

DESIGN PROFESSIONALS' PRACTICE UPDATE

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INDEMNITY

By Seth E. Watkins

Crawford v. Weather Shield Mfg., Inc. 136 Cal.App.4th 304 (rev. granted 5/24/06)

The California Supreme Court has agreed to accept a case holding that a subcontractor's agreement to defend a developer against claims "growing out of the subcontractor's work" is an agreement to defend while the suit is in progress, before it is even possible to know whether the work was defective.

Homeowners sued a developer, its window-manufacturing subcontractor, and its framing subcontractor, alleging that the homes' windows fogged and leaked. Each subcontractor had promised to defend the developer against actions "founded on . . . claims growing out of the execution of the" subcontractors' work. Each subcontractor denied the developer's tender, claiming there was no duty to defend unless the subcontractors had executed their work negligently, a fact that could not be known until the litigation concluded. The developer sought a judicial declaration that each subcontractor had a duty to defend.

At trial, the jury found the subcontractors were not negligent, but the judge ruled that the subcontractors had a duty to defend the developer since the homeowners' claims against the developer grew out of the subcontractors' work. On appeal, the window manufacturer argued that claims

cannot grow out of a subcontractor's work unless that work is defective.

A court's purpose in addressing disputes over indemnity agreements is to ascertain the parties' intent and give it effect. The contract at issue obliged each subcontractor to "indemnify" the developer and "save [the developer] harmless," i.e., "defend" the developer, against "all claims for damages . . . growing out of the execution of the work." "Indemnify" includes the meaning "[pay] a judgment or settlement that might result from certain conduct" or "reimburse." Reimbursement can only occur at the end of litigation when the amount owed is known. By contrast, "defend" means to provide legal services to deal with a pending lawsuit while it is in progress. Thus, unless parties use language to the contrary, an agreement to defend is an agreement to provide a present service, not a service contingent upon a future finding that the subcontractor was negligent.

The court also noted with approval that the agreement in question was quite specific in its obligation. It did not obligate the subcontractor to defend every claim against the developer, but was only triggered by claims that grew out of the window manufacturer's work. The narrowness and specificity of the agreement were factors favoring its enforceability.

The court also emphasized the distinction between defense provisions found in insurance contracts and defense provisions found in indemnity agreements in construction contracts. Both types of contracts are contracts of adhesion, meaning the stronger party imposes the terms on the weaker party with little or no negotiation. Because insurers dictate the terms under which they must defend policyholders, courts broadly construe the defense provisions of insurance contracts and require carriers to provide a complete defense to insureds even if only a single claim is covered. By contrast, a developer or contractor dictates the terms under which a subcontractor provides a defense. Accordingly, defense provisions in indemnity agreements are construed narrowly, being limited to the precise language of the contract, and may require less than a complete defense. Thus, as the court observed, in ascertaining the obligations imposed by indemnity agreements in construction contracts, "[t]here simply is no substitute for *reading the contract.*"

Comment: Indemnity provisions should be carefully drafted to obtain the benefit of a defense to avoid the burden of providing a defense to a third party.

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