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Current Battle Ground of Intervention – Additional Insured Carriers and Developers Seeking Unreimbursed *Crawford* Fees and Costs

I. Current backdrop of construction defect cases in California

Parties looking for money

As has been the case for many years with all civil lawsuits, most construction defect cases in California settle before starting trial. A typical construction defect lawsuit involves multiple single family homes or a condominium project against a large developer/general contractor (hereinafter "Developer"). During the inception of these cases, Plaintiffs made claims of construction defects as to every part of the house or condominium, the land they sit on and any and all common areas. Developers in turn filed cross-complaints against their subcontractors. And, ultimately, Developers and subcontractors worked together to fight against the Plaintiffs' construction defect claims and to settle these lawsuits.

Currently, many of the Developers are considered "paper general contractors" meaning that the Developer performs no type of labor in actually constructing the houses or condominiums. In terms of constructing the homes, the Developers hire the subcontractors, coordinate their work and provide supervision. In other words, Developers' work is considered passive in nature rather than active. And, over the years, Developers' written contracts with their subcontractors have evolved so that they contain very strong express indemnity language in favor of the Developer. After that, the California Supreme Court case of *Crawford vs. Weathershield Mfg., Inc.* (2008) 44 Cal.4th 541 which bolstered Developers' claims of express indemnity and also confirmed that a defense of the Developer must be provided. Accordingly, in addition, Plaintiffs' monetary damages, Developers began demanding and expecting reimbursement for their own attorneys' fees and costs in defending these actions against Plaintiffs.

In addition, to Developers' *Crawford* claims, they have always sought funding of their defense under additional insured endorsements issued by the subcontractors' primary insurers. For many years, Developers' defense has been paid for by many of

these additional insurers. However, with economy down turns in the housing market, subcontractors going out business and their insurers issuing different kinds of additional insured endorsements, there are far fewer additional insurers providing such a defense for the developers. Accordingly, for the few additional insurers now providing such a defense, they are seeking to intervene themselves into the lawsuits filed by the Plaintiffs in order to seek reimbursement from the subcontractors directly to obtain their fair share of the Developers' fees and costs pursuant to the legal theory of equitable subrogation in the seminal case of *Valley Crest Landscape Development, Inc. vs. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468.

Accordingly, there are now three parties to a construction defect case seeking money: Plaintiffs, Developers and Additional Insured Carriers.

The Parties with the Money

Essentially, the only parties and entities with the money to fund a settlement with Plaintiffs are Developers' primary insurers, subcontractors, subcontractors' primary insurers and additional insurers of subcontractors.

In the case of the Developer, assuming they have a primary insurer providing their defense, that insurer contribute to a settlement where the Developer is a paper general contractor only and is being defended by additional insurers. Further, many Developers have large self-insured retentions for their primary insurance policies which remain unmet. In those cases, their primary insurers are not participating in their defense and the Developers are very resistant to contributing to the settlement.

In the case of the subcontractors, most have primary insurers providing their defense from day one. The subcontractors' primary insurers are, for the most part, funding the settlements of Plaintiffs' construction defect claims and Developers' *Crawford* claims. Just like Developers, many subcontractors have self-insured retentions on their primary insurance polices which are unmet. In those cases, the subcontractors themselves are expected contribute money out of pocket.

In the case of the additional insurers for the subcontractors, while they may provide Developers a defense, they do not typically pay any indemnity on behalf of the Developer for Plaintiffs' construction defect claims.

Dwindling amount of subcontractors, additional insurers and lack of responses to *Crawford* tenders of defense and indemnity

With the collapse of the housing market in 2008, many Developers and subcontractors went out of business. In addition, subcontractors' primary insurance policies have stopped issuing additional insured endorsements for completed operations and instead have started issuing more endorsements for ongoing operations

only. Further, there seems to be a proliferation of self-insured retentions for not only Developers but also for subcontractors. And, with the lack of viable subcontractors, Developers' *Crawford* tenders of defense and indemnity go unanswered.

All of these factors have resulted in a smaller and smaller pool of parties and entities with the money to fund the settlement of these lawsuits.

Parties' rights to reimbursement

There is no question as to Plaintiffs' rights to pursue construction defect claims. There is also no longer any question about Developers' contractual *Crawford* claims. However, with anti-indemnity statutes soon impacting such claims, it will become more difficult for Developers to recover 100% of the attorneys' fees and costs in this manner.

In addition, with less and less additional insured endorsements being issued, those additional insurers which do provide a defense to Developers have increasingly been paying a bigger share, if not all, of Developers' attorneys' fees and costs. As mentioned above, they are intervening or threatening to intervene in these cases against the subcontractors who do not have participating additional insurers. There have been attempts made to oppose such intervention which have had limited success. There have also been attempts made to combat their right to equitable subrogation. The opposition makes the distinction between the difference of pursuing parties contractual rights versus non-party insurers seeking to be reimbursed under an insurance policy. It is often said that "coverage issues" are being brought into lawsuit. But, for purposes of this discussion, they are being allowed to intervene into these cases and bring their claims for equitable subrogation.

II. Obstacles and Suggestions for Resolution

Navigating each parties' rights

Because Developers seek reimbursement for their *Crawford* claims against the subcontractors in their cross-complaints, they put their attorneys' fees and costs in issue in the litigation. To that end, subcontractors are seeking copies of all invoices, Developers' primary insurance policies and additional insured policies. This is done primarily to determine how much of Developers' fees and costs have been reimbursed by insurance policies versus those that are out of pocket and how much of those fees and costs are incurred in the defense of construction defect claims arising from any particular subcontractors' scope of work. It is also done in order to determine if all of Developers' primary and additional insurers have been identified and a tender of defense made to them.

More and more, we see either separate written discovery to Developers or as part of Pre-Trial Orders or Case Management Orders. There have been attempts by

Developers to oppose production of their invoices based upon attorney client privilege, by seeking bifurcation of their *Crawford* claims and\or summary adjudication of their *Crawford* claims with varying levels of success. Because Developers' attorneys' fees and costs do not end until Developer is settled out of the case, these disputes necessarily cause Developers' attorneys' fees and costs to continue to be incurred and increase during the life of the lawsuit.

Additional insurers which have intervened into the case may also seek summary adjudication, conduct their own written discovery and have written discovery propounded upon them. Because they are new to these lawsuits and often intervene late into the lawsuit, a significant amount of time is spent so that they can get up to speed, respond to discovery and then participate in settlement negotiations. This delay and their intervention into the case, also increases the amount of Plaintiffs', Developers' and subcontractors' attorneys' fees and costs.

For the subcontractor, with three claims to defend against, their own attorneys' fees and costs continue to increase. This makes trying to keep their costs down and achieve settlement early more and more unlikely and difficult.

Problems with Resolution

The primary problem with achieving settlement is raising enough money from the subcontractors and their insurers for Plaintiffs, Developers and Additional Insurers. As stated above, there are less viable subcontractors, less primary insurers providing for their defense and less additional insurers paying for the Developers' defense.

With Developers being defended and paid through insurance dollars, they have little incentive to settle these cases early. Also, as stated above, they fight producing the evidence to support their *Crawford* claims. And, they have traditionally controlled the entire defense of these lawsuits and settlement negotiations with Plaintiffs even though they generally no longer pay for any of Plaintiffs' construction defect claims. That is, they pass through Plaintiffs' construction defect claims to the subcontractors. Whether or not these *Crawford* claims are covered by the subcontractors' primary insurers is also sometimes an issue. And, to complicate matters more, it is often the case that the total amount Developers' attorneys' fees and costs are higher than the amount it would take to settle Plaintiffs' claims. In this respect, the lawsuit is "upside down".

And, now, additional insurers are becoming more aggressive in seeking reimbursement. Subcontractors' primary insurers have reacted to these claims by demanding settlement terms including no reservation of additional insured rights, a cut-off date for additional insured obligations and hold harmless and indemnity from Developers for all additional insured claims for reimbursement. These demands have not been met with much success. But, in the end, this adds to the complexity and of the settlement negotiations.

Because of this, it has become increasingly difficult to settle all three claims for an early global settlement.

Creative Approaches to Settlement

Some ideas to achieve settlement include removing Plaintiffs from the equation and conversely removing Developers and additional insurers from the equation.

In an effort to obtain the most reasonable settlement with Plaintiffs, we need to stop the increase of Plaintiffs' own attorneys' fees, expert fees and costs. One way to do this, is to settle Plaintiffs' indemnity claims only. The Developers, subcontractors and their primary insurers would need to agree to settle in a piece meal fashion. That is, first agree to fund a settlement with Plaintiffs for a certain sum leaving Developers' *Crawford* claims and the additional insurers' claims to be resolved at later time. Competing against this need to settle with Plaintiffs early is the subcontractors' desire to resolve all three claims at the same time. This is due to the fact that the attorneys' fees and costs of the Developers, subcontractors and additional insurers will continue to be incurred. In addition, Developers are uncomfortable with leaving their *Crawford* claims to be resolved at a later time for fear that they will not be reimbursed at 100% without the pressure of Plaintiffs' claims still looming.

Conversely, another approach is to have the subcontractors settle directly with the Plaintiffs. In other words, take Developers out of the negotiating process altogether. In order to do this, subcontractors would need to obtain a complete release and dismissal for the Developer from Plaintiffs' claims. At this point, Developers would stop incurring attorneys' fees and costs in defending the action and additional insurers' obligations payment of those fees and costs would be cut-off and capped. This requires that the subcontractors and their primary insurers can come together to fund such a settlement. Once a settlement is completed with Plaintiffs, then the subcontractors can negotiate with Developers and additional insurers to resolve their claims.

A third approach would be for all the parties being discussed here today to form an alliance to fight off the plaintiff claims, but do so in a way the minimizes the costs. For the approach to be effective, the parties would need to negotiate a sharing of responsibility and retain one counsel up front. This approach would eliminate a majority of the discovery costs and the focus would be making the plaintiffs prove their case. The best circumstance for this approach would involve cases where plaintiffs' have little or no support for their claims. However, experience has shown that a significant number of cases fall into this category. The model would mirror what many Developers and insurers are doing today where the cases are being handled under an owner controlled insurance policy ("OCIP").