



Special Update

a/e Risk Review Volume 16, Number 4 Important Announcement RE: Indemnification in California

On July 21, 2008, the California Supreme Court, in *Crawford vs. Weather Shield MFG. Inc.* held that the duty to indemnify can include a broad duty to defend even when it was established there was no liability for damages, as in this case.

In a confusing analysis that frankly created more questions than answers, the court ruled that a subcontractor, who was ultimately found to be blameless for the damages claimed by homeowners but who had agreed to broadly indemnify the developer, was responsible to pay the latter's defense costs. Given the facts specific to this case, the result was not particularly surprising. However, some of the court's reasoning implies that this obligation could be imposed upon indemnitors who thought they had agreed to more limited indemnification provisions.

This is of great concern to design and environmental consultants since their professional liability insurance excludes coverage for an obligation to pay for someone else's defense pursuant to an indemnity agreement. It heightens our concerns regarding the need to exercise extreme care in limiting your obligation in indemnity and hold harmless provisions. Consultants must be more cautious than ever in working with their legal counsel and

insurance advisors in evaluating the risk associated with such provisions.

In a perfect world you would never agree to indemnify any client. When that is not possible, limit your obligation to matters "to the extent actually caused by" your negligence and avoid any language that requires you to provide anyone else with a defense or pay for their defense costs. However, even removal of such references may not have the desired effect since California Civil Code 2778 can also imply a duty to defend or pay defense costs. Ideally an indemnification clause would require you to "indemnify but not defend". A possible compromise would be to replace any references to defense obligations with a clause such as this: "Consultant's obligation shall include the duty to defend, but only to the extent such matters are ultimately determined by the Court to be caused by [your] negligence."

For clients who insist on more, consider a bifurcated indemnity that includes a broader obligation for matters not arising from your professional services. General liability insurance typically includes broad coverage for liability assumed by contract for bodily injury and property damage claims including the cost to defend.

Specifically regarding agreements with public agencies, Civil Code 2782.8 imposes specific fault-based

limitations regarding what indemnification "including the cost to defend" can be required of licensed architects and engineers. Therefore, the *Weather Shield* decision may not apply to such agreements, but there is no certainty this will be the case. Until there is more clarification, which is not likely to occur for some time, caution is recommended on these public agreements as well.

As always, we recommend you have your attorney review your agreements for services for their legal implications, particularly when addressing potentially uninsured liability.

This material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

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