



California Legal Update

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February 2006

Construction Defect Litigation and Indemnity Contracts

In the case of Crawford v. Weather Shield Mfg., Inc., DJDAR 1359 (2006), the Fourth Appellate District of Division Three issued a rather lengthy decision to explain its affirmation of the trial court's decision that an indemnitor's duty to defend, absent language to the contrary, does not require a finding of fault. In so rendering its decision, the Court stated:

This opinion will show that, at least as regards the language of the particular contract before us, the case law is consistent, and upholds the decision of the trial judge.

At least two decisions of the Court of Appeal, Continental Heller Corp. v. Amtech Mechanical Services, Inc. (1997) 53 Cal.App.4th 500 and Centex Golden Construction Co. v. Dale Tile Co. (2000) 78 Cal.App.4th 992, have clearly held that there is no per se rule precluding a subcontractor-indemnitor from paying for the defense costs of a general contractor-indemnitee related to claims growing out of the subcontractor-indemnitor's work, even though the subcontractor-indemnitor is ultimately found not to be negligent.

It then opined that the cases of Peter Cully & Associates v. Superior Court (1992) 10 Cal.App.4th 1484; Regan Roofing Co. v. Superior Court (1994) 24 Cal.App.4th 425; Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265; Mel Clayton Ford v. Ford Motor Co. (2002) 104 Cal.App.4th 46; and most recently Baldwin Builders v. Coast Plastering Corp. (2005) 125 Cal.App.4th 1339, did not when read properly, support the converse conclusion.

The Court reviewed each of these decisions in painstaking detail, citing specific language in each to demonstrate they do not articulate a per se rule that a determination of liability must precede the triggering of an express defense obligation.

DISCUSSION

This matter arose out of a homeowners' lawsuit for construction defect brought against the developer, the window manufacturer and window framer. As to the window manufacturer, it was alleged the windows were defectively designed and manufactured, causing them to leak and fog. The developer filed a cross-complaint against the window manufacturer and the window framer, seeking its attorney's fees incurred in defending against the homeowners' suit as well as indemnification. The homeowners eventually entered into a sliding scale "Mary Carter" agreement with the developer, in conjunction with which all complaints and cross-complaints were dismissed except as to the window manufacturer and the window framer who did not settle. The matter proceeded to trial, the jury finding in favor of the window manufacturer on both the homeowners' claim as well as the developer's claim for contractual indemnity.

In a subsequent bench trial, the trial judge reviewed the following contract provision:

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 homeowners' 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 or loss or theft. ... (emphasis added).

The Court interpreted this term as requiring the window manufacturer to pay its share of defense costs incurred by the developer.

The appellate court concluded the subject language was properly interpreted by the trial court. In sum, it found:

The subcontract agreement between the developer and the window manufacturer in this case, even narrowly construed, plainly and unambiguously called for the window manufacturer to provide a defense, i.e., for an attorney or attorneys to conduct that defense of the homeowners' suit, at least to the degree the suit was founded upon claims of window problems independent of whether the window manufacturer was itself ever held to be responsible for those window problems. Crawford at 1370.

In rendering its decision, the court expressed two cautionary notes. First:

We most certainly do not say that a subcontractor is necessarily responsible for providing a "complete defense" to an action founded upon a claim growing out of a subcontractor's work. We only say that **this** subcontract obligated **this** window manufacturer to pay for its half share of the defense costs reasonably attributable to the homeowners' window claims; i.e. clearly growing out of the subcontractor's own work. No one should assert that this opinion stands for any proposition broader than that. Id. at 1370 (original emphasis).

Secondly, the court stated:

This opinion must not be read as importing the Gray (Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263) "potentiality rule" from insurance jurisprudence into the relationship between a general contractor and subcontractor. There is simply no substitute for reading the contract. All we are saying is that if the contract says that there is an obligation to defend a suit founded on a claim of "such damage" as grows out of the subcontractor's work, and this suit clearly is founded on the subcontractor's work as this suit was, the defendant's obligation is triggered even if the claim itself is ultimately proved to be unfounded.

Id. at 1370. (Emphasis added).

The court next reviewed each of the cases which defendant manufacturer asserted required a finding of fault before the indemnity obligation would be triggered. Of importance, is the court's review of Regan Roofing and Heppler, both of which have been interpreted to preclude a defense obligation in the absence of liability. The court was critical of both Regan Roofing and Heppler because it determined neither decision specifically addressed the distinction between the specific obligation to defend a "claim" and classic indemnity in the sense of paying for a settlement or judgment. Accordingly, it concluded that because these cases did not address that specific distinction, they were not precedent and could not be employed. The court found support for its interpretation and criticism in Centex Golden Construction Co. v. Dale Tile Co., *supra*, 78 Cal. App. 4th 992, (a decision issued by the same court that propounded Regan Roofing). Centex held:

Contrary to the [tile subcontractor's] argument, nothing we said in Regan Roofing [citation] is inconsistent with the freedom of contract discussed in Continental Heller. In Regan Roofing, we merely held that it was premature to decide whether a subcontractor could be required to contribute to the defense of a claim before either its fault had been established or any determination had been made that such a defense existed notwithstanding fault. We did not suggest that an agreement which required indemnity from a faultless indemnitor was in any manner improper or unusual.

Id. at 997, n.1 (emphasis added).

CONCLUSION

In sum, Crawford aligns itself with the Continental Heller and Centex decisions; parties are free to contract to allocate their respective risks. Absent express language to the contrary, an indemnitor will be liable for defense obligations regardless of fault. Of significance is the court's review of the cases it distinguishes, notably Regan Roofing and Heppler. The court's detailed analyses raises valid questions as to their continuing vitality.

Our office is always available for further consultation and assistance on these issues. Please don't hesitate to call us if we can help you in any way. Burnham Brown is one of Northern California's pre-eminent business counseling and litigation firms, offering clients leading-edge expertise and strategic guidance. Our services are aligned with our clients' personal, commercial, and corporate goals. For more information, please visit www.burnhambrown.com.