



California Construction Law Update

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***Crawford* Redux II: The Legislature Speaks**

Crawford v. Weather Shield, Mfg. Inc. 44 Cal.4th 541 (2008) established a New World Order in construction litigation. The California Supreme Court created a new paradigm, shifting power to developers and general contractors and increasing the burden on subcontractors under express indemnity provisions of subcontracts. We previously reported on *Crawford* in March 2010, and on an appellate decision enforcing *Crawford* in February 2010. [Click here for a link to those prior reports.]

Most recently, the Fourth Appellate District held that an assignee of a construction contract could enforce the assignor's *Crawford* rights. *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.*, 191 Cal.App.4th 1394 (2011). There, Parsons Infrastructure built a chemical plant for Kerr-McGee Chemical Corporation under a contract in which Parsons agreed to indemnify Kerr-McGee. Kerr-McGee later sold its chemical plant to Searles Valley Minerals. After an employee of Searles Valley Minerals died in an industrial accident, his heirs sued Kerr-McGee. Searles Valley Minerals defended Kerr-McGee in the wrongful death action and then sued Parsons to recover Kerr-McGee's defense costs, as an assignee of the Parsons – Kerr-McGee construction contract. The Court of Appeal enforced Searles Valley Minerals' rights as assignee of the construction contract, over the objection that Kerr-McGee did not sustain any damages.

The lay of the land is that with rare exception, subcontractors and other indemnitors in construction contracts have an immediate duty to defend. They do so, in advance of an adjudication that they are liable for the injury or damage. They do so, even though they are ultimately adjudicated to have no liability. They do so, even for the assignee of a building owner's rights.

They also have a duty to pay judgments against (indemnify) an indemnitee, usually the building owner and/or general contractor. Historically, the balance of power favored the building owner/developer against the general contractor, and the building owner and the general contractor against subcontractors. Over the years, the California Legislature has attempted to ease the burden on subcontractors and other indemnitors.

It first enacted Civil Code Section 2782 in 1967, prohibiting express indemnity provisions in construction contracts that indemnified the sole negligence or willful misconduct of the indemnitee.

As construction defect litigation concerning residential construction became epidemic and saddled small subcontractors with oppressive defense and indemnity obligations, the California Legislature amended Section 2782, effective January 1, 2006, to outlaw "Type I" express indemnity agreements in favor of developers. ("Type I" is the name for express indemnity agreements that indemnify someone except for sole negligence.) Type I indemnity agreement in favor of general contractors were not forbidden.

Section 2782 was later amended effective January 1, 2008, to also prohibit Type I express indemnity agreements in favor of general contractors, but again it was limited to residential construction contracts.

Most recently, the California Legislature amended Section 2782, to prohibit Type I express indemnity agreements in virtually all construction contracts entered on or after January 1, 2013.

Whether an express indemnity agreement is or is not prohibited, the type of construction in which the provision is or is not prohibited, and the type of entity that may or may not be indemnified, thus depends upon the date on which the construction contract was entered.

We present the following chart, to help guide you through the maze. We provide highlights; the devil as always is in the details. Consult your legal advisor for definitive guidance. Our law firm is well equipped to provide you that definitive guidance.

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The Burnham Brown Guide to Enforceability of Indemnity Agreements By David H. Waters

Date Construction Contract Entered	Type of Claim Affected	Rule
January 1, 1967 to December 31, 2005	All Construction Contracts	<p>Type I express indemnity agreements permitted in all construction contracts.</p> <p>However, public entities may not be indemnified for their active negligence.</p> <p>In a Type I express indemnity agreement, the indemnitor (typically the subcontractor) must indemnify the indemnitee (typically, developer/building owner and/or general contractor) unless the indemnitee is 100% at fault for the injury or damage. Thus, if a developer is 99% at fault, the subcontractor pays 100% of the judgment—not just its 1%.</p> <p>Frequently, a general contractor may also have a Type I express indemnity obligation owed to the developer/building owner.</p>
January 1, 2006 to December 31, 2007	Indemnification of builders in residential construction defect claims.	<p>Type I express indemnity provisions in favor of a “builder” for “residential construction” construction defect claims are prohibited. The builder may not be indemnified for its negligence, or for the negligence of the builder’s other agents or independent contractors, or to extent claims do not relate to the indemnitor’s scope of work.</p> <p>Does not affect the builder’s right to an immediate defense.</p> <p>“Builder” is limited to a party that <u>sells</u> the residential units to the public and therefore can include not only developers, but developers/contractors. “Builder” does <u>not</u> include a general contractor who does not sell the residential unit.</p> <p>The prohibition of Type I indemnity in favor of a builder applies only to original construction of individual dwelling units. (E.g., does not apply to construction of apartment buildings or remodeling.)</p>
January 1, 2008 to December 31, 2008	Indemnification of general contractors in residential construction defect claims.	<p>Section 2782 amended to also prohibit Type I indemnity agreements in favor of a general contractor for construction defect claims, but still only with respect to original construction of individual residential units, even if the general contractor is not the “seller” of the units.</p> <p>General contractor may not be indemnified for its negligence, negligence of its other agents or subcontractors, or to the extent the claims do not arise out of the subcontractor’s scope of work.</p>

Date Construction Contract Entered	Type of Claim Affected	Rule
January 1, 2009 to December 31, 2012	Subcontractor's duty to defend builders or general contractors in residential construction defect claims.	<p>Section 2782 amended to provide that a subcontractor's duty to defend a builder or general contractor in construction defect litigation involving original sale of individual residential dwelling units arises after tender.</p> <p>Grants subcontractor the option (1) to defend the builder or general contractor with counsel of subcontractor's choice or (2) to pay a reasonable allocated share of the builder's or general contractor's defense costs.</p> <p>Statute remains limited to construction defect claims involving original construction of residential dwelling units.</p>
On or after January 1, 2013.	<i>Specifically:</i>	<p>Type I indemnity now prohibited in all construction defect litigation, both residential and commercial.</p> <p>Type I indemnity also prohibited in favor of property owners for bodily injury and property damage claims.</p> <p>Type I indemnity also prohibited for bodily injury and property damage claims involving commercial construction.</p>
	Public Agencies.	Public agencies may not be indemnified for active negligence by any contractor, subcontractor, or supplier of goods or services. [Formerly, this protection only extended to those with <u>direct</u> contracts with public agencies.]
	Owners of Private Real Estate.	<p>Type I indemnity prohibited in favor of owners of privately owned real property in all construction contracts. (If owner is not acting as contractor or supplier of materials or equipment.)</p> <p>Such owner may not obtain indemnity as to its active negligence or that of its employees.</p>
	All Commercial Construction Claims, including Bodily Injury, Property Damage and Construction Defect Claims.	<p>Section 2782.05 added: prohibition of Type I indemnity extended to all commercial construction contracts.</p> <p>Precludes Type I indemnity in favor of general contractors, construction managers or other subcontractors. Applies to bodily injury claims as well as to property damage.</p> <p>Specifically, express indemnity agreements by subcontractors may not extend to the active negligence or willful misconduct of a general contractor, construction manager or other subcontractor to the extent of the active negligence or willful misconduct of the general contractor, construction manager or other subcontractor, or to the extent the claims do not arise out of the scope of work of the indemnifying subcontractor.</p> <p>Exception: does not apply to direct contracts with public agencies or owners of privately owned real property, controlled by separate statutes discussed above.</p>

Date Construction Contract Entered	Type of Claim Affected	Rule
	Residential Construction Defect Claims	Unaffected. Prior statutes continue to apply. Which statute is applicable continues to depend on date contract entered.
	Residential Construction Bodily Injury and Property Damage Claims (except construction defect claims).	Type I <u>not</u> prohibited for bodily injury and property damage claims. However, residential construction defect claims continue to be controlled by prior statutes.

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