



January 2009

Summary Analysis of Assembly Bill 2738

“RESIDENTIAL” AND “PUBLIC WORKS” LAW CHANGES - CALIFORNIA (Effective JANUARY 1, 2009)

On January 1, 2009, Assembly Bill 2738 went into effect. This bill impacts the contractual risk transfer between residential owners, builders, general contractors and their subcontractors. In addition AB 2738 places new disclosure requirements for “wrap-up” insurance programs for both residential and public works contracts.

AMENDMENT OF SECTION 2782

Existing law considers any agreement affecting residential construction, entered in to after January 1, 2008, which requires indemnification from a subcontractor to a builder, general contractor or contractor not affiliated with the builder to be unenforceable to the extent that such indemnity relates to:

- negligence of the builder or contractor or any of their other agents
- defects in design furnished by the builder or contractor or any of their other agents, or
- claims that do not arise out of the scope of the work in the written agreement between the two parties

Simply stated, broad form indemnification agreements are not enforceable as provided for in this code section. However, existing law does not specifically address acceptable defense processes.

Civil Code Section 2782 was amended to address the absence of such processes for all contracts and amendments for residential construction after January 1, 2009.

The amendment states that if a builder or contractor tenders a claim or portion thereof to a subcontractor the subcontractor shall be entitled to either

1. defend the claim with counsel of his/her choice, or
2. within 30 days of receipt of an invoice from the builder or general contractor, pay no more than a reasonable share of the builder’s or general contractor’s defense fees and cost.

The bill also provides that a builder, general contractor or subcontractor has the right to seek equitable indemnity for construction defect claims.

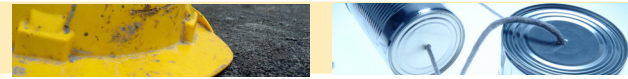
If the subcontractor does not defend the claim or pay amounts when due they shall be liable to the general contractor for resulting damages as provided for in the statute.

The amended language also requires the general contractor to reallocate defense costs to all parties with 30 days following final resolution of a claim.

ADDITION OF SECTION 2782.9

This addition holds as unenforceable, contracts and agreements entered into after January 1, 2009 that require enrolled and participating subcontractors to indemnify, hold harmless, or defend another for any claim or action covered by a wrap-up insurance policy for a “residential” construction project.

A general contractor may require a reasonably allocated contribution from a subcontractor for any self-insured



retention or deductible amount under the wrap-up policy, if the following conditions are met:

- A maximum amount and method of collection of the participant's contribution is disclosed
- The contribution shall only be collected when the deductible is incurred by the general contractor and in an amount that bears a reasonable and proportionate relationship to the alleged liability arising from the subcontractor's scope of work

ADDITION OF SECTION 2782.95

This addition establishes certain disclosure requirements related to any wrap-up insurance policy that insures a private "residential" work of improvement that first commences construction after January 1, 2009:

- The owner, builder or general contractor obtaining a wrap-up insurance program shall disclose the total amount or method of calculation of any credit or compensation for premium required from a subcontractor in the contract documents
- Contract documents shall disclose, if and to the extent known:
 - Policy limits
 - Scope of policy coverage
 - Policy term
 - Basis upon which deductible is triggered
 - If policy covers more than one work of improvement, the number of units indicated on the insurance policy application
 - Good faith estimate of available limits remaining from insurer under policy
- A copy of the insurance policy shall be provided upon written request of any participant
- If the owner, builder or general contractor obtaining a wrap-up policy fails to disclose total amount or method of calculation of the premium

credit or compensation to be charged prior to the bid, the participant shall not be legally bound by the bid unless that participant has the right to increase the bid up to the amount equal to the difference between the amount the participant included and the amount of the actual bid credit

- This subdivision shall not apply if subcontractor was not required to offset the original bid amount with a deduction for the wrap-up policy

ADDITION OF SECTION 2782.96

This addition establishes certain disclosure requirements for any wrap-up insurance policy that insures a public work or any other project other than "residential" construction that is put out for bid after January 1, 2009:

- The total amount or method of calculation of any credit or compensation for premium required from the subcontractor shall be clearly delineated in the bid documents
- The named insured shall disclose to the subcontractor the following:
 - Policy limits
 - Known exclusions
 - Length of time policy is intended to remain in effect
- Copies of policies shall be provided upon written request once available

Above disclosure requirements are not required for an insurance policy purchased by owner, builder or general contractor providing additional coverage beyond what was contained in the original wrap-up policy if no credit or compensation for premium is required of the subcontractor for the additional insurance policy



AB 2738 will change the contractual relationship between the owner/builders, general contractors, subcontractors and the responsibilities of insurance carriers for residential construction projects. Greater disclosure will be required by sponsors of wrap-up insurance programs for both residential and public works projects. Understanding these changes and incorporating them into your risk transfer approach and philosophy is important. For additional information please contact your Woodruff-Sawyer Account Executive. A complete copy of the Chaptered Legislation can be found at <http://legisweb.com/calm/model/Retrieve.asp?ref=urn:calm:2007:ab2738:doc>

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