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California's New Anti-Indemnity Scheme: Will It
Really Make A Difference For Residential Subcontractors?

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With a certain amount of fanfare, the California Legislature has expanded the State's Anti-Indemnity Statute to provide additional protections to residential subcontractors. Although the new statute, found in California Civil Code section 2782, will provide some relief, that relief is likely to be limited in its impact.

California's indemnity statute, portions of which date back to 1872, has been applied in a broad variety of insurance and non-insurance contexts. Until 2006, the only prohibition or anti-indemnity provision in the statute for contracts with private persons or entities was contained in Civil Code section 2782(a) which prohibited indemnitees (parties claiming indemnity rights) in construction contracts from being defended or indemnified for their sole negligence or willful misconduct. In 2005, the State Legislature revised Civil Code section 2782 to add new sub parts Civil Code sections 2782(c) and (d) which preclude builders in residential construction contracts from being defended or indemnified for claims which arise from the work of others. The new sub parts became effective January 1, 2006 and apply to residential construction contracts entered into after January 1, 2006. The anti-indemnity statute was further revised, effective January 1, 2008, by the enactment of Civil Code section 2782(e) so that general contractors, just as with residential builders, are precluded from obtaining indemnity and a defense from a subcontractor for claims arising from the work of others (that sub part applies to residential contracts entered into after January 1, 2008). The anti-indemnity statute has now been further revised, effective January 1, 2009, so that the subcontractor will have defined periods of time to act and will face additional consequences for failing to so act.

This new scheme, while relatively welcome news for subcontractors, has had little practical impact so far because it only applies to contracts entered into after January 1, 2006, at the earliest (and most suits to date deal with residential construction contracts entered into before that date). However, even with the passage of time and the revisions effective January 1, 2008 and January 1, 2009, the revisions to the anti-indemnity statute may have relatively minimal impact and could even pose additional burdens on subcontractors.

This is so for a number of reasons.

First, Civil Code section 2782(c) (as revised in 2006 and 2008 and to be revised in 2009) contains a provision providing that it will not apply to the obligations of an insurance carrier under Presley Homes, Inc. v. American States Insurance Company (2001) 90 Cal.App.4th 57 (which applies a broad scope of defense to any "additional insured" insurer). Second, under Civil Code section 2778(d) (as revised in 2006 and 2008 and to be revised in 2009), the subcontractor may enter into an agreement (and undoubtedly will be so required) to mutually agree as to the timing or immediacy of defense and reimbursement of defense fees and costs (so long as the limitation on scope of the indemnity obligation is not waived). That sub-part (as revised effective in 2009) further provides that, upon a written tender, the subcontractor will have the option of:

1. within 90 days of tender agreeing to defend the claim with counsel of its choice for claims arising from the subcontractor's work; and
2. within 30 days of receipt of an invoice, agreeing to a reasonable allocated share of the builder/general contractor's defense costs.

Moreover, if the subcontractor fails in its obligations with respect to a "provided for" defense under pending Civil Code section 2782(d)(1), it can be pursued for compensatory damages, consequential damages and attorney's fees. If the subcontractor fails in its obligations under the "shared defense" option under pending Civil Code section 2782(d)(2), it can be pursued for compensatory damages, consequential damages, attorney's fees and interest at the rate of two (2) percent per month under the prompt pay statute found in Civil Code section 3260. The only saving grace is that, within 30 days of resolution of the claim, the subcontractor can pursue a claim if the developer/general contractor fails to reallocate to accord with the statutory limit as to scope of defense.

In summary, while certainly of interest to residential subcontractors in California, the revisions to California's anti-indemnity statute may have limited impacts given that it provides no direct relief to insurers providing additional insured endorsements and essentially only abridges the allocable defense obligation which can be imposed on a subcontractor. Also, the pending revisions to the new statute provide for a direct action against the subcontractor for failure to provide a defense or join in a defense and even contains new penalties for failure to defend. Therefore, while close scrutiny should be paid to the statute, its actual impacts remain to be determined.

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