Focus

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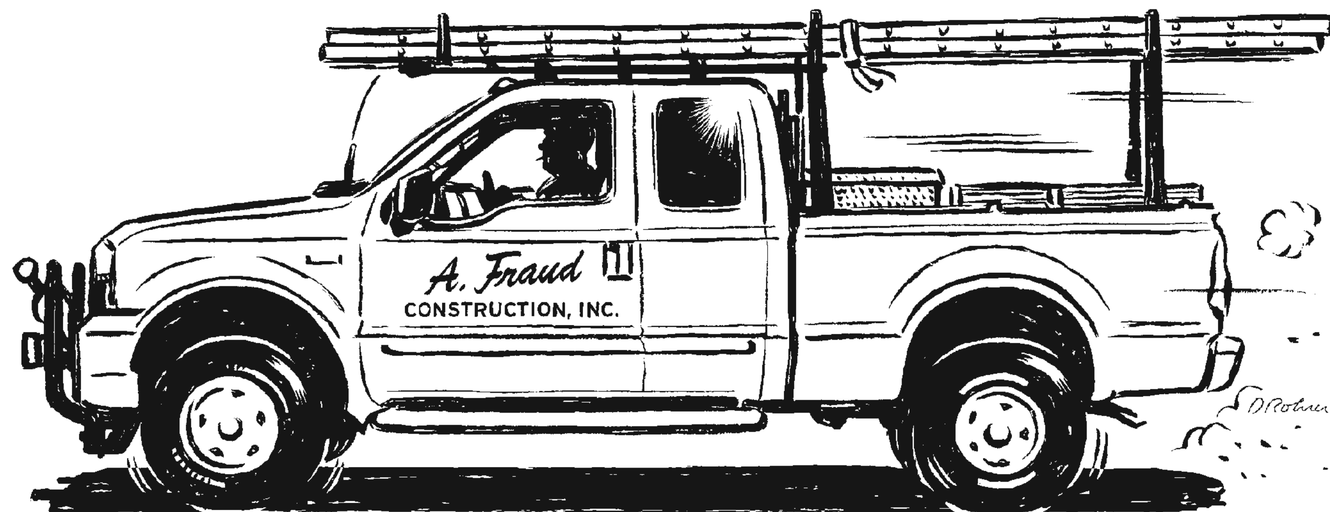
Strict Construction



By Gary A. Watt

Can one party to a contract shift the costs of *defending* claims and suits to the other party to the contract, even if that other party is not negligent? Can this "defense" obligation ripen and remain even when no damages for negligence are owed? The California Supreme Court heard oral argument on May 7 and could affirm a subcontractor's liability for "defense" even though the jury found the subcontractor's work was not negligent. But will they?

In *Crawford v. Weather Shield Mfg., Inc.*, 136 Cal.App.4th 304, the 4th District Court of Appeals found that Weather Shield owed the developer its defense costs and fees despite a jury finding that Weather Shield's work was not negligent. The window manufacturer signed a contract with the developer that contained an indemnity provision made up of two operative clauses: "Contractor … agree[s] *to indemnify* and save Owner harmless against all claims for damages … growing out of [Contractor's] execution of the work, and at [Contractor's] own expense *to defend* any suit or action brought against Owner founded upon the claim of such damage." (Emphasis added.)

Despite the developer's requests that Weather Shield defend the matter, the company refused. The developer eventually settled the case with the homeowners, then sought the costs of defense from Weather Shield. The trial court found Weather Shield (and the framer) each liable for half the costs of defending the homeowners' claims alleging defective windows. But a jury found that Weather Shield was not negligent.

In analyzing the provision, the Court of Appeal noted that the Supreme Court has long instructed that it is the intent of the parties as expressed in the indemnity agreement that controls. It also noted that strict construction applies against the indemnitee, in this case the developer.

But, as the Court of Appeal put it, strict construction is not a license to ignore terms of the contract. It found that the contract's use of different verbs, "to indemnify" and "to defend," had to be given independent meaning. "To defend," promised "the rendering of a present service, … and not just reimbursement of defense costs retroactively determined." Given the obligation to provide a present service, the text could not be interpreted as stating an obligation contingent on an ultimate finding of an indemnity obligation, i.e., a finding of negligence. In essence, while Weather Shield won on indemnity, it lost on defense.

Will the Supreme Court agree? At the oral arguments before the high court recently, Weather Shield's counsel did not contest the notion that a contract could be used to create a present duty to defend that is not contingent upon a finding of negligence. And none of the questions asked by the justices suggested such an arrangement to be improper. In fact, counsel for the developer reminded the court that the Legislature has not made a present, non-contingent duty to defend void as against public policy.

Ambiguity in an indemnity provision defeats the indemnitee's claim.

So the issue is whether *this* contract was clear *enough* to create such an obligation. At oral argument, counsel for Weather Shield said "no" of course, suggesting that literal language be used to avoid what she described as a "stealth provision" in the disputed agreement. But the problem with such an argument, at least from the doctrinal perspective, is that in two cases finding a non-contingent duty to indemnify, *Continental Heller* and *Centex*, neither used literal language to express the sweeping obligation.

In *Continental Heller Corp. v. Amtech Mech. Serv.*, Inc., 53 Cal.App.4th 500 (1997), the indemnity provision required indemnification for a loss "in any way connected with the performance of the work" and the agreement applied to "any acts or omissions … or negligent conduct" of the subcontractor. When a valve exploded and injured a meat packing plant's employees, they sued Heller and Heller sued the subcontractor, Amtech. Although Amtech's work was not negligent, the defective valve that exploded was part of their work and the Court of Appeal observed that the phrase "any acts or omissions" had to be interpreted in light of the phrase "or negligent conduct." *Continental Heller* concluded that the phrase "any acts or omissions" thus manifested clear intent that the duty to indemnify was not contingent upon a finding of negligence. And installation of the valve, even though not negligently done, was still "connected with the performance of the work," thereby triggering Amtech's obligation.

Likewise, in *Centex Golden Construction Services v. Dale Tile Co.*, 78 Cal.App.4th 992 (2000), the Court of Appeal found language sufficiently clear to show that the subcontractor's negligence or fault was not a prerequisite to the indemnity obligation. The trial court found an indemnity obligation despite the jury finding that neither the sub nor the general contractor were negligent. The tile subcontractor's agreement stated that all work "shall be at the risk of Subcontractor exclusively" including claims covered by or incidental to the subcontractor's work, even those involving the "alleged or actual negligent act or omission" of the general contractor. As between the two non-negligent parties, the trial court decided and the Court of Appeal agreed that given such language, the subcontractor was obligated to indemnify the general contractor.

Neither *Continental Heller,* nor *Centex* used literal wording such as, "even if Subcontractor is not negligent, Subcontractor will still indemnify Contractor." And as the Court of Appeal put it, the "expression of an obligation without fault" is present in *Crawford* too, albeit in the second clause's "to defend any suit … *founded upon the claim* of such damage." "Such language is surely clear enough."

Crawford concluded that "this case, then, fits with both *Continental Heller* and *Centex* in involving language that necessarily contemplated obligations not dependent on an adjudication of subcontractor negligence." Thus, in deciding *Crawford*, the Supreme Court's willingness to conclude that the indemnity provision is not sufficiently clear would, at minimum, have to confront *Continental Heller* and *Centex* and perhaps even impliedly overrule them.

Ambiguity in an indemnity provision defeats the indemnitee's claim. At oral argument before the high court, Justice Kathryn Mickle Werdegar probed possible ambiguity by focusing on the words "such damage" in the second clause. It appeared Werdegar, like the dissenting justice below, was positing a link between the first clause's indemnity of "all claims for damages" and its implied, not literal, requirement of a finding of negligence. Under this interpretation, the words "such damage" in the following "defense clause" would be merely a reiteration of the *contingency,* i.e., damages-subject-to-negligence requirement stated in the first clause.

One problem with Werdegar's suggestion, however, is that it tends to make the second clause redundant. Another, more serious problem is that focusing solely on the words "such damage" ignores the two words that precede and condition them. The operative phrase is "founded upon *the claim* of such damage."

Justice Carlos Moreno noted this very point, pondering whether the critical issue is whether the words "founded upon" mean the same as "alleged" or "actual." The phrase "the claim" is much broader than *actual* damages, and as Moreno appeared to observe, "founded upon the claim of such damages" indicates a duty to defend a claim, however valid that claim, so long as it is attacking the subcontractor's work. The majority in *Crawford* made that very observation.

Justice Marvin Baxter asked counsel about the practicality of a present duty to defend, positing that the subcontractor should seize the opportunity to take charge of its own defense, and conflicts worked out, also defend the general. And as Justice Carol Corrigan observed, as did the Court of Appeal in Crawford, the subcontractor is only obligated to pay for defending the particular claims arising out of its work, not for defending any and all claims. Reality, however, is that in most cases, the combination of conflicts of interest, available insurance coverage (primary and additional insured) and multiple indemnitor parties will produce incentives for a *refusal* to defend. So at the end of the day, will Weather Shield have to pay? If your eyes have glazed over, you are probably in good company. As Justice David Sills noted in *Crawford*, "The comedy troupe Monty Python once made the subject of insurance — *insurance* of all things — the butt of a comedy skit. But we doubt that even comedians of their caliber would try to make "indemnity" the topic of comedy." But it won't be a laughing matter to many businesses, large and small, facing less than equal bargaining power and such defense obligations. Some businesses will not have the luxury of spreading such costs in their bid pricing. While, as Justice Joyce Kennard noted at the outset of oral argument, this case did not involve the usual David and Goliath situation, many cases will. It may well be that the Legislature, not the Supreme Court, will have the last word.

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