



# LEGAL BRIEFING

## It's Official—Developers Do Not Have To Prove Negligence To Trigger A Subcontractor's Defense Obligation

By Jay B. Freedman

In *Crawford v. Weather Shield Manufacturing, Inc.* (2006) 136 Cal.App.4th 304 [38 Cal.Rptr.3d 787], the fourth appellate district confirmed that, with the right contractual language, subcontractors have always been obligated to defend developers for claims arising out of the subcontractor's work even if the subcontractor is not adjudicated to be negligent.

The plaintiffs in *Crawford* filed a typical construction defect action and the developer filed a cross-complaint against the window manufacturer to recover its defense costs based on the express indemnity provision in its contract. Though the jury found in favor of the window manufacturer, the trial court awarded the developer \$131,000 from the window manufacturer for its defense costs arising from the plaintiffs' window related claims. On appeal, the window manufacturer argued that it never had a duty to defend because the jury found it was not negligent.

The court of appeal had no trouble disposing of the subcontractor's argument. The indemnity provision at issue 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 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.**"

The court held that the provision at issue obligated the window manufacturer to provide a defense to the developer upon tender and whether or not the manufacturer was negligent. The court noted that a defense obligation is different from an indemnity obligation. While indemnity is an obligation to make good a loss or damage incurred by another, an obligation which may be satisfied by reimbursement after the fact, the duty to provide a defense is a duty to render a service **right now**.

As explained by the court, "the right to receive a defense is not equal to the right to receive reimbursement and cannot be equated with it. There is a distinct benefit in not having to pony up money immediately." The court concluded that because the defense obligation was an obligation to provide a present service, "by definition the obligation could not have been contingent on the establishment of a *subsequent* indemnity obligation."

Overall, *Crawford* provides a very valuable tool to developers. Developers should review their subcontracts to make sure that they contain the *Crawford* language to trigger an immediate defense obligation. This case should also be kept in mind when making settlement demands during the course of litigation and when confronted with viable subcontractors that either do not have insurance or whose carriers are not defending the developer.

*Jay Freedman is a partner in the firm's Newport Beach office concentrating on business and construction litigation. He can be reached at jay.freedman@ndlf.com.*



## Be Aware: SB-1025 Means New Design Requirements For Certain Multifamily Dwellings

By Adriene M. Flores

In 2003, SB-1025 amended the Government Code in order to provide for greater disabled accessibility in new housing. As a result, contractors submitting building permit applications on or after July 1, 2005, must incorporate certain design features when constructing new "covered multifamily dwellings."

The new law, now entitled Government Code Section 12955.1.1, defines "covered multifamily dwellings" as: (i) buildings consisting of at least four condominium units or at least three apartment units if the buildings have at least one elevator; or (ii) the *ground floor dwelling units* in a building that consists of at least four condominium units or at least three apartment units if the building does *not* have an elevator. Under the revised Government Code, the builder could be liable for charges of

"discrimination" for any failure to design and construct certain disabled accessible- and adaptable-design features.

In order to comply with the *accessibility requirements*, at least ten percent (10%) of the ground-floor dwelling units must have an accessible route to the primary entry level entrance; doors sufficiently wide to allow passage by persons in wheelchairs; public/common areas accessible and useable by persons with disabilities; and at least one bathroom on the primary entry level and any public/common areas.

In order to comply with the *adaptability requirements*, the applicable units shall also contain adaptable-design features on the ground floor, including an accessible route into and through the unit; light switches, electrical outlets, thermostats and other environmental controls in accessible locations; reinforcements in walls to allow later installations of grab bars around the toilet, tub, shower stall and shower seat, where provided; and kitchens and bathrooms in which an individual in a wheelchair can maneuver.

In calculating the total number of units which must incorporate the accessible- and adaptable-design features, all covered multifamily dwellings in a project are "considered collectively."

For example, in a condominium project which contains five multistory

(see SB-1025, page 2, col. 1)

Newmeyer & Dillion **UPCOMING EVENTS** on page 2

**Tom Newmeyer** and **Tom Reilly** have contributed articles to recent issues of Smart Business Magazine's newly launched Orange County edition. Newmeyer addressed "Guarding trade secrets" and Reilly's article looked at "HR compliance — How California employers can avoid common wage-and-hour mistakes." Reprints of both articles are included with this newsletter mailing.

The firm welcomes **Kevin D. Elder** as an associate in our Newport Beach office. He focuses on real estate and business transactions, ranging from representing public and private entities in the negotiation of purchase and sale agreements, to negotiating asset and stock purchase agreements.

The firm is pleased announce the participants in our Summer Associate Program, offering real-world experience to third-year law-school students. Working in our Newport Beach office are **David Beser**, attending the University of Illinois School of Law, and **Salman Alam**, from the University of California, Hastings College of Law. Associates in our Walnut Creek office are **Jenni Khuu**, also attending Hastings, and **Rebecca Virgil-Romero**, from Golden Gate University.



(SB-1025 continued from page 1)

condominium buildings, with four condominium units in each building, only two of the twenty condominium units in the project must incorporate the necessary design features.

Owners, builders and architects must carefully review their projects and plans to ensure compliance with these new requirements.

**Adriene (Mae) Flores** is an associate in the Newport Beach office and specializes in real estate transactions, including master planned community development and Department of Real Estate matters. She can be reached at [adriene.flores@ndlf.com](mailto:adriene.flores@ndlf.com).

## UPCOMING EVENTS

### HBANC Women's Council PCBC Bay Area Bus Tours

Tues., June 20

The HBA of Northern California offers 3 tours of Bay area housing, including Urban Infill, Master-Planned Madness, and Wine Country Living & Tasting Galore (including wine tasting). *More information at <http://hbanc.org/>, or [www.pcbc.com](http://www.pcbc.com).*

### PCBC 2006

Moscone Center, San Francisco

Wed., June 21, 1 p.m.-2 p.m.

**Greg Dillion** moderating panel: "Stacking the Deck: Reducing the Risks of Mid- & High-Rise Residential," with experts describing risk-avoidance and reduction strategies.

Demand for homes in attractive markets remains strong, while raw land for home construction is scarce. To satisfy the market, savvy builders look to mid- and high-rise projects – which often carry risks and insurance issues that vary from traditional residential construction. Learn how others have successfully confronted the risks and challenges of this hot topic and gain profitable solutions that will change everything. *More information at <http://www.pcbc.com/attending/spdetail.asp?event=P07>.*

### Lorman Education Services Seminar:

#### "Construction Defect Claims in California"

Clarion Hotel, San Bernardino

Thurs., July 13, 9 a.m.-4:30 p.m.

**Jay Freedman** will participate in this seminar dealing with the legal basis for construction defect claims, the statutes of limitations that apply to such claims, the detailed procedures that must be utilized in pursuing and recovering for such claims and the applicable insurance coverage, both under the old law and SB 800. *More information at [http://www.lorman.com/seminars/seminar\\_details.php?pid=152725](http://www.lorman.com/seminars/seminar_details.php?pid=152725)*

## About Newmeyer & Dillion LLP

Newmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

### Litigation

- *Business*
  - Unfair Competition/Trade Secret
  - Business & Professions Code §17200
  - Partnership Dissolution
  - Lender Liability
  - General Business Disputes
- *Real Estate*
  - Construction
  - Real Estate Finance
  - Environmental Warranty
  - Title
  - Inverse Condemnation and Eminent Domain
  - Government Tort Claims
  - Regulatory Takings
- *Labor & Employment*
  - Wrongful Termination
  - Employment Discrimination
  - Sexual Harassment
- *Insurance & Risk Management*
  - First and Third Party Coverage
  - First and Third Party Bad Faith
- *Products Liability*
- *Appellate Practice*

### Real Estate Transactions

- Acquisition, Development, Option, Sale and Lease of Real Property (Residential, Retail, Multifamily, Office, Industrial, Agricultural)
- 1031 Like-Kind Exchanges
- Master Planned Community Developments and Community Associations
- Department of Real Estate and Other Regulatory Filings
- Construction Related Matters
- Military Base Reuse
- Due Diligence

### Real Estate Lending & Finance

- Documentation of Real Estate, Personal Property and Unsecured Loans
- Coordination of Loan Transactions for Borrowers

### Business Arrangements

- Formation, Structuring, Maintenance and Evaluation of Business Entities (Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Ventures)
- Shareholder, Partnership and Stock Option Plan Agreements
- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
- Licensing and Franchising Arrangements

### Land Use/Environmental

- Development Agreements
- Mitigation Agreements
- Subdivision Map Act
- Environmental Permitting



CREATING SOLUTIONS