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Subcontractors Beware: Understand Your Liability and Defense Obligations in Contracts

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The building industry is no stranger to indemnity provisions commonly found in construction contracts, but the legal interpretation of these agreements may come as a surprise.

Many subcontractors don't realize the extent of liability when signing an indemnity agreement. They presume that they will defend only if they are found negligent. The unfortunate reality is, everything can be done correctly, but the subcontractor still has to defend and potentially pay a lot of money.

Indemnity agreements typically require the indemnitor, or subcontractor to "defend, indemnify and hold harmless" the indemnitee, the general contractor or developer, from third-party claims. As a subcontractor, it's reasonable to assume that you would only need to defend and/or indemnify the indemnitee if the claim arose because of a defect or problem with your work; however, that is often not the case. Under many construction subcontract agreements, the subcontractor is obligated to defend even if their work is perfect.

Court's Ruling on the Duty to Defend

In *Crawford v. Weather Shield Mfg., Inc.* (2008), the California Supreme Court held that the duty to defend claims embraced by the indemnity agreement arises immediately upon the proper tender of defense, and thus, before the litigation has determined whether indemnity is actually owed. (Id. at p. 558.) Claims on which a duty to defend is owed include those which at the time of tender allege facts that would give rise to a duty of indemnity. (Ibid.) In 2019, this decision was upheld in *Centex Homes v. R-Help Construction Company*, and took the *Crawford* decision a step further by clarifying the issue of whether the trier of fact (i.e. a jury) decides whether the indemnity agreement applies. The court in *Centex* made clear that this issue was not for the jury to decide, but was the court's decision to make as a matter of law.

The jury still decides whether the subcontractor is negligent or at fault, but the outcome of that determination does not change the obligation for the subcontractor. That means, under this type of indemnity agreement, it doesn't matter if the subcontractor was not at fault or negligent. All that matters is the claim or allegation "arises out of the work."

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For example, a subcontractor installs a concrete curb and does so exactly as it should be installed. An individual then trips over the curb and the contractor is sued. Under *Centex*, if the subcontractor has an agreement to "indemnify and defend any and all claims arising out of the work" the subcontractor still has to defend this claim. The court says that whether the subcontractor was at fault or not is irrelevant. They must defend the general contractor because the claim arose out of the subcontractor's work. That is what the contract requires as a matter of law.

Additionally, whether the subcontractor was also named in the complaint doesn't matter because under the indemnity agreement, it states the subcontractor will defend and indemnify the contractor for any claims out of the work – not any claims arising out of the subcontractor's negligence in the performance of the work (which is a different type of indemnity agreement that is obviously more beneficial to the subcontractor). While this may seem illogical to the subcontractor, this type of indemnity agreement is perfectly legal. The case can proceed to trial, and even if the subcontractor is exonerated because the work was done properly, the person still tripped over the subcontractor's installed curb and therefore, the subcontractor has to pay for the defense of the general contractor, in addition to defending themselves.

If I'm Found Not at Fault, Can I Get My Money Back?

As a subcontractor, you may be wondering if it's possible to recoup your defense costs after the matter is decided, and it's determined that you weren't negligent. The short answer is no. The defense duty arises upon tender of the potentially covered claim and lasts until the underlying lawsuit is concluded. To get your money back, you have to prove as the subcontractor that the claim was not embraced by the indemnity agreement as a matter of law, and until you've established that, you still have to defend both yourself and the general contractor/indemnitee.

Let's assume you defended the general contractor and incurred $20,000 in costs to establish that the claim didn't arise out of your work – the person did not trip over the curb you installed; he actually tripped over something else unrelated to the curb installation and the injury did not arise out of your work. Since the claim is not embraced by the indemnity agreement, do you get that $20,000 back? The courts in *Crawford* and *Centex* didn't answer this. They only care that it was "alleged to have arisen out of your work," which suggests that you don't get your money back. The courts did make it clear that even if you establish you weren't negligent, but the claim arose out of your work, i.e. he did trip over your curb. You don't get your money back.

The moral is, thoroughly read all contracts and ensure you understand the provisions. As a subcontractor, your hands may be tied since you want the work and feel like you have to agree to the contractor's indemnity terms. However, before you sign off, it's worth asking your lawyer to negotiate the terms and change the language to "any claim arising out of our negligence" versus the standard language of "any claim arising out of our work." Generally speaking, this avoids the scenario addressed above where you will have the duty to defend whether you are negligent or not.

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