



## The Burnham Brown Guide to Enforceability of Indemnity Agreements By David H. Waters

Date Construction Contract Entered	Type of Claim Affected	Rule
January 1, 1967 to December 31, 2005	All Construction Contracts	<p>Type I express indemnity agreements permitted in all construction contracts.</p> <p>However, public entities may not be indemnified for their active negligence.</p> <p>In a Type I express indemnity agreement, the indemnitor (typically the subcontractor) must indemnify the indemnitee (typically, developer/building owner and/or general contractor) unless the indemnitee is 100% at fault for the injury or damage. Thus, if a developer is 99% at fault, the subcontractor pays 100% of the judgment—not just its 1%.</p> <p>Frequently, a general contractor may also have a Type I express indemnity obligation owed to the developer/building owner.</p>
January 1, 2006 to December 31, 2007	Indemnification of builders in residential construction defect claims.	<p>Type I express indemnity provisions in favor of a “builder” for “residential construction” construction defect claims are prohibited. The builder may not be indemnified for its negligence, or for the negligence of the builder’s other agents or independent contractors, or to extent claims do not relate to the indemnitor’s scope of work.</p> <p>Does not affect the builder’s right to an immediate defense.</p> <p>“Builder” is limited to a party that <u>sells</u> the residential units to the public and therefore can include not only developers, but developers/contractors. “Builder” does <u>not</u> include a general contractor who does not sell the residential unit.</p> <p>The prohibition of Type I indemnity in favor of a builder applies only to original construction of individual dwelling units. (E.g., does not apply to construction of apartment buildings or remodeling.)</p>
January 1, 2008 to December 31, 2008	Indemnification of general contractors in residential construction defect claims.	<p>Section 2782 amended to also prohibit Type I indemnity agreements in favor of a general contractor for construction defect claims, but still only with respect to original construction of individual residential units, even if the general contractor is not the “seller” of the units.</p> <p>General contractor may not be indemnified for its negligence, negligence of its other agents or subcontractors, or to the extent the claims do not arise out of the subcontractor’s scope of work.</p>

Date Construction Contract Entered	Type of Claim Affected	Rule
January 1, 2009 to December 31, 2012	Subcontractor's duty to defend builders or general contractors in residential construction defect claims.	<p>Section 2782 amended to provide that a subcontractor's duty to defend a builder or general contractor in construction defect litigation involving original sale of individual residential dwelling units arises after tender.</p> <p>Grants subcontractor the option (1) to defend the builder or general contractor with counsel of subcontractor's choice or (2) to pay a reasonable allocated share of the builder's or general contractor's defense costs.</p> <p>Statute remains limited to construction defect claims involving original construction of residential dwelling units.</p>
On or after January 1, 2013.	<i>Specifically:</i>	<p>Type I indemnity now prohibited in all construction defect litigation, both residential and commercial.</p> <p>Type I indemnity also prohibited in favor of property owners for bodily injury and property damage claims.</p> <p>Type I indemnity also prohibited for bodily injury and property damage claims involving commercial construction.</p>
	Public Agencies.	Public agencies may not be indemnified for active negligence by any contractor, subcontractor, or supplier of goods or services. [Formerly, this protection only extended to those with <u>direct</u> contracts with public agencies.]
	Owners of Private Real Estate.	<p>Type I indemnity prohibited in favor of owners of privately owned real property in all construction contracts. (If owner is not acting as contractor or supplier of materials or equipment.)</p> <p>Such owner may not obtain indemnity as to its active negligence or that of its employees.</p>
	All Commercial Construction Claims, including Bodily Injury, Property Damage and Construction Defect Claims.	<p>Section 2782.05 added: prohibition of Type I indemnity extended to all commercial construction contracts.</p> <p>Precludes Type I indemnity in favor of general contractors, construction managers or other subcontractors. Applies to bodily injury claims as well as to property damage.</p> <p>Specifically, express indemnity agreements by subcontractors may not extend to the active negligence or willful misconduct of a general contractor, construction manager or other subcontractor to the extent of the active negligence or willful misconduct of the general contractor, construction manager or other subcontractor, or to the extent the claims do not arise out of the scope of work of the indemnifying subcontractor.</p> <p>Exception: does not apply to direct contracts with public agencies or owners of privately owned real property, controlled by separate statutes discussed above.</p>

Date Construction Contract Entered	Type of Claim Affected	Rule
	Residential Construction Defect Claims	Unaffected. Prior statutes continue to apply. Which statute is applicable continues to depend on date contract entered.
	Residential Construction Bodily Injury and Property Damage Claims (except construction defect claims).	Type I <u>not</u> prohibited for bodily injury and property damage claims. However, residential construction defect claims continue to be controlled by prior statutes.

*David H. Waters advises owners, general contractors, and subcontractors and represents them in construction litigation. Mr. Waters further specializes in advising clients on their rights and obligations under insurance policies for all types of lawsuits. Mr. Waters can be reached at (510) 835-6725 or [dwaters@burnhambrown.com](mailto:dwaters@burnhambrown.com).*