



LEGAL BRIEFING

Victory for Builders in the California Supreme Court

By Jeff Dennis

The California Supreme Court's recent ruling in *Crawford v. Weather Shield Mfr, Inc.* is a victory for California developers and any other California businesses that reach arm's length agreements to transfer defense-risk indemnity in the event of litigation. The *Crawford* decision affirmed an appellate court's finding that under the typical defense and indemnity provisions in the subcontract agreement, a subcontractor's duty to defend a developer arises immediately upon tender of a claim, **even if it is later determined that the subcontractor was not negligent.** This decision will not only preserve the intent of parties to the defense and indemnity agreement but it will also help keep the focus in construction defect cases where it belongs, on the parties that performed the work at issue.

The *Crawford* case arose from a typical construction defect action, in which a group of homeowners brought suit against a developer and a number of subcontractors. After a trial in which the window manufacturer was absolved of negligence liability, the trial court found that although the window manufacturer did not owe indemnity to the developer, the subcontractor was nevertheless obligated to pay for the developer's attorneys' fees expended in defense of the case because the subcontract required the subcontractor to do so.

Crawford was appealed to the fourth appellate circuit, which upheld the lower court's rulings on both the indemnity and duty-to-defend issues. Newmeyer & Dillion filed an amicus brief in the California Supreme Court case on behalf of several homebuilders.

In upholding both the trial court and appellate court, the Supreme Court conducted an exhaustive review of the history of contractual duties in California and found a repeated distinction between a party's duty to indemnify and a duty to defend. While a subcontractor's duty to indemnify is intimately tied to its cul-

pability, a contractual promise to defend "clearly connotes an obligation of active responsibility, from the outset, for the promisee's defense against such claims."

The Supreme Court also rejected Weather Shield's interpretation of *Civil Code* section 2778, which sets forth general rules of indemnity-contract interpretation. In concluding that the defense duty which appears in subdivision 4 of section 2778 "arises immediately upon a proper tender of defense by the indemnitee, and thus before the litigation to be defended has determined whether indemnity is actually owed"—the Court held that the duty to defend "cannot depend on the outcome of that litigation," but rather commences upon tender.

The *Crawford* ruling provides further support for builders forced to defend themselves in lawsuits arising out of trade contractor errors, particularly where the subcontracts contain appropriate contractual defense indemnification language. A developer need not wait for the conclusion of protracted litigation to establish a subcontractor's affirmative duty to immediately defend the developer, regardless of eventual liability or fault. In fact, the Court in footnote 12 went to great lengths to explain exactly how a builder might establish the duty by filing a motion for summary judgment, and to advise the trial court on how to determine damages against a subcontractor that breaches its duty to defend in bad faith.

Since not all contractual indemnity provisions may be the same, it is prudent to conduct a review of such language in light of the *Crawford* ruling.

Jeff Dennis is a partner in our Newport Beach office and concentrates on business and construction litigation. He may be reached via e-mail at jeff.dennis@ndlf.com.



Battening Down for a Potential Litigation Wave

By Joseph A. Ferrentino

(This is the second of two parts; Part I appeared in our First Quarter 2008 newsletter.)

As described in the last article, several factors, including the downturn in the real estate market and the challenges of complying with the right-to-repair law, create conditions for a new wave of construction defect litigation in California. The following pointers are provided to help builders prepare for this wave.

First, with today's complex insurance environment, it is important to understand the coverage provided. Five to seven years ago, most builders had insurance policies based upon a standard commercial liability form with self-insured retentions and deductibles that were manageable. Now, there are many insurance products, frequently tailored to each builder, and builders often have more money at stake because of higher retentions and deductibles. Without a clear understanding of the policies, it is dif-

ficult for builders to predict the out-of-pocket cost of the claims.

Second, review legal strategies with an experienced attorney. The days of simply turning the claim over to the insurance company and relying on the insurer to resolve it are over. Hence, prudent builders are retaining lawyers with specific and extensive expertise in the newest construction defect laws and insurance programs.

Third, builders should work with their legal and risk-management team to devise a course of action based upon the cash-flow of their company and the specifics of its insurance program. For example, it may not be in every builder's best interest to resolve every claim quickly. It is worth considering the value of holding onto cash. Also, homes in lengthy litigation could drop out of an on-going suit due to a future foreclosure. Another important question is whether the builder's insurer will support the builder's right to repair by paying for repairs before a suit is filed.

Finally, builders should educate the appropriate staff on the specific requirements of the right-to-repair law, especially in the requirements of maintaining certain construction records. Also, customer service representatives must understand that defects are now defined by the functionality standards of the right-to-repair

(see Battening, page 2, col. 2)

The firm welcomes **Philip D. Kopp** as a partner at our Newport Beach headquarters. Phil formerly held the positions of Regional General Counsel for the West Coast Region and the Senior Vice President of Operations, Southern California Coastal Division with Centex Homes. His practice focuses on business, real estate, and commercial litigation, including an emphasis in labor and employment matters.

Congratulations to **Jan Gruen**, managing partner in Walnut Creek, and partner **Alan Packer** for being listed in the 2008 Northern California Super Lawyers. Having been recognized since the survey began in 2004, Jan was also named for the second year to the "Top 50 Women Super Lawyers." In addition, Jan was honored among the 2008 "Women of Distinction" by the *East Bay Business Times* in recognition of her tremendous professional accomplishments and community involvement.

Newmeyer & Dillion LLP has been named one of the "Best Companies To Work For in Orange County" in the annual list published by *OC Metro Business* and highlighted in the magazine's June 5 issue.

The firm welcomes **Jonathan N. King** and **Daniel M. O'Connell** as litigation associates in our Walnut Creek office. Jonathan's practice focuses on the representation of developers, builders, and general contractors in construction litigation, while Daniel emphasizes business, construction, real estate litigation.

The firm is pleased announce the participants in our Summer Associate Program, offering real-world experience to law-school students. This year, our Newport Beach office hosted **Tania Berger** and **Ryan Smith** from UCLA Law School, and **Susannah Eichele** and **Eric Rollins** from Loyola Law School in Los Angeles.

law. This could lead to increased costs, and potentially expose the company to additional claims.

In summary, builders should follow the lead of their legal counsel in navigating their insurance program, understanding the right-to-repair law, and formulating a plan of attack suited to the company's culture and goals.

Joe Ferrentino is a litigation and insurance partner in the firm's Newport Beach office. He may be reached via e-mail at joe.ferrentino@ndlf.com.

(A version of this article was printed in the June 2008 edition of *Builder & Developer* magazine.)

UPCOMING EVENTS

Mealey's Conferences/BVR Legal Comprehensive Construction Defect Claims & Coverage SuperConference
Wednesday, Nov. 5, 2008, 4:45 p.m.

Mandalay Bay Resort and Casino, Las Vegas

John O'Hara will speak on a panel entitled "Allocation Between Additional Insureds and Other Insurers," addressing current issues between the policyholder carrier and the additional insured carrier. *More info* <http://www.bvrresources.com/conferences.asp?f=bvrmealeys110508live>

20th Anniversary Building Industry Show

Friday, Nov. 14, 2008, 10:45 a.m.-12 Noon

Long Beach Convention Center

Greg Dillion moderates and **John O'Hara** will speak on "How to Effectively Enforce Your Right to Repair," discussing the intricacies of California's right-to-repair statute and how to use it to turn the tide against construction defect litigation. *More info* at <http://www.buildingindustryshow.com/ED-BISuniversity.php>

 Printed with soy ink on 50% recycled paper (25% post-consumer content).

For reprint permission, contact marketing@ndlf.com.

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*

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

Corporate Finance, Securities and Mergers & Acquisitions

- Venture Capital Financing
- Mergers, Acquisitions, and Leveraged Buyouts
- Public and Private Securities Offerings
- Federal Securities Law

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

Land Use/Environmental

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