LOS ANGELES
Daily Journal

WEDNESDAY,
FEBRUARY 22, 2006
Vol. 119. No. 35

SINCE 1888

OFFICIAL NEWSPAPER OF THE LOS ANGELES SUPERIOR COURT AND UNITED STATES SOUTHERN DISTRICT COURT

Focus

# Contractual Duty to Defend Is Independent of Jury Findings

By Thomas B. Snyder

In *Crawford v. Weather Shield Manufacturing Inc.*, a subcontractor was held liable for providing and paying for a defense to claims against a developer, even though it was ultimately found to be not negligent with respect to the work in question.

The appellate court upheld the decision that the subcontractor, based on the language of the contract, had a separate and independent duty to defend against the claims raised, regardless of whether there was a finding of negligence. This decision emphasizes what is sure to be fertile ground for litigation in years to come.

The lawsuit originated as a construction defect lawsuit against a developer, the window manufacturer and the window framer. The defense of the case was tendered by the developer to both the window manufacturer and the window framer. Both rejected the tender.

The developer filed a cross-complaint asserting its contractual defense and indemnity rights. The developer then settled with the homeowners and the case proceeded to trial solely against the window manufacturer and the window framer. After trial, the jury found that the window manufacturer was not negligent.

In light of the jury's verdict, the developer's cross-complaint for contractual indemnity against the window manufacturer was dismissed. However, the trial court found that the window manufacturer was responsible for the defense of the claims, notwithstanding the finding of no negligence.

The trial court reasoned that the defense obligation was not dependent upon a finding of negligence and therefore despite the absence of any negligence on the part of the window manufacturer, it was obligated to defend the developer and therefore pay a percentage of the defense costs the developer had incurred in litigating the case. The window manufacturer was ordered to pay a total of $131,274 toward the defense costs the developer had incurred.

Because the decision rests so heavily on the particular language of the contract, it is helpful to cite that language at the outset. The contract provided that:

"Contractor does agree to indemnify and save Owner harmless against all claims for damages to persons or to property and claims for loss, damage and/or theft of homeowner's personal property growing out of the execution of the work, and at his own expense to defend any suit or action brought against Owner founded upon the claim of such damage loss of theft."

The appellate court started with the common principle that an indemnity provision in a construction contract, unlike an insurance contract, must be interpreted so as to limit the scope of the indemnity obligation. There is no indemnity obligation unless there is clear language in the agreement that provides for that obligation.

Both opinions cite to the number of cases that stand for the proposition that an indemnity provision will not be interpreted to require indemnity without the indemnitor's negligence only when that requirement is expressly set forth in the agreement. "[H]ad the parties intended to include an indemnity provision that would apply regardless of the subcontractor's negligence, they would have had to use specific, unequivocal contractual language to that effect." Citing to *Heppler v. JM Peters Co.*, 73 Cal.App.4th 1265 (1999).

It is in the application of these basic principles that the majority and dissent part ways. For the majority, the contractual language cited above provides for a disjunctive obligation to indemnify on the one hand and to defend on the other. The majority found that the phrase "and at his own expense to defend any suit or action brought against [o]wner founded upon the claim of such damage loss of theft" that grows "out of the execution of the work" required the subcontractor to provide a defense regardless of negligence. The primary thrust of the majority's reasoning seems to be directed at the temporal concept of providing a defense to a "claim." The language cited above, according to the majority, supports the argument that any claim that arises out of or grows out of the subcontractor's work required a defense, regardless of how the merits of that claim are ultimately adjudicated.

The primary thrust of the majority's reasoning seems to be directed at the temporal concept of providing a defense to a "claim."

In other words, if the claim relates to the subcontractor's work, the subcontractor must defend immediately. The majority found that the term "defend" carried with it a temporal meaning that did not allow the subcontractor to sit back, wait to see how the case resolved and then "reimburse" the developer for the attorney fees incurred if some negligence is later found.

There is some appeal to the notion that a subcontractor should not be allowed to sit back, refuse to defend a claim relating to its work, and then escape any liability if the developer's hard work in litigation results in a finding of no negligence. The developer or owner is forced to bear the

majority of the risk and all of the up front expenses, while the subcontractor waits in the wings. Such a result would potentially result in an unwarranted windfall for the subcontractor who disregards his or her contractual obligations.

For the dissent, the references to defense and indemnity above were simply two sides of the same coin. The indemnity provision does not require the subcontractor to indemnify without negligence. However, the obligation to defend, which is found in the same sentence, specifically refers back to the indemnity obligation by reference to "such claims."

In other words, the duty to defend only applied to those claims embraced by the indemnity. Because the indemnity did not require indemnity without negligence, neither did the duty to defend.

First, it is a very close question whether the language at issue in the contract before the court was sufficiently "unequivocal" to support a finding that there was a duty to defend without negligence. The majority's effort to find a current duty to defend by incorporating a temporal concept into the definition of defending against a claim is arguably too slender a reed to overcome the presumption against coverage that applies to indemnity contracts.

Parties would be well advised not to rely on such language to clarify their respective obligations. Nevertheless, language strong enough to establish a duty to defend without negligence can be drafted. Indeed, if a subcontractor wants to be assured that there is no defense obligation without negligence, then specific language to that effect must be drafted as well to avoid the implication found by the *Crawford* court.

Another issue worth consideration is the recent revision to Civil Code Section 2782. That revision specifically voids any contract provision that would require a subcontractor, in residential construction, to be required to defend or indemnify a general contractor for the negligence of the general contractor or its subcontractors.

That provision would seem to envision that with respect to residential construction contracts executed after Jan. 1, 2006, a provision that purports to require a separate defense obligation without the necessity of a finding of fault against the subcontractor, would be void. To put it another way, a subcontractor who is ultimately found to be not negligent cannot be required to defend or indemnify a general contractor because, by definition, the finding of no negligence means that the damages were caused by the negligence of the general and/or his other subs.

However, Section 2782 also provides that it does not preclude an agreement as to the timing or immediacy of the indemnity obligation. Thus, a subcontractor and general could conceivably draft a provision that required an immediate defense by the subcontractor regardless of fault, which at that time is unknown. The subcontractor provides its portion of the defense and, if the subcontractor were ultimately found to be not negligent, the subcontractor would have a claim for reimbursement from the general.

The *Crawford* opinion itself may be of little precedential value given that it is so closely tied to the language of the contract before it. While the court's interpretation of prior cases is of some interest, the resolution of the case ultimately turned on the language of the contract. The precedential value of the case may be further limited by the actual language used in the contract. It would be foolhardy to rely on the language similar to the contract at issue in *Crawford* to define their respective defense and indemnity obligations.

The true value in the *Crawford* opinion may lie in the fact that it highlights the substantial gray area between the obligation to defend and the obligation to indemnify. This gray area can be substantially clarified with a little careful thought and negotiation during contract formation.

If a developer desires a separate and independent obligation to defend from its contractors, regardless of whether those contractors are found to be negligent, it would be well served to draft much more specific language than that found in *Crawford*. Ultimately, this is an issue that the industry is sure to see more of in the future. Whether the parties wish to have defense and indemnity obligations that are coextensive or not, due consideration must be given to defining not only indemnity obligations, but also the scope of any obligation to defend.

---

Thomas B. Snyder is an associate in the construction, environmental, real estate and land use litigation practice group in Sheppard, Mullin, Richter & Hampton's Del Mar Heights office.