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Architect-Engineer's Duty to Defend Is Immediate Under Construction Indemnity Clause

By Helen Lauderdale

Indemnification clauses in construction contracts often state that one party to the contract – the "indemnitor" – will defend and indemnify the other party from particular types of claims. On construction projects, the "indemnitors" are typically the contractor and architect/engineer ("A-E") who agree to defend and indemnify the owner – the "indemnitee." If the owner is sued for construction defects or personal injury which implicate the contractor or A-E, the owner usually tenders the lawsuit to them for defense and indemnity.

Of course, having a contract right to a defense is not the same as actually receiving a defense. For example, a contractor/indemnitor attempting to avoid paying for defense costs could simply deny the tender of defense from the owner with the hope that when the underlying claim is resolved the defense obligations will be forgotten. If the owner/indemnitee had long memory and pressed to recover defense costs, the contractor/indemnitor could try to justify denying the tender by claiming that its defense obligations coincided with its indemnity obligations and that neither arose until a final determination was made that the underlying claim was one for which indemnity was owed.

However, the California Court of Appeal rejected this justification for denying an immediate defense earlier this year, in UDC – Universal Development vs. CH2M Hill, 181 Cal.App.4th 10 (2010). The Court of Appeal followed the Supreme Court's lead, in Crawford v. Weather Shield, 44 Cal.4th 541 (2008), holding that the right to a defense is separate and distinct from the right to indemnity under a typical indemnity clause. The court said the right to a defense arises immediately upon assertion of a claim, and the right exists regardless of whether the claim is ultimately proven to be legitimate. The facts in UDC demonstrate that a refusal to defend can be risky – and costly.

UDC was the developer of a condominium project. It contracted with CH2M Hill to provide engineering and environmental planning services for the project. Their agreement called for CH2M Hill to indemnify UDC for all claims "that arise out of or are in any way connected with any negligent act or omission" of CH2M Hill. It also required CH2M Hill to provide UDC with a defense to any action brought on any claim covered by the indemnity obligation. After the project was completed, the homeowners' association filed suit against UDC for construction

defects at the project due in part to negligent planning and design of open spaces and common areas. The complaint did not attribute negligence to any particular subcontractor but instead contained general allegations of deficient services by architects, engineers, and consultants.

UDC filed a cross-complaint for equitable, comparative, and express contractual indemnity against numerous subcontractors on the project, including CH2M Hill. It also tendered the defense of the homeowners' association's lawsuit to all cross-defendants. CH2M Hill declined the tender. UDC succeeded in settling all of the cross-claims except those asserted against CH2M Hill.

At trial, the parties agreed the jury would decide the factual issues of negligence and breach of contract and the court thereafter would apply the contract's indemnity provisions. The jury concluded CH2M Hill had **not** been negligent and had **not** breached its contract with UDC. With these favorable conclusions in hand, CH2M Hill argued to both the trial and appellate courts that it had no duty to defend UDC. According to CH2M Hill, such a duty could only arise after a finding that CH2M Hill had been negligent.

However, both the trial and appellate courts rejected CH2M Hill's argument. Instead, they ruled that a duty to defend is separate from a duty to indemnify, and the duty to defend necessarily occurs ***before*** the duty to indemnify arises and ***before*** any negligence determination is made. CH2M Hill also unsuccessfully urged the courts that it owed no duty to defend the developer because the homeowners' association's complaint did not specifically allege that CH2M Hill was negligent. The appellate court concluded that the developer's right to a defense did not turn on whether the plaintiff named a particular consultant or subcontractor in its complaint. The plaintiff's general allegations of negligent design services by engineers for the project, together with the developer's cross-complaint for indemnity attributing responsibility to CH2M Hill for the plaintiff's damages, were sufficient to trigger CH2M Hill's duty to defend.

The UDC and Crawford decisions eliminate any lingering uncertainty about when a contractor's or A-E's obligation to provide a defense arises: under a typically worded indemnity clause, the duty to defend requires action by a contractor or A-E when the defense of a claim is tendered. But whether these decisions will alter real world conduct by them or their insurance carriers and result in their taking an active responsibility for the defense of claims from the outset is far less certain.

Not so coincidentally, California just enacted a new law, sponsored by the American Council of Engineering Companies, which attempts to modify the UDC holding. The new statute applies to design professionals' contracts with public agencies executed after January 1, 2011. It declares that indemnity clauses in design contracts which indemnify the public agency, including the duty and cost to defend, are unenforceable **except** for claims that arise out of the designer's negligence, recklessness or willful misconduct. Private works contracts are not affected by this statute. Stats. 2009-10, Chpt. 510.

It's worth remembering that defense and indemnity rights are creatures of contract. If the contractor or A-E seeks to limit the obligation to provide a defense immediately upon the assertion of a claim, they can draft an enforceable contract clause that explicitly excludes such an

obligation. Otherwise the contractor or A-E would face the risk of paying for the owner's defense costs even if the contractor or A-E was ultimately exonerated from any fault in causing the claim.

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