

California Insurance Law Coverage Newsletter for Attorneys

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Crawford v. Weather Shield Mfg. Inc. (2008) 44 Cal.4th 541: SUBCONTRACTOR'S DUTY TO DEFEND DEVELOPER, GENERAL CONTRACTOR IN 'NON- INSURANCE' CLAIMS

§ S100.01:1 In general

Parties to a contract, including a *construction contract* may define their duties toward one another in the event of a THIRD PARTY CLAIM against one or both arising out of their relationship. Terms of this kind may require one party to *indemnify* the other, under specified circumstances, for monies paid for expenses incurred by the latter as a result of such claims. See Civ. Code § 2772 [Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.]. They may also assign one party, pursuant to the contract's language, responsibility for the other's *legal defense* when a THIRD PARTY CLAIM is made against the latter. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 551, 79 Cal.Rptr.3d 721]

The parties may agree that the promisor's indemnity and/or defense obligations will apply only if the promisor [subcontractor] was negligent, or, *conversely*, even if the promisor [subcontractor] was not negligent. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 552, 79 Cal.Rptr.3d 721] See **§ A104 ASSUMED BY THE INSURED [§ A104:5 No duty to defend indemnitee]; § I22 INDEMNITY [§ I22:3.1 Attorneys fees/defense costs under an assumed insuring agreement]**

§ S100.01:2 Interpretation of noninsurance contractor - subcontractor agreements

Though indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly. *Ambiguities* in a policy of insurance are construed against the insurer, who generally drafted the policy, and who has received premiums to provide the agreed protection. In *noninsurance contexts*, however, it is the *indemnitee* [developer, general contractor] who may often have the superior bargaining power, and who may use this power unfairly to shift to another a disproportionate share of the financial consequences of his own legal fault. This causes a public policy concern. This public policy concern influences to some degree the manner in which noninsurance indemnity agreements are construed. For example, if one seeks, in a noninsurance agreement, to be indemnified [e.g. developer, general contractor seeking indemnity] for his or her own active negligence, or regardless of the indemnitor [subcontractor] fault-protections beyond those afforded by the doctrines of implied or equitable indemnity-language on the point must be particularly clear and explicit, and will not be construed strictly against the indemnitee [developer, general contractor].

For similar public policy reasons, statutory law imposes some absolute limits on the enforceability of *noninsurance indemnity agreements* in the construction industry. For example, a party to a construction contract could not validly agree to indemnify the promisee [developer, general contractor] for the latter's sole negligence or willful misconduct. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 552, 79 Cal.Rptr.3d 721, citing Civil Code § 2782(a) and Civil Code § 1668] See **§ P90 PROCURING AND MAINTAINING INSURANCE AS REQUIRED BY CONTRACT PROVISION [§ P90:2, § P90:3]**

Civil Code § 2778

Finally, Civil Code § 2778, unchanged since 1872, sets forth general rules for interpretation of indemnity contracts, 'unless a contrary intention appears'. If not forbidden by other, more specific statutes, the obligations set forth in Civil Code § 2778 thus are deemed included in every indemnity agreement unless the parties indicate otherwise. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 553, 79 Cal.Rptr.3d 721]

§ S100.01:3 Duty to defend

The duty to defend is a promise to render, or fund, the *service of* providing a defense on the promisee's [developer, general contractor] behalf. The duty arises as soon as such claims are made against the promisee [developer, general contractor] and may continue until they have been resolved. This is the common understanding of the word 'defend' as it is used in legal parlance. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 553-554, 79 Cal.Rptr.3d 721]

Statute and case law has long confirmed that, unless the parties' agreement expressly provides otherwise, a contractual indemnitor [subcontractor] has the obligation, upon proper tender by the indemnitee, to accept and assume the indemnitee's [developer, general contractor] active defense against claims encompassed by the indemnity provision. Where the indemnitor [subcontractor] has breached this obligation, an indemnitee [developer, general contractor] who was thereby forced, against its wishes, to defend itself is entitled to reimbursement of the cost of

doing so. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 555, 79 Cal.Rptr.3d 721]

Civil Code § 2778(4)

Civil Code § 2778(4) states: "The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter [developer, general contractor] in respect to matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, *if he chooses to do so.*" (emphasis added) Civil Code § 2778(4) places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemnitee's [developer, general contractor] defense, if entered, against all claims 'embraced by the indemnity'. The indemnitor's failure to assume the duty to defend the indemnitee upon request (§ 2778(4)) may give rise to damages in the form of reimbursement of defense costs the indemnitee was thereby forced to incur. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 557-558, 79 Cal.Rptr.3d 721]

§ S100.01:4 Duty to defend is 'separate' from the obligation to pay indemnity

The duty to defend is distinct and separate from the contractual obligation to pay an indemnitee's defense costs, after the fact, as part of any indemnity owed under the agreement. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 558, 79 Cal.Rptr.3d 721] Civil Code § 2778(3) states: "An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the cost of defense against such claims, demands or liability incurred in good faith, and in the exercise of a reasonable discretion." This duty, as described, cannot depend on the outcome of the litigation. It follows that, under Civil Code § 2778(4) claims 'embraced by the indemnity' as to which the duty to defend is owed, include those which, at the time of tender, *allege facts* that would give rise to the duty to indemnify.

§ S100.01:5 The duty to defend extends to 'all claims'

Unless the indemnity agreement states otherwise, the statutorily described duty to

defend the indemnitee [developer, general contractor] upon tender of the defense extends to *all such claims*. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 558, 79 Cal.Rptr.3d 721]

◆ **ILLUSTRATION [Subcontractor's duty to defend]:**

In *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 558, 79 Cal.Rptr.3d 721, the subcontractor's [Weather Shield] duty 'to defend' in its subcontract expressly set forth a duty to defend that arose when such a claim was made by the general contractor, and was not depended on whether the very litigation to be defend later established Weather Shield's obligation to pay indemnity.

Unlike Civil Code § 2778(4), Weather Shield's contract did not expressly condition the duty 'to defend' upon the general contractor's *request* for a defense. Weather Shield did not contend it was absolved of a duty to defend on account of any failure by the general contractor to make such a request. [*Crawford Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 558, fn. 8, 79 Cal.Rptr.3d 721]

◆ **EXAMPLE [Paragraph in sub-contract to defend general contractor]**

A subcontract paragraph requiring the subcontractor to defend the general contractor against *any suit or action founded upon* the claim of such damage giving rise to a duty to defend as soon as a 'suit or action' is brought against the general contractor that was 'founded upon' a covered claim, i.e. that asserted a claim within the coverage of both the duty to defend and indemnity clauses.

Necessarily, a duty expressed in this manner does not require a final determination of the issues, i.e. such issues as negligence.

§ **S100.01:6 Parties can disclaim responsibility for another's defense**

Parties to an indemnity contract can easily disclaim any responsibility of the indemnitor [subcontractor] for the indemnitee's defense [developer, general contractor] or the cost thereof. Short of that, the parties can specify that the indemnitor's [subcontractor] sole defense obligation will be to reimburse the indemnitee for costs incurred by the indemnitee's [developer, general contractor] in defending a particular claim. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 560, 79 Cal.Rptr.3d 721]

§ **S100.01:7 Duty to defend not dependent upon outcome of the suit or claim by third party**

Prior decisions such as *Regan Roofing v. Superior Court* (1994) 24 Cal.App.4th 525, 29 Cal.Rptr.2d 413 suggested that a contractual duty to defend specified claims necessarily depends on the promisor's [subcontractor] ultimate liability for indemnity on those claims. The Supreme Court disapproved *Regan Roofing* by stating that *Regan Roofing* was mistaken insofar as it concluded that, under the agreement there at issue, the subcontractors' defense duties arose only if the subcontractors became liable for indemnity. [*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 565, 79 Cal.Rptr.3d 721]

CGL policy coverage: Attorney's fees/defense costs incurred by indemnitee under an assumed contract insuring agreement are covered

§ **A104:1** An insured with contractual liability coverage would reasonably expect that the indemnitee's attorney's fees and costs are sums the insured becomes "legally obligated to pay as damages because of covered tort claims." [*Golden Eagle Ins. Co. v. Insurance Co. of the West*, 99 Cal. App. 4th 837, 851-852, 121 Cal. Rptr. 2d 682 (4th Dist. 2002)] In *Golden Eagle Ins. Co. v. Insurance Co. of the West*, a subcontractor under its CGL policy was insured under its policy for liability assumed under an "insured contract," i.e. liability for damages assumed in a contract or agreement which in this case was an indemnity agreement. The contractor incurred \$600,000 in defense costs defending

against third party claims. The contractor obtained an arbitration award against the subcontractor for \$600,000 pursuant to a type 1 indemnity agreement whereby the subcontractor agreed to defend and pay any and all legal expenses against claims and suits brought against the contractor. The court held that the indemnitee's [general contractor] defense costs were sums the insured became legally obligated to pay as damages because of property damage as set forth in the subcontractor's CGL policy. [*Golden Eagle*, 99 Cal. App. 4th at 842] See **§ D20 DEFENSE COSTS—SEPARATE FROM OR INCLUDED WITHIN POLICY LIMITS.**

bold references are to Vols 1 and 2 of the text entitled CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE (15th Edition, 2009)

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