION 2782.05: ADDITIONAL PROTECTIONS FOR SUBCONTRACTORS**

As explained above, section 2782 protects certain contractors, subcontractors, and suppliers from having to indemnify public or private owners for the owners' active negligence. Now, a recently enacted statute—section 2782.05—expands the protections for subcontractors under new contracts. Although it is not applicable in a number of circumstances, including residential projects, section 2782.05 now prevents other participants from imposing certain indemnity, insurance, and defense duties on subcontractors.

Specifically, a GC, CM, or another subcontractor (or their agents) cannot force a subcontractor to indemnify or insure them for their "active negligence." Any 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 attempt to do so are void and unenforceable. §2782.05(a). Thus, while subcontractors are protected against having to indemnify owners (§2782(b)(2), (c)), section 2782.05 expands this protection by (i) expanding the list of participants that cannot force a subcontractor to indemnify them for their own active negligence to include GCs, CMs, and other subcontractors (or their agents), and (ii) barring these participants from forcing a subcontractor to *insure* them for their "active negligence."

The new regime adds two further subcontractor protections. A subcontractor can no longer be forced to indemnify or insure a GC, CM, or another subcontractor (or their agents) (i) for defects in the project's design provided by them to that subcontractor, or (ii) to the extent the claims at issue arise outside the scope of that subcontractor's work. § 2782.05(a).

Section 2782.05(a)'s new subcontractor protections cannot be waived or modified by the parties' contractual agreement, act, or omission. §2782.05(a), (d). While a GC or CM might try to avoid section 2782.05's subcontractor protections by adding a choice-of-law clause to a new contract that designates more tolerant indemnity laws of another state, the statute provides that these protections cannot be subverted through a choice of law clause. Rather, "[n]otwithstanding 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." §2782.05(c). The statute does not explain the circumstances that would render a contract one "to which this section applies."

However, as noted above, section 2782.05(a) does not apply in a variety of circumstances enumerated in section 2782.05(b):

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; and
11. Provisions that require the purchase of any of the following: (i) owners and contractors protective liability insurance; (ii) railroad protective liability insurance; (iii) contractors all-risk insurance; (iv) builders all-risk or named perils property insurance.

Some of these exceptions are not as clear on their face as others. Unfortunately, section 2782.05 offers no guidance as to the meaning or scope of these exceptions. This lack of guidance will at best create uncertainty and, worse, could result in disputes and litigation.

Moreover, section 2782.05(a) also states that it shall not alter the obligations of an insurance carrier under *Presley Homes, Inc. v. American States Ins. Co.*, 90 Cal.App.4th 571, 573-576 (2001), which held that a subcontractor's liability insurance

carrier is required to provide a full and complete defense to all claims, covered and uncovered, brought by a third party against an additional insured under that insurance policy. Thus, under the new statute, it appears that insurance carriers will be required to honor defense obligations owed to additional insureds (e.g., a GC), but the circumstances where a subcontractor can be required to name a GC, CM, or another subcontractor as an additional insured may be narrower.

Section 2782.05(a) also states that it shall not affect the rights of an insurance carrier under *Buss v. Superior Court*, 16 Cal.4th 35, 39 (1997), which held that insurance carriers (i) may seek reimbursement of certain defense costs for claims that are not even potentially covered by the policy (but not for claims that are potentially covered), and (ii) bear the burden of proving the right to reimbursement and the amount of such defense costs.

While section 2782.05(a) does not apply to certain residential projects, subcontractors remain protected on residential projects by preexisting section 2782(d). That statute prohibits a "builder," as defined in section 911,<sup>1</sup> from requiring a subcontractor to indemnify the builder for its negligence in connection with construction defect claims, for defects in design furnished to the subcontractor, or to the extent a claim arises outside of the subcontractor's scope of work.

## WHAT IS MEANT BY "ACTIVE NEGLIGENCE"?

The preexisting and now expanded anti-indemnity laws do not define what constitutes "active negligence." Before the amendments, the California Supreme Court explained the difference between "active" and "passive" negligence, albeit in the context of determining what contractual language is sufficient to require one party to indemnify another party for the latter's own active negligence:

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<sup>1</sup> Section 911 defines a "builder" as "any entity or individual, including but not limited to a builder, developer, general contractor, contractor, or original seller, who, at the time of sale, was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim or was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim."

Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law.... Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform.

*Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal. 3d 622, 629 (1975). The Court also explained that distinguishing “active” from “passive” negligence should be addressed on a case-by-case basis, with “each case [turning] on its own facts.” *Id.* at 634.

Disagreements can be expected to arise among construction participants as to whether the indemnitee’s negligence was “active” or “passive.” This is especially true given the absence of a statutory definition of “active negligence” in

sections 2782 and 2782.05. It remains to be seen whether courts will look to *Rossmoor* and its progeny for guidance in resolving such disagreements.

## CHARTS SUMMARIZING THE PROHIBITED INDEMNITY CLAIMS

The following two charts—the first for public projects and the second for private projects—summarize the prohibited indemnity claims, with ***bold italics*** signifying those applicable to construction contracts entered into on or after January 1, 2013 based on the recent amendments. The indemnifying party (i.e., the indemnitor) is listed in the left column, with the type of project listed to the right. Cross-referencing the indemnifying party with the type of project shows those claims that the indemnifying party cannot be required to indemnify.

Prohibited Indemnity Claims on PUBLIC Projects		
Indemnifying Party	Residential Projects	Nonresidential Projects
<b>Contractor</b>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p>Public Agency's active negligence [§2782(b)(1)]<sup>2</sup></p>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p>Public Agency's active negligence [§2782(b)(1)]<sup>2</sup></p>
<b>Supplier</b>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p><b>Public Agency's active negligence</b> [§2782(b)(2)]<sup>2</sup></p>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p><b>Public Agency's active negligence</b> [§2782(b)(2)]<sup>2</sup></p>
<b>Subcontractor</b>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p>Negligence of builder (as defined in §911), or GC or contractor unaffiliated with builder, in connection with construction defect claims [§2782(d)]</p> <p>Builder (as defined in §911), or GC or contractor unaffiliated with builder, for defects in design furnished to subcontractor [§2782(d)]</p> <p>Builder (as defined in §911), or GC or contractor unaffiliated with builder, to the extent a claim arises outside subcontractor's scope of work [§2782(d)]</p> <p><b>Public Agency's active negligence</b> [§2782(b)(2)]<sup>2</sup></p>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p><b>Active negligence of Public Agency</b> [§2782(b)(2)],<sup>2</sup> <b>Owner</b> [§2782(c)(1)],<sup>2</sup> or <b>GC, CM, or other subcontractor</b> [§2782.05(a)]<sup>3</sup></p> <p><b>GC, CM, or other subcontractor for defects in design furnished to subcontractor</b> [§2782.05(a)]<sup>3</sup></p> <p><b>GC, CM, or other subcontractor to the extent a claim arises outside subcontractor's scope of work</b> [§2782.05(a)]<sup>3</sup></p>

1 Subject to exceptions under §§2782.1, 2782.2, 2782.5, and 2782.6 (see above)

2 Subject to exceptions under §§ 2782.1, 2782.2, and 2782.5 (see above)

3 Subject to exceptions under § 2782.05(b) (see above)

Prohibited Indemnity Claims on PRIVATE Projects		
Indemnifying Party	Residential Projects	Non-Residential Projects
<b>Contractor</b>  <b>or</b>  <b>Supplier</b>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p><b>Owner's active negligence, except where (i) owner is acting as contractor or supplier, or (ii) owner is performing project on his/her single-family dwelling [§2782(c)(1), (3)]<sup>2</sup></b></p>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p><b>Owner's active negligence, except where owner is acting as contractor or supplier [§2782(c)(1)]<sup>2</sup></b></p>
<b>Subcontractor</b>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p><b>Owner's active negligence, except where (i) owner is acting as contractor or supplier, or (ii) owner is performing project on his/her single-family dwelling [§2782(c)(1), (3)]<sup>2</sup></b></p> <p>Negligence of builder (as defined in §911), or GC or contractor unaffiliated with builder, in connection with construction defect claims [§2782(d)]</p> <p>Builder (as defined in §911), or GC or contractor unaffiliated with builder, for defects in design furnished to subcontractor [§2782(d)]</p> <p>Builder (as defined in §911), or GC or contractor unaffiliated with builder, to the extent a claim arises outside subcontractor's scope of work [§2782(d)]</p>	<p>Anyone's sole negligence or willful misconduct [§2782(a)]<sup>1</sup></p> <p><b>Owner's active negligence, except where owner is acting as contractor or supplier [§2782(c)(1)]<sup>2</sup></b></p> <p><b>GC, CM, or other subcontractor's active negligence [§2782.05(a)]<sup>3</sup></b></p> <p><b>GC, CM, other subcontractor for defects in design furnished to subcontractor [§2782.05(a)]<sup>3</sup></b></p> <p><b>GC, CM, other subcontractor to the extent a claim arises outside subcontractor's scope of work [§2782.05(a)]<sup>3</sup></b></p>

1 Subject to exceptions under §§2782.1, 2782.2, 2782.5, and 2782.6 (see above)

2 Subject to exceptions under §§ 2782.1, 2782.2, and 2782.5 (see above)

3 Subject to exceptions under § 2782.05(b) (see above)

## PARTING THOUGHTS

The California Legislature appears to have taken a big step in the direction of holding construction participants accountable for their own “active negligence” by not allowing them, in many circumstances, to foist their liability onto other participants. Additional protections have been added to protect a subcontractor from having to indemnify other participants for their active negligence, for defects in the project’s design, and for claims arising outside the scope of the subcontractor’s work. However, these new laws are not always clear and consistent. Adding to this uncertainty is the fact that while some of these protections can be addressed by the parties through contract negotiation, others cannot be waived or modified.

This new regime of anti-indemnity laws will likely result in disagreements and even litigation among construction participants. It remains to be seen how the parties, and likely the courts, will address and resolve the disputes that will almost certainly arise out of the new laws. In the meantime, construction participants should be careful to consider the impact of the new anti-indemnity laws, and consult legal counsel as appropriate, when negotiating or modifying their construction contracts after January 1, 2013.

## LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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