Duty to Defend — The Impact of *Universal Development, L.P. v. CH2M Hill* on California Design Professional Litigation

Douglas C. Reinbold

As all defense counsel, design professionals and insurance adjustors in the State of California know, the holding in *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal. 4th 541 is problematic for cases involving design professionals. Recently, California Court of Appeal for the Sixth District handed down a decision which expands upon the holding in *Crawford.* The case, *Universal Development, L.P. v. CH2M Hill,* 2010WL144353 ("*UDC*"), is an unfortunate one, and is an extension of *Crawford* [holding an indemnity clause might cause the indemnitor to provide a defense to the indemnitee even if the indemnitor was not itself found negligent] and *Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.* (1996) 49 Cal. App. 4th 1397 [allowing a contractor who had formed an "illegal bargain" in violation of licensing laws to collect "equitable indemnity" from the indemnitor]. While the *UDC* case is a California decision, given that it involves an issue of first impression, there is a possibility that decisions in other states regarding duty to defend issues could mirror the rationale used by the Court in *UDC.* As a result, this decision carries potential implications for design professionals across the country.

The *Crawford* Issue:

In *UDC,* CH2M Hill ("CH2M") agreed to provide engineering services for UDC, a developer and predecessor of Shea Homes. CH2M entered into a contract with UDC and, in doing so, accepted, the developer's standard indemnity provision. Unfortunately for CH2M, this was a key part of the problem in the case[1]. Although CH2M was not found "negligent" by the jury on the developer's Cross-Complaint, it was held liable for the developer's defense fees and costs under the aforementioned express indemnity clause. The Court determined that the indemnity clause was broad enough to allow that particular result pursuant to the holding in *Crawford.* It can be reasonably concluded from the Court's holding that unless the indemnitor (here it was CH2M) specifically has a provision in the indemnity language to prevent it from defending the indemnitee (here it was UDC) in the event of the indemnitor's lack of fault, then the indemnitor will have to pay for the indemnitee's defense fees and costs. Simply put, the language of the UDC indemnity provision was sufficiently like that in *Crawford. As a result,* CH2M was obligated to pick up the developer's defense, even though it was not found liable. This was true due to the incredibly broad language contained in the indemnity clause agreed to by CH2M. A potential solution to this problem is discussed below.

On a somewhat related note, CH2M contended that it could not be responsible for UDC's fees because the plaintiff Home Owners Association ("HOA") (which did not sue CH2M) did not specifically allege that CH2M was negligent and because CH2M's negligence was only pled by UDC in its' Cross-Complaint. The Court pointed out that the HOA's suit was broad in its allegations and did assert fault on the part of, among others, "engineers."[2] Also, UDC's Cross-Complaint for defense/indemnity against CH2M did assert the latter's negligence.

Illegality:

In addition to the foregoing, a central issue was whether or not UDC's "illegal bargain" with its contractors and design professionals precluded recovery. It appears that UDC failed to establish that it was properly licensed for the project in question. CH2M's lawyers argued that no recovery was permitted against CH2M because UDC acted in violation of the California Business and Professional Code and Contractor's Licensing

Laws. The argument failed because the Court found that UDC was only seeking defense costs as part of an "indemnity" situation, and that it was not attempting to obtain "compensation" for work performed. That result was arguably correct because of the 1996 *Ranchwood Communities* concurring/dissenting opinion of Justice McIntyre, which distinguished between an unlicensed contractor trying to recover damages, as opposed to only indemnity. In the instant case, UDC was only trying to obtain indemnity for claims it had to pay the HOA due to alleged defects in engineering work for which UDC believed CH2M was responsible, as opposed to trying to collect compensatory damages. While the logic of the holding in UDC appears flawed, based upon the "majority opinion" of *Ranchwood Communities*, this is the essence of the ruling on the unsuccessful illegality defense.

Verification Motion and Certificate of Merit (CCP §411.35):

While not directly germane to the duty to defend issues, the Court in *UDC* made an interesting ruling regarding the statutorily required certificate of merit in design professional litigation. CH2M filed a verification motion pursuant to Code of Civil Procedure Section 411.35 to ascertain the identity of the professional UDC consulted with in conjunction preparing its claim and for fees and costs. UDC did not file a certificate of merit along with its Cross-Complaint and CH2M did not demurrer on that basis. Ultimately, the Court held that, even though UDC should have filed a certificate of merit, CH2M failed to show that the failure had resulted in a further expense of any kind and denied their request for attorney's fees. As a result, the Court determined that the failure to file a certificate of merit was, essentially, a "no harm, no foul" situation.

The foregoing is problematic for design professionals and their counsel. It is essential that design professionals and their counsel recognize the need for a certificate of merit. Indeed, in the event that a certificate of merit is not filed in a case involving professional liability of a design professional, a demurrer must be immediately filed.

Conclusion:

The *UDC* decision is slated for publication. If that happens, it can be cited by all lawyers/Courts in the State; however, it is possible CH2M may seek a review of the decision by the California Supreme Court. While it is unclear whether the California Supreme Court would be interested in reviewing the fact specific indemnity provision issue arising from the payment of defense fees, the illegality/express indemnity issue (never ruled on by the California Supreme Court as of yet) could cause review of the decision to be granted. The *UDC* case is not as dangerous as it may seem as it pertains to the holding in *Crawford* because the result was the product of a poorly drafted (from CH2M's perspective) indemnity clause. Indemnity clauses are typically different from one another, and each provision requires independent analysis, in light of the holding in *Crawford.*

So, the logical question for the design professional is: what does the holding in *UDC* mean to me? The answer is that a broad indemnity agreement can have disastrous consequences should litigation occur. Here, CH2M was required to pay UDC's legal fees even though UDC was found not liable by the trial court simply because the language in the parties' indemnity agreement was broad enough to allow it to happen. Another problem is that your standard errors and omissions insurance policy may not cover the costs associated with indemnity. Simply put, this could mean that the owner can be found not liable and the design professional can still be saddled with the owner's legal fees, for which there may not be insurance coverage. It doesn't take an expert to see that this could have potentially devastating consequences for a design professional's business.

So, the next question is: what is the solution? The solution to the defense fees/costs indemnity problem is for the design professional to not sign a broad indemnification clause (like the one in *Crawford* or the one in *UDC*) or, if possible, remove it from the contract completely. At the very least, the indemnity provision agreed upon needs to make clear that if the indemnitor is not adjudged liable, by way of final judgment, the indemnitor need not pay the indemnitee's fees and costs. *Crawford* allows an indemnitor to draft such protective language. Had CH2M done that, the jury's finding of "no fault" would have ended the matter. Consequently, the holding in *UDC* is a cautionary tale for all design professionals; beware broad indemnity language.

---

1. The offending clause in question calls for indemnification when claims against UDC "arise out of or are in any way connected with a negligent act or omission by CH2M."
2. *See* Page 5 of opinion.

Douglas C. Reinbold is an attorney with Byron & Edwards, APC, a boutique law firm in San Diego, California specializing in the representation of design professionals. Mr. Reinbold's practice focuses on General Litigation, Insurance Defense, Professional Negligence, and the Defense of Architects and Engineers.

For more information on this or other topics, Mr. Reinbold can be reached at 619-400-5880, dreinbold@bemapc.com or visit Byron & Edwards, APC's website at www.bemapc.com.
