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## WHITE PAPER ALERT

Duty to Defend -

Contractual Indemnity

IMPORTANT NEW DECISION

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Crawford v. Weather Shield Mfg., Inc.  
**Court of Appeal, Fourth District - January 31, 2006**

The contractual duty to defend in a contractual indemnity agreement has always been treated differently from an insurer's duty to defend. This case discusses whether the duty to defend under a contractual indemnity agreement arises immediately upon tender and exists independent of a duty to indemnify.

In this large construction defect action two-hundred homeowners in Huntington Beach, California brought an action against the developer, the project's window manufacturer and the window framer. The windows allegedly leaked and suffered from fogging. The developer cross-complained against the window manufacturer and window framer, seeking attorneys' fees for defending the suit, as well as indemnification. The homeowners settled with the developer. The cross-complaints then proceeded to trial. A jury found for the window manufacturer, but against the window framer, on claims of negligence and breach of warranty as well as the claim for contractual indemnity.

The window manufacturer's contract with the developer provided that it would defend and indemnify the developer for claims relating to the execution of the window manufacturer's work. The trial court found the window manufacturer responsible for the developer's attorneys' fees attributable to window problems, even though it had no duty to indemnify. The Court allocated 70% of the developer's defense costs to window problems based on the developer's risk manager's testimony. The Court then split the amount equally between the window manufacturer and the window framer, and ordered the window manufacturer to pay the developer \$131,274 in defense costs and fees. The trial court also awarded the developer fees and costs in prosecuting the cross-complaint. The trial court later granted a new trial on liability, based upon erroneous jury instructions and the failure to instruct on strict liability. Appeals were filed on the trial court's determination of damages, as well as new trial order.

The Court of Appeal, in a 2-1 decision, affirmed the granting of the new trial order and the granting of the developer's request for reimbursement of its defense costs and fees. The bulk of the 71 page opinion is devoted to the issue of: whether the window manufacturer was excused from the contractual duty to provide a defense to the developer where no negligent conduct was attributed to them by the jury. In an opinion that discusses all of the major contractual indemnity cases decided in California, as well as Monty Python, the Court held that the absence of a

negligence finding did not excuse the defense obligation undertaken in the indemnity agreement.

The Court stated that it is not adopting a rule which requires a defense in all cases potentially covered by an agreement, as in insurance law. Rather, the Court stated it must be shown that the claim grows out of the subcontractor's particular work. The Court felt this result was warranted given the language of the particular agreement, as well as Civil Code Section 2778, governing indemnity agreements.

The Court went on to hold that attorneys' fees for prosecuting the indemnity cross-complaint, where there is no indemnity awarded are left to the discretion of the court. In this case, the trial court granted the developer recovery of those fees.

The Court held the contractual duty to defend was triggered upon tender. This duty arose independent of whether the window manufacturer was ever held negligent. The duty was not to provide a complete defense, but only a defense to claims arising out the subcontractor's work.

The Court affirmed the new trial order and the trial court's order awarding the developer attorneys' fees for defending the action and prosecuting their cross-complaint. The dissent asserted the majority opinion adopted a new rule for interpreting duty to defend contract provisions. The dissent felt that the language of the contract was tied to indemnity. The dissent stated there is no duty to pay for the defense where there is no duty to indemnify. The dissent also noted, importantly, that this case would require trial courts sort out the portion each subcontractor must pay toward the defense of the developer before fees are incurred and would require subcontractors provide a current defense to claims that are only potentially covered.

## **COMMENT**

This controversial decision will likely be requested for reviewed in the California Supreme Court. In the meantime, the decision is likely to shake up the handling of construction defect lawsuits.

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