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THE DUTY TO DEFEND UNDER NON-INSURANCE INDEMNITY AGREEMENTS:
CRAWFORD V. WEATHER SHIELD MANUFACTURING, INC. AND ITS TROUBLING CONSEQUENCES FOR DESIGN PROFESSIONALS*

Gilson S. Riecken**

I. INTRODUCTION

In Crawford v. Weather Shield Manufacturing, Inc.,¹ the California Supreme Court considered a subcontractor's duty to provide the legal defense for a developer under an indemnification and defense agreement.² The Crawford court unanimously held that unless parties expressly provide otherwise, every contract to indemnify a person includes a duty to defend that person in any lawsuit potentially embraced by the indemnity.³ This defense duty arises “before the litigation to be defended has determined whether indemnity is actually owed . . . [and], therefore cannot depend *The case UDC-Universal Dev. v. CH2M Hill applied Crawford to an engineering firm and did not require the plaintiff to have specifically named the firm to trigger its duty to defend a developer under an indemnity and defense agreement. UDC-Universal Dev. v. CH2M Hill, No. H033610, 2010 WL 144353, *3–9 (Cal. Ct. App. Jan. 15, 2010). This case was decided after this article was written and thus was not included, but it is consistent with the views expressed herein.

**Distinguished Research Adjunct in Law (2008–2009), Santa Clara University School of Law. I wish to specifically acknowledge Dean Donald Polden and the faculty and staff of the Santa Clara University, School of Law for providing the resources to research and write this article, and Professor Marina Hsieh for encouraging me to pursue the research. I also wish to acknowledge the law librarians at the Heafey Law Library for their assistance on historical and background research for this article, and Santa Clara University for providing me with the opportunity to research and write it.

2. Id.
3. Id. at 434.

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on the outcome of that litigation." The Crawford court affirmed a judgment requiring the subcontractor to pay the developer's defense costs, notwithstanding a jury verdict exonerating the subcontractor of all fault.5

There are two bases upon which the Crawford court could have held the innocent subcontractor responsible for the developer's defense: either the defense duties spelled out in the subcontract's defense clause,6 or a statutorily implied duty that the court said exists by default under every indemnity clause.7 Unfortunately for subcontractors, and particularly for design professionals, the latter basis appears more central to the decision.

This article examines the Crawford decision and its potential consequences, and emphasizes its particular impact on design professionals. Part II begins with a brief summary of the Crawford decision8 and proceeds to test whether the decision actually constitutes the "narrow issue" of contract interpretation9 that the court purports to have undertaken.10 Part III analyzes the Crawford court's stated bases for imposing defense liability upon the subcontractor and argues that the statutory basis appears more central to the holding.11 This section also discusses the treatment of the defense duty in previous California cases dealing with construction law, including a fourteen-year-old appellate decision disapproved by Crawford,12 and examines whether other jurisdictions might similarly impose a defense duty on non-insurance

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4. Id. (emphasis added).
5. Id. at 427.
6. Id. ("In the contract, Weather Shield promised (1) 'to indemnify and save [Peters] harmless against all claims for damages[,] . . . loss, . . . and/or theft . . . growing out of the execution of Weather Shield's work,' and (2) 'at its own expense to defend any suit or action brought against [Peters] founded upon the claim of such damage[, . . . loss, . . . or theft."")(brackets in original omitted)).
7. Crawford v. Weather Shield Mfg., Inc., 187 P.3d 424, 431 (Cal. 2008) ("Finally, [Civil Code] section 2778, unchanged since 1872, sets forth general rules for the interpretation of indemnity contracts, 'unless a contrary intention appears.' If not forbidden by other, more specific statutes, the obligations set forth in section 2778 thus are deemed included in every indemnity agreement unless the parties indicate otherwise.").
8. See infra Part II.A.
9. See infra Part II.B.
11. See infra Parts III.A–B.
12. See infra Parts III.C–D.
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indemnitors.³

Part IV discusses the particular problems that Crawford presents for design professionals,⁴ focusing on the differences between coverage under designers' professional liability insurance as opposed to the general liability insurance generally relied upon by other parties in construction projects.⁵ Part V compares the defense duty recognized in non-insurance agreements to the duties of an insurer and concludes that, despite the court's statements to the contrary concerning interpretation of insurance and non-insurance agreements,⁶ Crawford imposes duties on indemnitors that are at least as broad as those of an insurer. Part VI examines the Crawford court's statements that (a) statutes limiting indemnity agreements for residential projects and public works mitigate the exposure of subcontractors and designers to defense duties on such projects,⁷ and that (b) the statute of repose⁸ will minimize their exposure under contracts that predate those statutes.⁹ Part VII contrasts the Crawford court's vision of designers' ability to effectively understand and negotiate indemnity agreements with the actual capabilities and limitations of typical design businesses.¹⁰

Part VIII considers and rejects arguments that would dismiss the statutory basis for imposing the defense duty as dictum.¹¹ Finally, Part IX proposes alternative judicial and

¹³. See infra Part III.E & app. B.
¹⁴. See infra Part IV.
¹⁵. See infra Part VI.A.
¹⁶. See infra Part V.
¹⁷. Crawford v. Weather Shield Mfg., Inc., 187 P.3d 424, 440 (Cal. 2008) (citing CAL. CIV. CODE § 2782(c)-(e) (2009)). The cited subdivisions address only indemnification provided by "subcontractors" and do not mention design professionals. See CAL. CIV. CODE § 2782(c)-(e). Whether the statute would apply to a designer working under a subcontract to a general contractor or builder is thus unclear. See id. For the purposes of this article, the author has assumed that the statute applies to design professionals and the analysis in Part VI explores the gaps that exist even with the statute's protection. However, if the statute does not apply to design professionals, then designers have even less protection against the imposition of liability for damages that they did not cause.
²⁰. See infra Part VII.
²¹. See infra Part VIII. Although the agreement at issue in Crawford contained strong language requiring the subcontractor to defend the developer without regard to fault, the opinion views that language as "confirming" a defense duty rather than establishing the basis for imposing a defense duty.
legislative solutions for restoring the default defense duty owed under non-insurance indemnity agreements to an obligation that more closely matches parties' reasonable expectations.22

II. CRAWFORD V. WEATHER SHIELD MANUFACTURING, INC. AND INDEMNITY CONTRACTS IN CALIFORNIA

One court has defined indemnity as "the obligation resting on one party to make good a loss or damage another party has incurred."23 In other words, under an indemnity agreement, one party agrees to protect another by assuming some liability that the other party might otherwise incur. The party providing protection is the "indemnitor"; the protected party is the "indemnitee"; and the act of providing protection is "indemnification."24 Generally, an indemnity promise specifies whether the indemnitor's duties extend to protecting the other party from: (1) all liabilities, including those caused by the indemnitee alone; (2) all liabilities, including those caused in part by the indemnitee, but excluding those caused solely by the indemnitee; or (3) only those liabilities caused by the indemnitor.25

Absent an indemnity agreement, the common law may impose a duty of indemnity: "[t]he duty to indemnify may arise, and indemnity may be allowed in those fact situations where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought."26 This "equitable indemnity" doctrine stems from the principle that everyone is responsible for the consequences of his or her own wrongs—if others must pay damages that a tortfeasor should have paid, they may then recover from that tortfeasor.27 Following the adoption of

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22. See infra Part IX.
24. BLACK'S LAW DICTIONARY 837 (9th ed. 2009).
27. Id.
comparative fault principles in California,\textsuperscript{28} equitable indemnification has essentially held that anyone engaging in tortious conduct is responsible to others for the consequences of that conduct.\textsuperscript{29} When a person incurs costs in defending him or herself against third-party claims caused by the tortious conduct of others, equitable indemnity permits recovery from the tortfeasors for these necessary defense costs.\textsuperscript{30}

Although the indemnity agreement at issue in \textit{Crawford} imposed greater indemnity duties on the subcontractor than would have applied under equitable indemnification principles alone,\textsuperscript{31} it did not require the subcontractor to indemnify the developer/builder if the subcontractor was without fault.\textsuperscript{32} The court nonetheless held the subcontractor liable for the developer's defense irrespective of fault under the principle that such a duty exists under "every indemnity contract, unless the agreement provides otherwise."\textsuperscript{33} This duty, the court said, arises upon tender of defense by the indemnitee if the claim contains allegations that, if proven,

\begin{itemize}
\item 28. Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).
\item 29. Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 912 (Cal. 1978) (modifying California's equitable indemnity rule "to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis."). For a more detailed discussion of the evolution of equitable indemnity in California, see 6 B.E. WITKIN, WITKIN LEGAL INST., SUMMARY OF CAL. LAW § 1357 (10th ed. 2005).
\item 30. Under the doctrine of "tort of another," California law allows recovery of defense costs when the party seeking the reimbursement (1) did not engage in wrongful conduct of its own, (2) was sued for the wrongful conduct of the party from whom it seeks indemnity, and (3) requested a defense from that party. California Code of Civil Procedure section 1021.6 provides:
\begin{quote}
Upon motion, a court after reviewing the evidence in the principal case may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person and (b) if that indemnitor was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so, and (c) that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict.
\end{quote}
\textsc{cal. civ. proc. code} § 1021.6 (2009).
\item 32. Id. at 428; see also § 1021.6.
\item 33. Crawford, 187 P.3d at 434.
\end{itemize}
would fall within the scope of the indemnity.\textsuperscript{34}

\textbf{A. The Trial Court Decision in Crawford}

The underlying lawsuit in \textit{Crawford} involved a homeowner, Kirk Crawford, and other home buyers who sued their subdivision's developer/contractor, J.M. Peters Co. ("Peters"), claiming a broad spectrum of construction defects, including framing problems and window leakage.\textsuperscript{35} Peters then filed cross-claims for indemnity against its various subcontractors and design professionals.\textsuperscript{36} Along with its indemnity cross-claims, Peters also requested that those same subcontractors and designers defend Peters against the homeowners' claims.\textsuperscript{37}

The subcontracts contained a provision under which each subcontractor/designer agreed:

- [1] to indemnify and save [Peters] harmless against all claims for damages to persons or to property and claims for loss, damage and/or theft of homeowner's personal property growing out of the execution of the work, and [2] at his own expense to defend any suit or action brought against [Peters] founded upon the claim of such damage or loss or theft . . . . \textsuperscript{38}

Before trial, Peters settled with the homeowners, design professionals, and all subcontractors except two: Darrow Framing, and Weather Shield Manufacturing, Inc.\textsuperscript{39} A jury returned an approximately one million dollar verdict against Darrow and exonerated Weather Shield of all fault.\textsuperscript{40} Because neither Darrow nor Weather Shield had provided Peters's defense, the trial judge then conducted a bench trial to determine their respective liabilities for Peters's cost to defend against the homeowners' lawsuit.\textsuperscript{41} The judge held both subcontractors jointly responsible for seventy percent—the portion attributed to the alleged framing and window

\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.} at 427–28.
\textsuperscript{36} \textit{Id.} at 428.
\textsuperscript{37} \textit{Id.} at 428 n.2.
\textsuperscript{39} \textit{Crawford}, 187 P.3d at 428.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.} at 428–29.
issues—of Peters's $375,069 defense costs, assessing half of that amount against each cross-defendant.\textsuperscript{42} Weather Shield appealed, arguing that it should have no liability for Peters's defense because the jury had found it was without fault and owed Peters nothing by way of indemnification.\textsuperscript{46}

B. Is Crawford a Matter of Narrow Contract Interpretation?

Initially, in framing the issues before it, the \textit{Crawford} court characterized its opinion as a simple matter of contract interpretation:

\begin{quote}
We consider whether, by their particular terms, the provisions of a pre-2006 residential construction subcontract obliged the subcontractor to defend its indemnitee—the developer-builder of the project—in lawsuits brought against both parties, insofar as the plaintiffs' complaints alleged construction defects arising from the subcontractor's negligence, even though (1) a jury ultimately found that the subcontractor was not negligent, and (2) the parties have accepted an interpretation of the subcontract that gave the builder no right of indemnity unless the subcontractor was negligent.\textsuperscript{44}
\end{quote}

The court expressed its apparent intent to address the narrow issue of how the subcontract's express terms should be interpreted:

\begin{quote}
We granted review, limited to the following issue: Did a contract under which a subcontractor agreed "to defend any suit or action" against a developer "founded upon" any claim "growing out of the execution of the work" require the subcontractor to provide a defense to a suit against the developer even if the subcontractor was not negligent?\textsuperscript{45}
\end{quote}

Yet, despite its stated intent to undertake a contract-based analysis of the defense clause, the court based its decision on an analysis of the statute that governs interpretation of the indemnity clause.\textsuperscript{46} Under a contract-based approach, a court would likely begin with the language of the subcontract's express \textit{defense clause} and then examine whether any

\textsuperscript{42} Id. at 429.
\textsuperscript{43} See id. at 429–30.
\textsuperscript{44} Id. at 427 (emphasis added).
\textsuperscript{46} See infra note 53 and accompanying text.
statute, the indemnification clause, or public policy prevented its enforcement.47 By contrast, a court undertaking a statute-based approach would first determine the defense duty owed under statutes governing interpretation of the indemnity clause, and then determine whether an express defense clause changed that duty.48

III. THE INDEMNITOR'S DEFENSE DUTY: SET BY STATUTE AND QUALIFIED BY CONTRACT, OR SET BY CONTRACT AND QUALIFIED BY STATUTE?

The Crawford court began its analysis by acknowledging that parties have great freedom to define their relationship by contract and that “[w]hen the parties knowingly bargain for the protection at issue, the protection should be afforded.”49 Furthermore, parties may freely negotiate both indemnity and defense terms and may specify whether those obligations apply with or without regard to the indemnitor’s negligence.50 Though the Crawford court initially framed the issue as merely a matter of contractual interpretation, its analysis centered instead on the defense duties arising under California Civil Code section 2778.51 When the court finally turned to the subcontract language itself, it focused on whether the bargained-for defense obligation differed from the statutory duties that it held otherwise exist in every

47. Crawford, 187 P.3d at 430–31 (discussing the rule of enforcing the bargain negotiated by contracting parties, subject to statutory and public policy considerations).

48. Id. at 431 (discussing the application of California Civil Code section 2778 to indemnity contracts). The terms “contract-based” and “statute-based” do not appear in the decision, but are used in this article to describe the alternative approaches for an analysis that involves both the statutes that govern contract interpretation and the contract itself.

49. Id. at 430.

50. Id. (citing Rossmoor Sanitation, Inc. v. Pylon, Inc., 532 P.3d 97, 104 (Cal. 1975)).

51. See id.


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indenmity contract.\footnote{Crawford, 187 P.3d at 431–32.}

A. The Crawford Court Found a Default Defense Duty Within Every Indemnity Agreement

The Crawford court noted that the freedom of parties to allocate indemnity and defense obligations is subject to certain prohibitions and limitations, none of which applied to the Peters/Weather Shield subcontract.\footnote{See discussion infra Part III.B.} The court then turned to section 2778 to determine the statutorily defined defense duty owed to Peters under the subcontract's indemnity clause.\footnote{Crawford, 187 P.3d at 431.} Citing the statute, the court stated that "'unless a contrary intention appears[,]... obligations set forth in section 2778 thus are deemed included in every indemnity agreement.'"\footnote{Id. (quoting CAL. CIV. CODE § 2778 (2009))} After concluding that section 2778 establishes a default defense duty for every indemnitee, the Crawford court thereafter examined the subcontract for evidence of any contrary intent.\footnote{Id. at 434–35.} This approach—implying a duty to defend within every indemnity \textit{unless expressly disclaimed} by the contract—conflicts with the court's own acknowledgement that parties should be free to contract as they please and that judges should simply hold the parties to their bargained-for agreement.\footnote{See supra notes 49–52 and accompanying text.}

In delineating the defense obligations imposed by section 2778, the Crawford court noted "that a promise of indemnity against claims, demands, or liability 'embraces the costs of defense against such claims, demands, or liability' insofar as such costs are incurred reasonably and in good faith.'"\footnote{Crawford, 187 P.3d at 431 (citing § 2778(3)).} It further noted that indemnitees are "'bound, on request of the [indemnitee], to defend actions or proceedings brought against the [indemnitee] in respect to the matters embraced by the indemnity,' though the indemnitee may choose to conduct the defense."\footnote{Id. (citing § 2778(4)).}

Before parsing section 2778, the Crawford court concurred with the appellate court's observation that the
Peters/Weather Shield subcontract included an unambiguous promise by Weather Shield to defend any suit against Peters that was "founded upon' claims alleging damage or loss arising from Weather Shield's [negligence]." Thus, independent of any defense owed under the indemnity, Weather Shield also had a contractual obligation to defend such a suit, regardless of whether Weather Shield was later determined to have been negligent.

The Crawford court observed that an obligation to defend differs from an obligation to reimburse for defense costs following resolution of claims, noting that the defense "necessarily arises as soon as such claims are made against the promisee, and may continue until they have been resolved." While section 2778(3) states that a promise to indemnify "embraces the costs of defense" against claims for matters covered by the indemnity, section 2778(4) separately specifies the duty to provide the defense "upon the indemnitee's request, [in] proceedings against the latter 'in respect to the matters embraced by the indemnity.'" The court thus saw Peters's demand for defense as triggering a separate and immediate defense obligation—a duty beyond reimbursement for costs incurred in an indemnitee's own defense. Additionally, section 2778(4) requires an indemnitor to defend its indemnitee in good faith upon tender of the defense—even if not expressly stated in the contract.

Drawing from prior decisions that had considered an "indemnitor's duty to defend an indemnitee upon the latter's

62. Id.
63. Id.
64. Id. at 432.
65. Id. at 431–32 (emphasis added).
66. See § 2778(3); Crawford, 187 P.3d at 432.
67. Crawford, 187 P.3d at 432 (quoting § 2778(4)).
68. See id. at 433–34 (citing Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherungen A.G., 476 P.2d 406, 414 (Cal. 1970) (holding that, while an "indemnitor is required to defend matters embraced by the indemnity if . . . requested to do so by the indemnitee," the existence of a contrary intent in the contract negated that duty)).
70. Id. at 433 (citing Buchalter v. Levin, 60 Cal. Rptr. 369, 373 (Ct. App. 1967)).
request, the Crawford court concluded that subsection four of section 2778 "places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemnitee’s defense, if tendered, against all claims 'embraced by the indemnity.'" While an indemnitee may seek to recover its defense costs following an indemnitor’s failure to defend a tendered claim, the claim is “nonetheless distinct and separate from the contractual obligation to pay an indemnitee’s defense costs, after the fact, as part of any indemnity owed under the agreement.”

B. There Are Other Statutes that Limit Indemnity Agreements in Cases Involving Residential Construction, Contracts with Public Entities, and Instances of an Indemnitee’s Sole Negligence

The Crawford court recognized that other statutes limit contractual indemnity in the context of design or construction agreements. With regard to residential work performed under contracts entered into after the statute went into effect, section 2782 voids "any term in such a contract that obliges a subcontractor to indemnify certain other project participants, ‘including the cost to defend,’ against construction defect claims ‘to the extent’ the claims ‘arise out of, pertain to, or relate to’ the negligence of those other entities." Similarly, section 2782.8(a) prevents public entities from requiring indemnification—expressly including defense costs—from design professionals “except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional." These statutory limits, however, do not apply outside the arenas of residential

71. See id. at 434; see also supra notes 50–52, 68–70 and accompanying discussion.
72. Crawford, 187 P.3d at 434.
73. Id. (citing CAL. CIV. CODE § 2778(3) (2009)).
74. Id. at 440.
75. Id. (citing § 2782(c)–(d), as added by Stats. 2005, ch. 394, § 1 and (e), as added by Stats. 2007, ch. 32, § 1). It is notable that the language of this statute bars only indemnity agreements that would require the indemnitor to indemnify the developer/builder for its own negligence. It does not address a situation such as that in Crawford, where the defense costs incurred by the developer (and imposed fifty percent on Weather Shield) arose, according to the jury, due thorough no negligence on the indemnitor's part. See generally id.
76. CAL. CIV. CODE § 2782.8(a) (2009).
construction or public works contracts, and they only cover projects performed under relatively recent agreements.

Section 2782 also prohibits any party to a construction agreement from requiring indemnification for that party's own sole negligence or willful misconduct. This prohibition provides the only statutory limit on indemnification cited by the court that applies to commercial, industrial and other private, non-residential design and construction projects.

C. Crawford’s Rejection of a Narrow Defense Duty Raises the Possibility that an Insurance-Like Defense Duty Exists in Every Non-Insurance Indemnity Contract

In concluding its discussion of Weather Shield’s liability for Peters's defense costs, the Crawford court formally disapproved of a case that had imposed a narrower interpretation of section 2778. Weather Shield and its amici curiae pointed to Regan Roofing Co. v. Superior Court to argue that an indemnitor owed its indemnitee a defense only to the same extent as its indemnification duty. Regan Roofing concerned facts that were similar to those in Crawford: construction defect claims by homeowners against a developer and its subcontractors, and the developer's tender of defense to its subcontractors. Upon the developer’s motion for summary judgment, the trial court in Regan

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77. Id. § 2782(a); id. § 2782.8(a).
78. The limitations pertaining to residential work took effect for contracts entered into starting January 1, 2006, and those pertaining to public projects apply to contracts entered into starting January 1, 2007. See supra notes 75–76 and accompanying text.
79. See § 2782(a); see also id. § 1668.
82. See Crawford, 187 P.3d at 438; see also Amicus Curiae Brief in Favor of Defendant, Appellant and Petitioner Weather Shield Manufacturing Inc., by The California Framing Contractor's Ass'n at 2, Crawford, 187 P.3d 424 (No. S141541).
83. The contracts in Regan Roofing required the subcontractors to indemnify and hold the developer harmless from "liability, cost or expense of any nature or kind arising out of or in any way connected with Subcontractor's performance, . . . save and except only such liability, cost or expense caused by [the developer's] sole negligence or sole willful misconduct." Regan Roofing Co., 29 Cal. Rptr. 2d at 415. The subcontracts contained a defense clause similar to that in the Peters/Weather Shield subcontract, requiring the subcontractor to defend at its own expense "[i]n the event any suit on any claim is brought against [the developer], subject to the [indemnity] provision." Id.
Roofing agreed with the developer that the indemnity provision included an enforceable duty to indemnify the developer for its own negligence, but ruled that any determination as to indemnity owed was premature because the developer had yet to incur any judgment or settlement payment.\(^{84}\) In a manner similar to the Crawford court, however, the trial judge held that section 2778 imposed a defense duty that applied as soon as the developer tendered its defense to the subcontractor and without regard to the subcontractor's actual indemnity liability.\(^{85}\)

Regan Roofing Company appealed both the indemnity enforceability and defense duty rulings.\(^{86}\) Though the Court of Appeal agreed with the lower court's ruling as to indemnity,\(^{87}\) it reversed the finding that the subcontractor had an immediate duty to defend the developer upon its tender and without regard to the subcontractor's actual indemnity liability.\(^{88}\)

Fourteen years later in Crawford, the California Supreme Court directly addressed Regan Roofing for the first time\(^{89}\) and rejected its interpretation of section 2778. The court reasoned that the Regan Roofing court assumed that,

\(^{84}\) Id. at 416.

\(^{85}\) Id.

\(^{86}\) Id. at 414. Regan Roofing Company also appealed on the ground that the trial court's ruling was procedurally improper "because it [did] not completely dispose of any cause of action or defense of the cross-complaint." Id. Regan Roofing challenged the ruling on the substantive grounds that the trial court (1) "improperly equated contractual indemnitors . . . with insurance companies, thus improperly expanding the duty to defend"; and (2) misconstrued the subcontract's indemnity clause. Id. Because the Court of Appeal disposed of the case on the procedural grounds, it declined to reach the substantive arguments. Id.

\(^{87}\) See id. at 419.

\(^{88}\) The Regan Roofing court explained:

Summary adjudication of the duty to defend and its relationship to the duty to indemnify (i.e., the scope of "the matters embraced by the indemnity") is premature. No determination has yet been made as to whether the subcontractors were negligent in the performance of their work, giving rise to a duty to indemnify and a related duty to defend. [The developer] has not clearly established that under this indemnity clause, the duty to defend against claims of liability is entirely free-standing of the duty to indemnify for liability arising out of a subcontractor's negligence.

\(^{89}\) A Westlaw Keycite "citing references" of Regan Roofing, conducted on May 26, 2009, found no previous citation by the California Supreme Court to the case. Appendix C summarizes the complete results of that Keycite.
under section 2778(4) and unless the agreement at issue clearly provided otherwise, an indemnitor's duty to defend upon request is not "free-standing," but extends only to claims as to which indemnity is actually owed. To this, the Crawford court responded:

[T]he duty to defend upon the indemnitee's request, as set forth in subdivision 4 of section 2778, is distinct from, and broader than, the duty expressed in subdivision 3 of the statute to reimburse an indemnitee's defense costs as part of any indemnity otherwise owed. Moreover, the subcontracts at issue in Regan Roofing, like the one before us here, did explicitly indicate a separate and distinct duty to defend the indemnitee, at the indemnitor's own cost and expense, against suits raising claims covered by the indemnity. That duty—like Weather Shield's in this case—necessarily arose when such a claim was made against the indemnitee, and thus did not depend on whether the conditions of indemnity were, or were not, later established.

The last two sentences quoted above appear to evidence an intent by the Crawford court to base its decision on the subcontract's specific, separate defense clause. But such a narrow reading of the case would ignore the lengthy analysis of section 2778 that preceded the quoted sentences. The court read the subcontract's broad defense clause as confirming that the parties had intended to bind the subcontractor to the same defense duties that the court said already existed under section 2778. In other words, rather than expressing a "contrary intent," the defense clause in the subcontract confirmed Weather Shield's obligation to provide Peters precisely what the statute required: a defense immediately upon tender, and without regard to Weather

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90. The Regan Roofing court used the term "free-standing" to describe a defense obligation that is not tied to actual indemnity liability. Regan Roofing Co., 29 Cal. Rptr. 2d at 419.
92. Id.
93. See id. at 431–38.
94. Id. at 434 ("Here, the subcontract at issue not only failed to limit or exclude Weather Shield's duty 'to defend' [Peters], as otherwise provided by subdivision 4 of section 2778, it confirmed this duty." (emphasis added)).
Shield's actual liability under the indemnification clause.\footnote{Crawford, 187 P.3d at 435.}

\textbf{D. Other Published Opinions, Both Before and After Crawford, Provide Little Guidance on the Defense Duty Owed Under Indemnity Agreements}

While the \textit{Crawford} court's disapproval of \textit{Regan Roofing} surprised many observers, it is not a departure for the California Supreme Court. Rather, it appears that, through \textit{Crawford}, the court sought to correct what it viewed as a mistake that could not otherwise be remedied.

Before \textit{Crawford}, California's lower courts (and a few non-California courts applying California law) cited \textit{Regan Roofing} fifty-seven times:\footnote{See supra note 89 and accompanying text.} thirty-two times in California Court of Appeal decisions, eleven times in California trial court opinions, twelve times in federal court opinions (ten in California, and one each in Arizona and Texas), and one opinion each from state trial courts in Maryland and Vermont.\footnote{Of the thirty-two California appellate decisions, Westlaw classifies twenty-six as providing a “positive” treatment of \textit{Regan Roofing}, and characterizes only six as providing “negative” treatment. The California Supreme Court had never cited \textit{Regan Roofing} before \textit{Crawford}. Furthermore, many of the lower court opinions that considered \textit{Regan Roofing} never made it into the official reports (leaving them generally uncitable as authority), including eleven of the twenty-six appellate opinions giving it} Of the thirty-two California appellate decisions, Westlaw classifies twenty-six as providing a “positive” treatment of \textit{Regan Roofing}, and characterizes only six as providing “negative” treatment. The California Supreme Court had never cited \textit{Regan Roofing} before \textit{Crawford}. Furthermore, many of the lower court opinions that considered \textit{Regan Roofing} never made it into the official reports (leaving them generally uncitable as authority), including eleven of the twenty-six appellate opinions giving it

\footnote{Id. As previously noted, the figure of six does not include the \textit{Crawford} Court of Appeal opinion.}

\footnote{See supra note 89 and accompanying text.}

\footnote{See infra app. C.}

positive treatment, and three of the six negative opinions. Another three positive treatments occur in "depublished" opinions, including the intermediate-level decisions in Crawford and one other case accepted for review by the California Supreme Court.

California courts have not published any further authority to interpret Crawford. As of the writing of this article, California state and federal courts have cited Crawford sixteen times—twice by the California Supreme Court, eight times by California Courts of Appeal, and six times in U.S. district court opinions. Neither of the California Supreme Court cases referenced Crawford for its treatment of the defense obligation, so those cases offer no further guidance to lower courts. Seven of the eight

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103. A procedure unique to the state allows the California Supreme Court to "depublish" lower court opinions:

California's unique procedure for the superseding and decertifying of opinions, or "depublication" as it is more commonly known, causes a great deal of confusion. The term "depublished" is commonly used to refer to any case that appears in the official advance sheets but is deleted from the official bound reports. Depublication is important because, with limited exceptions, only opinions ordered officially published can be cited as authority before the California courts (California Rules of Court, rule 977).


104. See infra app. C.

105. See infra app. C.


107. See infra notes 109, 112 and accompanying text.

108. One California Supreme Court reference to Crawford concerns only the principle that "noninsurance indemnity agreements [are] construed strictly against [a] party seeking to be indemnified against its own negligence." Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 615 (Cal. 2008). The other state Supreme Court case cites Crawford to make the point that "express indemnity allows contracting parties 'great freedom to allocate [indemnification] responsibilities as they see fit,' and to agree to 'protections beyond those afforded by the doctrines of implied or equitable indemnity.'" Prince v. Pac. Gas & Elec. Co., 202 P.3d 1115, 1120 (Cal. 2009) (noting that "Prince makes no
appellate decisions that cited **Crawford** are not published—although several contain extensive discussion of the defense obligation owed under section 2778—while the single published case cites **Crawford** for a matter unrelated to the scope of defense duty.\(^9\)

Finally, four of the six federal cases citing **Crawford** did not directly address section 2778. In one, the issue of defense duty was not before the court, because both parties had conceded that under **Crawford**, "the duty to defend can be triggered even if the party is not ultimately found to be negligent."\(^10\) Furthermore, the subcontractor in that case successfully argued that "the duty to defend was never triggered" because the plaintiff homeowner did not allege that

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\(^10\) For the lone published case, see Martin Bros. Constr., Inc. v. Thompson Pac. Constr., Inc., 102 Cal. Rptr. 3d 419, 430 (Ct. App. 2009) (citing **Crawford** for principle that "[u]nless the parties have indicated a special meaning, the contract's words are to be understood in their ordinary and popular sense").

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the subcontractor's work had caused the particular problem (roof leaks), for which the developer sought indemnification.111 Three other U.S. district courts cited Crawford for purposes unrelated to the issue of the defense duty.112

Only the last two federal cases citing Crawford engaged in analysis of whether a defense duty existed under Crawford. One court accepted Crawford's application of section 2778, but denied a city/indemnitee's motion for partial summary judgment that would have imposed defense liability because the city failed to show that the plaintiff's claims fell within the indemnification provision.113 But in the other case, the court allowed a contractor/developer to proceed against two subcontractors on the issue of defense owed under an indemnification, even while granting the subcontractors' motions for summary judgment the underlying indemnity claims under applicable statutes of limitations.114 While none of these federal cases serve as binding precedent for California's state courts, it appears that they read Crawford to impose a broad, "free-standing" defense duty upon tender of defense.115

111. Id. at *3–4.
115. Writing about the defense duty owed under a contract for indemnity, the Eastern District of California, stated:

[T]he potential existence of a class of damages that may not be within the scope of indemnity costs, combined with Centex's claim for damages arising from those costs, is sufficient to create an issue of material fact that will require resolution either by the finder of fact or by subsequent motion for summary judgment.

E. Crawford's Implications May Extend Beyond Design and Construction, and Potentially Beyond California

Although the Crawford holding arose in the context of a construction dispute in California, it may have a far greater reach. The court based its decision upon a statute that applies to every indemnity agreement, and it did not limit its opinion to the design and construction fields. Also, the California statute at issue comes directly from the Field Code, which has influenced the laws of many other states since the mid-nineteenth century. Four other states retain the same Field Code language found in the California's section 2778. Furthermore, as discussed in Appendix B, statutes and case law from other states suggests that courts in other jurisdictions could find a similar, independent defense obligation lurking within every indemnity agreement.

IV. CRAWFORD PRESENTS UNINSURABLE RISKS FOR DESIGN PROFESSIONALS

A. Given the Differences Between General Liability and Professional Liability Insurance Policies, Crawford Will Create Particular Problems for Designers

Crawford has particularly grave implications for design professionals because of the differences between professional liability insurance, which provides designers with the

116. Section 2778 begins with the following sentence: “In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears.” CAL. CIV. CODE § 2778 (2009); see also infra app. A (including the complete text of the statute).
120. Appendix B includes citations to cases imposing a defense liability independent of actual indemnity liability under varying contractual situations in decisions from courts in Alaska, Florida, Hawaii, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, Oregon, Texas, and Wisconsin. See infra app. B.
coverage typically excluded from their general insurance, and
the general liability coverage relied upon by owners,
contractors and subcontractors.\footnote{121} In design and construction
matters, parties primarily rely on one of those two types of
insurance to cover damages caused by their negligence.\footnote{122}
For parties other than design professionals, general liability
insurance (GL) covers most damages caused by the negligence
of the insured parties.\footnote{123} A typical GL policy allows a
policyholder to list other parties as “additional insureds,” and
can be endorsed to cover contractually-assumed liability in
addition to ordinary negligence by the insured.\footnote{124}

As a rule, however, GL policies have endorsements that
exclude coverage for any liability arising from the rendering
of “professional services,” such as engineering or
architecture.\footnote{125} Even the professional liability coverage
available as an addition to contractors’ GL policies typically
covers only bodily injury and property damage (not economic
loss), and generally will cover only design work incidental to

\footnote{121} See PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER &
coverage: Introduction—Insurance coverage for design-build projects.”).

\footnote{122} “[Professional liability insurance] offers design professionals a form of
protection against the risks inherent in professional practice, and affords
coverage for claims made arising out of actual or alleged negligent acts, errors,
or omissions in the performance of professional services.” KEVIN R. SIDO,
ARCHITECT AND ENGINEER LIABILITY: CLAIMS AGAINST DESIGN PROFESSIONALS

\footnote{123} Id.; see also FUNDAMENTALS OF CONSTRUCTION LAW (Carina Y. Enhada,
Cheri Turnage Gatlin, Fred D. Wilshusen eds., 2001) (“Most of the [contractor’s
insurance] coverages under AIA Document A201 are provided under policies
known as commercial general liability (‘CGL’) policies.”).

\footnote{124} COMMERCIAL GENERAL LIABILITY POLICY OCCURRENCE FORM (2005),
L%20Occurrence%20Form%20-%20%20LX%209641%20(ed%2E%2010-05)_tcm295-
8807.pdf [hereinafter GENERAL LIABILITY POLICY] (removing exclusion for
“insured contracts”). In the author’s experience, such provisions are typical of
commercial general liability insurance policies. It is not within the scope of this
article to present a detailed comparison of the different types of insurance, nor
additional insured coverage issues.

\footnote{125} Id. at 15–16 (excluding from the definition of an “insured contract” any
part of the contract “[u]nder which the insured, if an architect, engineer or
surveyor, assumes liability for an injury or damage arising out of the insured’s
rendering or failure to render professional services, including those listed in (2)
above and supervisory, inspection, architectural or engineering activities”); see
also BRUNER & O’CONNOR, supra note 121, § 11:118 (“Professional liability
coverage: Introduction.”); id. § 11:119 (“Professional liability coverage:
Introduction—Scope of ‘professional services’ exclusion.”).
the construction process, not complete project design services. While a design professional may have GL insurance, such a policy would offer little protection for claims regarding professional engineering or architectural services because of the exclusion. Therefore, professional liability insurance (PL) provides the most important coverage for design professionals in any claim involving their services.

The Crawford decision creates particular problems for designers because of one key difference between PL and GL insurance—the exclusion of contractually-assumed liability from coverage under PL policies. Under equitable indemnity principles, a person must indemnify others for damages caused by his or her own negligence. In California, the costs that such other persons incur to defend themselves against third-party claims caused by a tortfeasor's negligence are reimbursable as damages that they can claim against the tortfeasor. This responsibility for defense costs

126. GENERAL LIABILITY POLICY, supra note 124; see also BRUNER & O'CONNOR, supra note 121, § 11:123 (“Professional liability coverage: Introduction—Insurance coverage for design-build projects.”).
127. BRUNER & O'CONNOR, supra note 121, § 11:119.
128. See id. at § 11:7 (“Standardization of policy language—How standard forms provide differing coverages to differently situated insureds. . . . Because most of the design professional's liability exposures in connection with any particular construction project arise out of the performance of its professional services, it is the professional liability policy that provides the greatest insurance coverage to architects and engineers.”).
129. See, e.g., CNA INS., PROFESSIONAL LIABILITY AND POLLUTION INCIDENT LIABILITY INSURANCE POLICY 8 (2005), http://www.schinnerer.com/industries/design-firms/Documents/PolicyForms/AEC-2005-Main-Policy.pdf [hereinafter CNA-PL Policy] (detailing IV(B) exclusions arising out of liability assumed under any oral or written agreement, excepting liability that would exist even without the contractual assumption).
130. See supra note 30 (discussing liability for defense costs under “tort of another” doctrine); see also WITKIN, supra note 25, § 115 (“The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him.” (citing Herrero v. Atkinson, 38 Cal. Rptr. 490, 493 (Ct. App. 1964)) (internal quotation marks omitted)).
131. See supra note 32 and accompanying text; see also John E. Branagh & Sons v. Witcosky, 51 Cal. Rptr. 844 (Ct. App. 1966). The court upheld a cross-defendant's liability under an indemnity agreement for cross-complainant's cost to defend itself from a third party action caused by the cross-defendant's fault. See id. The indemnity at issue provided protection “from any and all loss, damage, liability, claim, demand, suit or cause of action” and the opinion does not mention any contractual term regarding either attorneys fees or a defense
matches an indemnitor's responsibility under section 2778(3): the reimbursement of an indemnitee's defense costs incurred as a result of—and proportionate with—matters embraced by the indemnity. Until the California Supreme Court rejected Regan Roofing in Crawford, determination of an indemnitor's liability for defense costs was premature until the court knew the indemnitor's liability on the underlying indemnification. The only exception occurred when the contract provided that the duty to defend against claims of liability was independent of the duty to indemnify for liability arising out of the indemnitor's negligence.

Prior to Crawford and absent other specific defense provisions, the extent of an indemnitor's defense duties under an indemnity contract thus mirrored the extent of its indemnity duties. If a designer's indemnity duties remained within what its PL insurance covered (damages caused by the designer's negligence), then its defense duties—reimbursement of defense costs caused by that negligence—would similarly stay within that coverage. But under Crawford, an indemnitor has a presumed defense obligation for matters allegedly embraced by the indemnity, regardless of ultimate indemnity liability, unless expressly disclaimed. It is likely that PL insurance carriers will decline coverage for a statutorily implied defense duty imposed on designers under a contractual indemnity, except to the extent that it would have existed under common law equitable indemnity. And for claims relating to the
designer's professional services, its GL insurance carrier also will not cover the exposure because of the professional services exclusion standard in GL policies. Thus, unless an indemnity clause expressly limits the defense duty to the same scope as that which exists under section 2778(3), it creates for designers an uninsured duty to defend the indemnitee without regard to the designer's fault—even if the indemnity makes no mention of "defense," and even if the indemnification applies only to the extent of the designer's negligence.

B. Crawford Creates Unexpected, Uninsured Risks in Mutual Indemnity Agreements Between Design Professionals

When a contract between two designers provides for mutual indemnification, Crawford creates a particularly interesting—and disturbing—situation. Such provisions, common in agreements between prime consultants and their sub-consultants, can leave both firms exposed to the other's defense costs without limit as a result of the defense duty recognized in Crawford. At the same time, as discussed below, such provisions may relieve the designers' respective insurers of any exposure to the defense cost of their own insureds.

Consider the following typical mutual indemnity provision:

Prime Consultant and Subconsultant agree that each of them, as Indemnitor, will indemnify and hold the other

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142. See supra note 125 and accompanying text.
143. Crawford, 187 P.3d at 434 (declaring that a defense duty exists independent of actual liability under the indemnity provision unless the parties provide otherwise).
144. Id. The court states that the provision exists in every indemnity agreement, not every indemnity and defense agreement, and it never says that the indemnity agreement needs to make any reference to defense. Id. Accordingly, any limitation on the scope of indemnification would not affect the scope of defense duty owed unless the provision expressed an intent to have a different defense obligation apply.
145. Professional liability insurance companies generally recommend that design professionals propose mutual indemnification provisions, both to their clients and in subconsulting agreements. Telephone interview with Lisa Gamblin, Vice President for Claims & Risk Mgmt., Terra Ins. Co. (May 6, 2009). Ms. Gamblin formerly served as Western U.S. Claims Manager for XL Design Professional.
146. See supra Part III.A.
harmless, as Indemnitee, from all liability, claims, losses, damages and expenses incurred by Indemnitee, but only to the extent such liability, claims, losses, damages and expenses are caused by Indemnitor’s negligence.\footnote{147. This is the mutual indemnity language recommended by the author to design professionals during his tenure as vice president for claims management and loss prevention with Terra Insurance Company from June 2003 through March 2008. Similar language is recommended by most professional liability carriers. Telephone interview with Lisa Gamblin, supra note 145.}

This provision confirms that each party will provide the other with the same scope of indemnity protection as exists under common law principles. As such, it amounts to a mutual affirmation of good faith and fairness, and seemingly confirms that the parties do not intend to change their common law obligations.\footnote{148. See supra notes 26–30 and accompanying text.} Yet now, under Crawford, each party also owes the other a defense for any claim alleging the party’s negligence.\footnote{149. See supra Part III.A.} This duty arises upon tender and without regard to actual liability, and is different from the reimbursement duty that the parties would each owe to the other under equitable indemnity principles.\footnote{150. See supra Part III.A.}

While the PL insurers would remain responsible for indemnity payments regarding any damages caused by their respective insureds,\footnote{151. See supra Part III.A.} the mutual indemnity will allow them to escape all liability for defense costs. Because each party owes the other a defense, the insurers can both insist that their respective insureds each tender their defense to the other party.\footnote{152. The CNA-PL Policy states: “If any of you have rights to recover amounts from another, those rights are transferred to us to the extent of our payment.” CNA-PL Policy, supra note 129, at 14 (bold omitted).} Yet when they do, the insurers can each refuse to pay for the defense of the other party, because that defense duty exists only as a consequence of the indemnity contract—and no coverage exists for contractually based obligations.\footnote{153. Id. at 8 (focusing on IV(B)).} This relieves the insurers of all defense liability for either party because, while the insurers would have to defend their respective insureds when the parties refuse to pay for each other’s defense, each insurer could later subrogate against the other party to recover those defense
costs without regard to any actual indemnity liability.\textsuperscript{154} Furthermore, because the subrogation actions would involve only the contractual liability for defense costs, neither design professional would have coverage for their defense against the claims of the other party's insurer in the subrogation actions.

Ironically, although it only restates each party's common law equitable indemnity obligation that applies absent an indemnity provision,\textsuperscript{155} the seemingly fair, "mutual indemnity" actually creates a mutual uninsured exposure for both designers. Indeed, this uninsured exposure involves costs that each designer would have had covered by its own insurer, except that the other party now has a contractually-assumed (and uninsured) obligation to pay those costs.\textsuperscript{156} After Crawford, parties can avoid this harsh consequence only if they specifically disclaim any defense duty beyond the reimbursement duty owed under section 2778(3).\textsuperscript{157}

V. UNDER CRAWFORD, AN INDEMNITOR'S DEFENSE DUTY RESEMBLES THE DUTY OF AN INSURER

From the outset, the Crawford court stated that a clear distinction exists between indemnity agreements in insurance policies and those contained in non-insurance contracts.\textsuperscript{158} The court observed that the law treats insurance and non-insurance agreements differently, with the former construed in favor of the insured because insurers generally enjoy superior bargaining power.\textsuperscript{159} By contrast, because indemnitees often have the greater power in non-insurance contract negotiations, public policy favors greater scrutiny of indemnity agreements, and disfavors enforcing indemnity promises in some situations.\textsuperscript{160} Thus, the Crawford court stated that outside of the insurance context any promise to provide indemnification beyond the obligations imposed

\begin{itemize}
  \item \textsuperscript{154} CNA-PL Policy \textit{supra} note 152, at 14.
  \item \textsuperscript{155} See \textit{supra} notes 26–30 and accompanying text.
  \item \textsuperscript{156} See \textit{supra} Part III.A.
  \item \textsuperscript{157} See \textit{supra} Part III.A.
  \item \textsuperscript{158} See Crawford v. Weather Shield Mfg., Inc., 187 P.3d 424, 427 (Cal. 2008).
  \item \textsuperscript{159} Id. at 430.
  \item \textsuperscript{160} Id. (citing Goldman v. Ecco-Phoenix Elec. Corp., 396 P.2d 377, 382 (Cal. 1964); Reagan Roofing Co. v. Superior Court, 29 Cal. Rptr. 2d 413, 419 (Ct. App. 1994)).
\end{itemize}
under common law equitable indemnity must be “particularly clear and explicit, and will be construed strictly against the indemnitee.”161 And, it noted, statutes prevent indemnifying a party for its own sole negligence or willful misconduct.162

Despite the court’s statements about the different scopes of indemnity in insurance and non-insurance agreements,163 Crawford turns that distinction on its head with regard to the defense owed under indemnity agreements in those contexts. At first, the Crawford court professed to agree that insurers owe their insureds a greater defense obligation than a non-insurance indemnitor owes to its indemnitee.164 Yet the court’s analysis results in finding a default defense obligation in every indemnity agreement that extends to any claim potentially embraced by the indemnity, absent language to the contrary.165 That obligation mirrors the defense duty of an insurer: a duty to defend the insured from any claim against the insured that might, if proven, fall within the insurance policy.166 Indeed, the defense obligation owed to an indemnitee under Crawford arguably encompasses a duty even broader in some respects than that owed by an insurer to its insured, as discussed below.

An insurer must defend its insured from any claim, even groundless ones, so long as the claim alleges liability for matters covered by the policy.167 Similarly, Crawford holds that, unless the parties expressly agreed otherwise, an

161. Id. at 431.
162. Id. (citing CAL. CIV. CODE §§ 1668, 2782(a) (2009)). For further discussion, see supra Part III.B.
163. In the court’s words:
   “[W]hile indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly. Ambiguities in a policy of insurance are construed against the insurer, who generally drafted the policy, and who has received premiums to provide the agreed protection. In noninsurance contexts, however, it is the indemnitee who may often have the superior bargaining power, and who may use this power unfairly to shift to another a disproportionate share of the financial consequences of its own legal fault.”
   Id. at 430 (citations omitted).
164. Crawford, 187 P.3d at 430.
165. See supra Part III.A.
166. CNA-PL Policy, supra note 129, at 2 (“We have the right and duty to defend any claim against you seeking amounts that are payable under the terms of this Policy, even if any of the allegations of the claim are groundless, false, or fraudulent.”) (bold omitted).
167. Id.
The duty to defend

Indemnitor must defend its indemnitee for any tendered claim—without regard to ultimate indemnification liability—provided that the claim against the indemnitee contains allegations that the indemnification would embrace if proven.\(^{168}\) Therefore, unless a different intent appears in the agreement, the defense duty owed for any claim tendered under the indemnity\(^ {169}\) is at least as broad as the duty an insurer owes its insured.\(^ {170}\)

If an insured conducts its own defense after the insurer wrongly denies defense, a good faith settlement or judgment is presumptive evidence against the insurer.\(^ {171}\) In such cases, the insured may also recover its defense costs from the insurer.\(^ {172}\) This right to recover defense costs exists even for claims ultimately determined not to be covered by the policy and without regard to the insured's ultimate liability.\(^ {173}\) However, an insurer's refusal to defend does not result in any liability greater than the policy limit.\(^ {174}\)

Similarly, unless the parties expressly agreed otherwise, Crawford stands for the principle that a non-insurance indemnity agreement allows an indemnitee to recover its defense costs from the indemnitor without regard to the indemnitor's actual fault.\(^ {175}\) And, when an indemnitor

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168. See supra Part III.A.
169. See supra Part III.A.
170. See supra note 166.
172. Id.
173. "The general measure of damages for a breach of the duty to defend an insured, even if it is ultimately determined there is no coverage under the policy, are the costs and attorney fees expended by the insured defending the underlying action." Emerald Bay Cmty. Ass'n v. Golden Eagle Ins. Corp., 31 Cal. Rptr. 3d 43, 52 (Ct. App. 2005).
174. See CAL. JUR. 3D, supra note 171, § 555. "While the insurer may be liable for amounts over the policy limit because of its wrongful refusal to settle the underlying action, the liability of an insurer for failure to defend is ordinarily limited to the amount of the policy plus attorneys' fees and costs." Id. (citing Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co., 219 P.3d 895 (9th Cir. 2000) (applying California law)).
175. "[U]nless the parties' agreement expressly provides otherwise, a contractual indemnitor has the obligation, upon proper tender by the indemnitee, to accept and assume the indemnitee's active defense against claims encompassed by the indemnity provision." Crawford v. Weather Shield Mfg., Inc., 187 P.3d 424, 432 (Cal. 2008). And:

the duty to defend an indemnitee against all claims "embraced by the indemnity" . . . arises immediately upon a proper tender of defense by
refuses to defend its indemnitee and the indemnitee conducts its own defense and settlement (or incurs a judgment), the results of those efforts are conclusive against the indemnitor.\textsuperscript{176} Thus, an indemnitor's refusal to accept an indemnitee's tender has essentially the same effect as an insurer's refusal to defend its insured.

Furthermore, the liability of an indemnitor that accepts a defense tender—unlike that of a PL insurer defending its insured—exists without limit, unless the contract places a limitation on such liability. This is similar to the exposure a GL carrier has for defense of its insured, because defense costs typically do not erode a GL policy's limits.\textsuperscript{177} In contrast, PL policies are often referred to as "wasting" policies, because policy limits include defense costs.\textsuperscript{178} A PL insurer thus has a cap on its exposure for the combined defense and indemnity costs—even when an insurer refuses to defend its insured from a claim, its exposure remains capped by its policy limit.\textsuperscript{179} By contrast, \textit{Crawford} exposes a design professional indemnitor to potentially unlimited defense cost liability.\textsuperscript{180}

And finally, an indemnitor faces a potentially greater exposure than an insurer when the tender of defense occurs after a delay. An insured that fails to tender its defense to its insurer may lose its entire protection under the policy—both for defense and indemnity.\textsuperscript{181} If the insured fails to comply

\textsuperscript{176} CAL. CIV. CODE § 2778(5) (2009).
\textsuperscript{177} GENERAL LIABILITY POLICY, supra note 124, at 11–12. "SUPPLEMENTARY PAYMENTS" concludes with the notation regarding payment for the insured's defense: "These payments will not reduce the limits of insurance." \textit{Id.}
\textsuperscript{178} CNA-PL Policy, supra note 129, at 10 (noting that V(A)(4) states that "[c]laim expenses are subject to and included within the applicable Limit of Liability").
\textsuperscript{179} See \textit{id.}
\textsuperscript{180} This should not be confused with the unlimited exposure that an insurer may face if it refuses to settle a case within policy limits, and thereby exposes its insured to an excess of policy limits judgment. Crisci v. Sec. Ins. Co., 426 P.2d 173 (Cal. 1967).
\textsuperscript{181} Under the terms of PL insurance, the insured must provide the insurer with proper notice of the claim in order to have coverage. See CNA-PL Policy,
with a policy’s notice and tender requirements, the insurer may not even need to show prejudice to escape any further obligations under the policy for both defense and indemnity, depending on the jurisdiction. Meanwhile, an indemnitee that chooses to provide its own defense may still seek indemnification upon incurring liability to a third party, to the extent that the liability falls within the agreed scope of indemnity. Furthermore, an indemnitee’s failure to tender its defense to the indemnitor does not bar the indemnitee from later recovering a reimbursement of defense costs incurred to the extent of claims for which the indemnitor has indemnity liability.

Thus, if an indemnitee fails to tender its defense, the most that the indemnitee might lose is the cost of defense beyond those costs incurred due to matters for which the indemnitor has an actual indemnification obligation. And any third party’s settlement or judgment against an indemnitee provides presumptive evidence against the indemnitor as to the indemnitee’s liability—but not conclusive evidence, as it would have been had the indemnitee tendered its defense. Thus, compared to a non-insurance indemnitor, a professional liability insurer may have less exposure to defense costs in the context of a late tendered claim.

supra note 129, at 2 (stating that I.B requires reporting of the claim to the insurer); id. at 10 (stating that IV(K)(1) limits coverage to only claims for which the insured has provided notice to the insurer).

182. California Jurisprudence states:
Commonly, “claims made” policies require not only that the underlying claim be made against the insured within the specified period, but that the insured give notice of the claim to the insured within that same period, or within a specified extended period. The notice-prejudice rule, which prevents an insurer from denying coverage for breach of the policy’s notice requirements unless it can show actual prejudice from the delay, does not apply to “claims made” policies, because that type of policy makes notice an element of coverage.

CAL. JUR. 3D, supra note 171, § 443 (citing Homestead Ins. Co. v. Am. Empire Surplus Lines Ins. Co., 52 Cal. Rptr. 2d 268 (Ct. App. 1996)).


184. Watsonville v. Corrigan, 58 Cal. Rptr. 3d 458 (Ct. App. 2007) (interpreting section 2778 to allow the City indemnitee to recover reimbursement for its defense costs under an indemnity agreement, even though the City had not tendered its defense to the developer indemnitor since the contract in question did not require such tender).

After declaring a rule that will, in effect, insert an insurance-like, default defense obligation into every non-insurance indemnity agreement, the Crawford court tried to down-play the rule's likely impact on contracting parties. The court acknowledged but dismissed a number of concerns raised by Weather Shield and other amicus participants. These concerns included: the disparate bargaining power between most contractors and their subcontractors, a lack of compensation for subcontractors' added risk exposure, the concern that relieving developers and builders of defense costs discourages them from exercising appropriate care, small subcontractors' lack of adequate resources to fund the "up-front" defense of developers and builders, the fact that developers and builders typically have interests adverse to those of the subcontractors asked to provide their defense, the inability of most subcontractors to benefit from the more favorable legal rates available to large developers and builders, subcontractors' frequent lack of access to developers' attorney billing records, and a fear that insurers will leave the California market.

The Crawford court professed its sensitivity to these policy issues, but dismissed them. In rejecting these concerns, it pointed to recent legislation that has addressed many of the issues in the contexts of residential and public construction projects. It did not mention, however, that this legislation fails to address private, non-residential design

186. See Parts III.C, V.
188. Id.
189. Id.; see also id. at 440 n.13 (noting, without any basis, that the court "[does] not dismiss the possibility that in many instances, subcontractors may prefer to assume, and control, the defense of suits against builders, developers, or other contractors, especially when the claims raised may expose the subcontractors themselves to direct or indirect liability"). In the author's experience, most construction disputes place developer/builders and their subcontractors in adverse positions, with each pointing the finger of blame at the other for the plaintiff's claims. Accordingly, it would be extremely rare for a subcontractor or design professional to "prefer to assume, and control" the developer/builder's defense in good faith.
190. Id. at 441.
191. Id. at 440 (citing CAL. CIV. CODE § 2782 (2009) for residential projects and CAL. CIV. CODE § 2782.8 (2009) for public projects).
and construction projects. Furthermore, as the court concedes, the residential and public project limitations affect only projects performed under contracts entered into after January 1, 2006 (residential construction) or January 1, 2007 (public works). Thus, residential and public projects subject to agreements in existence before these dates also remain unaffected by the limitations. Then, with no further attention to the concerns raised in Weather Shield’s favor, the court summarily declared: “Nonetheless, for reasons stated at length above, we decline the holding [Weather Shield and its amici curiae] propose.”

In discussing the arguments of Weather Shield and its supporting amici curiae, the opinion also appears to accept that California’s statute of repose over time will mitigate the risks posed by older projects and, presumably, those posed by non-residential private work. But the statute of repose does not bar all design and construction claims after ten years; rather, it applies to only to claims for damage to real or personal property caused by undiscovered, “latent” defects, and it does not apply to any claim of bodily injury or death. In addition, large projects can take many years to design and construct, so that many designers and subcontractors are even now working under pre-2006 or pre-2007 contracts, and will continue to working under those agreements for years to come. Because the ten-year period

192. CAL. CIV. CODE § 2782.
193. § 2782.8.
195. Crawford, 187 P.3d at 440. This presumably refers to the lengthy analysis of the defense duty under California Civil Code section 2778, although the court did not specifically identify the antecedent intended by its reference to "the reasons stated at length above."
196. CAL. CIV. PROC. CODE § 337.15 (2009). The court refers to this as a "statute of limitations." See Crawford, 187 P.3d at 440. The distinction between statutes of limitations and repose is not relevant to this article.
197. See Crawford, 187 P.3d at 440. The court states: "However, Weather Shield and its amici curiae assert that, unless we hold otherwise, California's [ten]-year statute of limitations for construction defects (Code Civ. Proc. § 337.15) still exposes numerous subcontractors who signed earlier agreements to unfair and burdensome defense demands by developers." Id. at 440 (emphasis omitted).
198. CAL. CIV. PROC. CODE § 337.15(a)(2).
199. Telephone interview with James Withiam, President of D'Appolonia Eng'g, Pittsburgh, Pa. (May 13, 2009).
200. Telephone interview with David L. Coduto, President of Terra Ins. Co.
does not begin to run on a project until its substantial completion, the repose period may not commence on some current projects until years from now.

Even when the statute of repose applies to an indemnity claim, it may not negate the defense obligation owed under an indemnity provision. The statute of repose is a defense to indemnity liability, but the default defense duty under an indemnity articulated in Crawford does not depend on actual indemnification liability. Weather Shield's duty to defend Peters existed without regard to the defenses Weather Shield had to indemnity liability. As a result, the fact that Weather Shield eventually obtained a defense verdict did not negate its duty to defend Peters prior to obtaining that judgment.

Similarly, it is possible that the statute of repose would not relieve an indemnitor of its obligation to defend an indemnitee before the indemnitor conclusively establishes that it has no liability under the indemnity agreement. A defense based on the statute of repose could be viewed as comparable to Weather Shield's "no-negligence" defense to Peters's cross-claim. But the mere possibility that an indemnitor may have a complete defense to its indemnity liability does not negate the defense duty recognized by Crawford. Thus, a statute of repose defense on the issue of indemnity might not relieve an indemnitor of its defense duty, just as Weather Shield's innocence defense under the indemnity did not affect its obligation to defend Peters.

(May 5, 2009).
201. CAL. CIV. PROC. CODE § 337.15(a).
202. See supra Part III.C.
203. See supra Part III.C.
204. The Crawford court states:
We do not suggest that the indemnitor's duty to defend would continue even if, during the progress of the third party proceeding against the indemnitee, all claims potentially subject to the contractual indemnity obligation were eliminated, or if the promisor otherwise conclusively established that the claims were not among those "embraced by the indemnity." Such issues are not before us, and we express no views thereon.
Crawford v. Weather Shield Mfg., Inc., 187 P.3d 424, 434 n.7 (Cal. 2008) (citation omitted). Note that the last sentence leaves the door open for the court to someday find that the defense duty could continue even after the indemnitor establishes it does not have any indemnity duty.
205. Id.; see also supra Part III.A; supra notes 114–15 and accompanying discussion
The risk of claims beyond the ten-year period is not remote. As noted above, the statute of repose does not apply to bodily injury claims. Nor does it apply where the indemnified party—such as an owner or lessor, as opposed to a contractor or developer—has actual possession of the property. Although the statute bars owners from asserting indemnity claims against their contractors, subcontractors, or designers after the ten-year period, it does not address an owner’s right to demand that an indemnitor defend it from claims involving matters for which indemnity would have applied. Even if courts hold that the statute of repose applies to defense tenders, as well as indemnity claims, an indemnitor could still find itself liable for defense costs incurred until the time when it conclusively proves it has no duty to indemnify.

Finally, opinions in a federal case suggests that the defense duty under an indemnity will not be subject to the same statute of repose that applies to construction defect claims. In separate rulings on a developer’s claims against two subcontractors, a U.S. district court held developer’s underlying indemnity claims were time-barred, but nonetheless refused to dismiss the developer’s claims against the subcontractors for defense costs regarding the matters covered by the indemnity.

206. CAL. CIV. PROC. CODE § 337.15(a).
207. The California Code of Civil Procedure states:
   The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.
   Id. § 337.15(e).
208. The California Code of Civil Procedure further states:
   As used in this section, “action” includes an action for indemnity brought against a person arising out of that person’s performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.
   Id. § 337.15(c).
209. See supra note 204.
210. See Centex I, supra note 114; Centex II, supra note 114; supra notes 114–15 and accompanying text.
VII. **CRAWFORD CREATES SIGNIFICANT, UNEXPECTED BURDENS FOR SUBCONTRACTORS AND DESIGN PROFESSIONALS**

The *Crawford* court attributed an unrealistic level of legal sophistication to designers and subcontractors with regard to their construction contracts, and displayed only partial awareness of the economic constraints that could impair typical contracting parties from obtaining legal assistance in most contract negotiations. The court breezily declared:

> Parties to an indemnity contract can easily disclaim any responsibility of the indemnitor for the indemnitee's defense, or the costs thereof. Short of that, they can specify that the indemnitor's sole defense obligation will be to reimburse the indemnitee for costs incurred by the latter in defending a particular claim.

But is it really that easy for typical designers or subcontractors to disclaim that defense liability? Is it realistic to assume that laypersons will understand that a promise to indemnify a client includes a legally implied duty to defend that client from any claim alleging the designer's or subcontractor's negligence, without regard to whether any actual negligence occurred? Is it reasonable to assume that degree of understanding when the promise only mentions providing indemnity to the extent of damages caused by the subcontractor or designer's own negligence, and never refers to defending the client?

As the cases cited in *Crawford* and *Regan Roofing* attest, such assumptions presume that subcontractors and designers confronted with indemnity agreements are legally sophisticated and can recognize when an agreement creates such exposure—and that they will know how to address that risk. That degree of understanding did not prevail even

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211. See *Crawford*, 187 P.3d at 436 (opining that parties can easily reallocate defense duties in their contracts).
212. See supra notes 186–99 and accompanying text. In its discussion of concerns raised by Weather Shield and its amici curiae, which included some economic issues, the court fails to address any economic issues raised. See *Crawford*, 187 P. 3d at 436.
214. See generally the discussion of prior cases contained in *Crawford*, 187 P.3d at 432–435, and supra notes 50–52, 68–70. Previous litigants' failure to squarely address what the *Crawford* court appears to regard as a clear statutory requirement strongly suggests that neither they nor their counsel
among most of the state's appellate judges for the fourteen years following Regan Roofing. Yet, under Crawford, the only way a non-lawyer designer or subcontractor can avoid this broad, insurance-like defense duty is if the indemnity promise expressly disclaims a broader defense duty.

The use of a subcontractor's or designer's own attorney to draft a standard agreement could, in theory, limit the broader default defense duty recognized in Crawford. But that assumes that subcontractors, designers, and their attorneys will recognize the defense duties imposed by Crawford. Nearly a year after the decision, that appeared not to be the case, as illustrated from a May 2009 meeting of attorneys and in-house counsels from major California engineering firms. The meeting's minutes summarized a discussion of Crawford with the comment that "[u]nder the facts in that case the court found that a duty to defend exists upon the mere allegation of a claim, if the contract between the parties so provides." In other words, this group of design professionals and attorneys who represent them remain focused on contractual defense provisions, not the default defense duty that Crawford found in every indemnity absent language expressing a contrary intent. Even if a standard agreement addresses the post-Crawford default defense duty, it solves only part of the problem. Except for contracts with individual consumers, it is widely held that many clients of

understood that California Civil Code section 2778 could insert into every indemnity agreement a default duty to defend the indemnitee upon a tender of defense and without regard to any actual fault by the indemnitor—even when the provision itself is silent with regard to the scope of defense.

215. In overruling Regan Roofing, the California Supreme Court classified as an error and mistake the California Court of Appeal's failure to read section 2778 as imposing a broad default defense obligation. Crawford, 187 P.3d at 439. Until Crawford, however, Regan Roofing had received largely positive treatment in other California Court of Appeal decisions for a decade and a half. See supra notes 97–99 and accompanying discussion.

216. Crawford, 187 P.3d at 434.

217. See supra Part III.A.

218. Minutes from the 12th Annual Meeting of the ACEC California Attorneys Roundtable, Manchester Grand Hyatt Hotel, San Diego, California (May 22, 2009), http://www.aceccalif.org/userdocuments/File/09-5-22_ART_Min.pdf. This day-long meeting is held in connection with the annual meeting of the California chapter of the American Council of Engineering Companies.

219. Id. (emphasis added).

220. Crawford, 187 P.3d at 434.
designers and subcontractors, if not the majority, insist on using their own standard forms agreements.\textsuperscript{221}

When faced with client-drafted contracts, the data on private consulting engineering firms suggests that it is unrealistic to presume that engineers have either the legal sophistication to appreciate the defense duty recognized by \textit{Crawford} or economically feasible access to legal assistance for most projects. Terra Insurance Company, which provides professional liability coverage to engineering firms of various sizes across the country, has collected data that demonstrates the infeasibility of such assistance.\textsuperscript{222} In a 2009 underwriting survey of its insureds, Terra found that they collectively earned approximately $850 million in fees during 2008,\textsuperscript{223} with the average firm earning $11 million in fees for the year. As a group they entered into contracts and started work on a combined 35,711 new projects.\textsuperscript{224} Dividing the revenues by the number of projects shows that the average project produced $23,800 in fees.

This average project size does not provide sufficient profit to allow firms to seek legal review on each new contract they sign. A typical design firm's profit margin is ten percent or less,\textsuperscript{225} so the profit on an average-size project in 2008 would have been on the order of just under $2,400. If it takes an attorney four hours to review a contract for indemnity/defense risks and assist the designer in negotiations regarding those issues, the legal costs could easily consume more than forty percent of the firm's profit on an average-sized project.\textsuperscript{226} The competitive marketplace for

\textsuperscript{221} Telephone interview with Lisa Gamblin, \textit{supra} note 145. In Ms. Gamblin's ten years of experience managing loss prevention and claims at three different professional liability insurance companies, designers had been able to use their own contracts in no more than half of all projects that had resulted in claims, and the firms reported success rates varying from twenty to seventy percent in having clients accept the designers' standard form agreements. \textit{Id.}

\textsuperscript{222} Telephone interview with David L. Coduto, \textit{supra} note 200. \textit{See also} E-mail from Terra Insurance Company (May 5, 2009) (on file with author) (providing an unpublished draft of the Terra Insurance Company 2009 Underwriting Survey).

\textsuperscript{223} E-mail from Terra Insurance Company, \textit{supra} note 222 (providing an unpublished draft of the Terra Insurance Company 2009 Underwriting Survey).

\textsuperscript{224} \textit{Id.}

\textsuperscript{225} Telephone interview with James Withiam, \textit{supra} note 199.

\textsuperscript{226} This assumes an average billing rate of $250/hour, which is on the low side among counsel typically retained in insurance defense matters by Terra Insurance Company. Telephone interview with Lisa Gamblin, \textit{supra} note 145.
design services does not provide sufficient fees for such additional legal work.\textsuperscript{227} And, since most design firms earning under $100 million in annual fees cannot justify in-house legal counsel,\textsuperscript{228} most firms will not have the expertise for such review.

On further examination, Terra’s 2009 underwriting survey reveals even stronger economic reasons why most design firms do not seek legal review of their contracts. While the average per-project fee is $23,800, that figure includes a small number of very large contracts by relatively large companies.\textsuperscript{229} For 2008, two-thirds of all projects involved contracts with fees of $10,000 or less, with a median contract fee of about $5,000.\textsuperscript{230} The profit margin on such a small project makes it economically unsupportable to obtain legal review: if one assumes $250 per hour as the cost for an attorney, a mere two hours of assistance would turn more than half of all projects into losing ventures.\textsuperscript{231} Thus most design firms must rely on their project managers—design professionals, not attorneys—to negotiate their agreements.\textsuperscript{232} Therefore, recognizing and negotiating indemnity provisions routinely falls on laypersons with no specialized legal training.

Subcontractors have economic constraints similar to those faced by designers. Fees and profits earned by the largest subcontractors on their larger projects may justify the costs of legal review and negotiation assistance; however, the typical project is relatively small and without sufficient profit for a subcontractor to obtain the assistance of legal counsel in negotiating contract terms.\textsuperscript{233} And, like design professionals, most subcontractors lack the training in or understanding of legal matters necessary to appreciate the defense exposure that \textit{Crawford} says exists in every indemnity agreement “unless a contrary intention appears.”\textsuperscript{234}

\begin{footnotes}
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} Telephone interview with James Withiam, \textit{supra} note 199.
\textsuperscript{229} Telephone interview with David L. Coduto, \textit{supra} note 200.
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.; see also} Telephone interview with Lisa Gamblin, \textit{supra} note 145.
\textsuperscript{232} Telephone interview with Lisa Gamblin, \textit{supra} note 145; \textit{see also} Telephone interview with James Withiam, \textit{supra} note 199.
\textsuperscript{233} Telephone interview with James Withiam, \textit{supra} note 199.
\end{footnotes}
VIII. IS CRAWFORD’S ANALYSIS OF A SECTION 2778-BASED DEFENSE DUTY MERE DICTUM?

If the indemnity-based defense obligations that *Crawford* recognized under section 2778 appear harsh, often uninsurable, and beyond the expectations of laypersons, does a reasonable argument exist that would allow subcontractors and designers to dismiss the court’s discussion as dictum? “Dicta” are surplus reasons or tangential observations that are not necessary to a court’s decision. One California Court of Appeal noted:

> [I]t is often difficult to draw hard lines between holdings and dicta. The basic formula is to take account of facts treated by the judge as material and determine whether the contested opinion is based upon them.

In addition, even when part of an opinion is not relevant to material facts, if it is responsive to an argument raised by counsel and probably intended for guidance of the court and attorneys upon a new hearing, “it probably cannot be put aside as mere dictum.”

These principles thus beg the question whether *Crawford’s* discussion of section 2778 was essential to the decision or mere dictum.

A. WAS THE SECTION 2778 ANALYSIS ESSENTIAL TO THE HOLDING REGARDING THE DEFENSE OWED?

As discussed above, the *Crawford* court declared that a defense duty exists under every indemnity agreement and, unless the agreement states otherwise, that it commences upon the tender of defense for any claim potentially embraced by the indemnity. However, the court appears to waffle over when Weather Shield’s defense duty actually arose. Initially, it asserted that the duty arose when the homeowners sued Peters, consistent with a duty based solely

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235. United Steelworkers v. Bd. of Educ., 209 Cal. Rptr. 16, 21 (Ct. App. 1984) (citing the definition of “dictum” in 6 B.E. WITKIN, CALIFORNIA PROCEDURE § 676 (2d ed. 1971)—now 9 B.E. WITKIN, WITKIN LEGAL INST., CAL. PROCEDURE § 509 (5th ed. 2008)). “[Dictum is a general argument or observation unnecessary to the decision which has no force as precedent.]” *Id.*

236. *Id.* at 17 (citations omitted).

237. *See supra* Part III.A.
on the contract language. It later stated that the duty arose on Peters's tender, consistent with its analysis of section 2778, but which necessarily would have been at a time after the homeowners had sued Peters.

This apparent ambiguity over when the duty arose calls into question whether the analysis of section 2778 provides the basis for the court's decision that Weather Shield owed Peters a defense without regard to Weather Shield's indemnity liability. As noted, the Crawford court held that the subcontract's defense clause "confirmed" Weather Shield's duty to defend Peters under the statute. In reaching this conclusion, the court relied upon its understanding of the "duty to defend upon the indemnitee's request, as set forth in subdivision 4 of section 2778" and on the fact that the subcontract did not indicate any different intention. It then considered arguments by Weather Shield for an outcome consistent with the dissent in the Court of Appeal opinion and with arguments of amici curiae in support of Weather Shield. Those arguments would have predicated Weather Shield's defense duty on a finding of liability under the indemnity clause. In the course of rejecting those arguments, the Crawford court referenced the subcontract and noted that Weather Shield's defense duty arose when the

238. Crawford, 187 P.3d at 431 (citing the subcontract's defense clause).
239. Id. at 432 (quoting CAL. CIV. CODE § 2778(4) (2009)).
240. Id. at 434–35. "Here, the subcontract at issue not only failed to limit or exclude Weather Shield's duty 'to defend' [Peters], as otherwise provided by subdivision 4 of section 2778, it confirmed this duty." Id.
241. Id. at 439.
242. As the court had stated earlier in the opinion:
Implicit in this understanding of the duty to defend an indemnitee against all claims "embraced by the indemnity," as specified in subdivision 4 of section 2778, is that the duty arises immediately upon a proper tender of defense by the indemnitee, and thus before the litigation to be defended has determined whether indemnity is actually owed. This duty, as described in the statute, therefore cannot depend on the outcome of that litigation. It follows that, under subdivision 4 of section 2778, claims "embraced by the indemnity," as to which the duty to defend is owed, include those which, at the time of tender, allege facts that would give rise to a duty of indemnity.
Id. at 434.
243. Id. at 435 (citing Crawford v. Weather Shield Mfg., Inc., 38 Cal. Rptr. 3d 787, 838–45 (Ct. App. 2006) (O'Leary, J., dissenting) (stating that she would have ruled in Weather Shield's favor on the defense duty)).
homeowners sued Peters.245

Just before rejecting Regan Roofing, the Crawford court declared that the duty to defend "necessarily arose when such a claim was made against the indemnitee, and thus did not depend on whether the conditions of indemnity were, or were not, later established."246 While the obligation under section 2778(4) requires that the indemnitee tender its defense to the indemnitor, the court’s statements indicate that it recognized that this particular subcontract required Weather Shield to defend Peters when the homeowners sued Peters and alleged that Weather Shield had been negligent—all of which would have been at a point in time before Peters tendered its defense to Weather Shield.247 This raises the possibility that the subcontract actually provides a complete basis for the court’s holding, rather than merely serving to "confirm" a defense duty owed under section 2778(4).248 If Weather Shield’s duty to defend Peters already existed before Peters tendered its defense to Weather Shield, then a defense duty arising upon tender would be redundant.

But does this render the entire discussion of a defense duty owed under section 2778 unnecessary to the holding? Or is the discussion interpreting the subcontract itself dictum, secondary to the statute as the basis for the Crawford court’s holding? The language used by the court suggests stronger support for the latter. The court referred to the subcontract’s defense clause as “confirming” the obligation created under section 2778(4),249 suggesting that it viewed the defense

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245. Id. at 442. The court stated:
We therefore conclude that the duty ‘to defend’ [Peters] against claims “founded upon” damage or loss caused by Weather Shield’s negligent performance of its work, as set forth in Weather Shield’s subcontract, imposed such duties on Weather Shield as soon as a suit was filed against [Peters] that asserted such claims, and regardless of whether it was ultimately determined that Weather Shield was actually negligent. Id. (emphasis added); see also id. at 435 (“[T]he subcontract required Weather Shield ‘to defend’ [Peters] against ‘any suit or action . . . founded upon the claim of such damage . . .’. Under this language, the duty to defend arose, as it logically must, as soon as a ‘suit or action’ was brought against [Peters] that was ‘founded upon’ a covered claim, i.e., that asserted a claim within the coverage of both clauses.” (emphasis added)).

246. Id. at 439.
247. Id.
248. Id. at 434–35.
249. Id. at 434 (“Here, the subcontract at issue not only failed to limit or exclude Weather Shield’s duty ‘to defend’ [Peters], as otherwise provided by
clause as additional support for its conclusion rather than as its primary basis. Furthermore, the court prefaced the “confirming” observation by reiterating its interpretation that the defense duty arises upon tender under subdivision (4). Later, the court turned to reinforcing considerations including the subcontract and its view that the defense duty arose as soon as the plaintiffs sued Peters. Finally, the court’s use of the word “moreover” to introduce discussion of the subcontract language further reinforces the view that the subcontract’s defense clause provided only a secondary, surplus rationale for the decision.

Viewed as a whole, Crawford relied on an interpretation of section 2778(4) as the basis for imposing a defense duty that exists independent of indemnification liability, rather than the subcontract’s defense clause.

B. Language in Crawford Suggesting that Only a Reimbursement Duty Applies in Absence of an Express Defense Duty Is Dictum

Near the end of its opinion, the Crawford court explored other ways that the parties might have allocated responsibilities for defense costs:

As we have indicated, an express promise “to defend” another against claims “founded upon” the promisor’s acts or omissions inherently incorporates the characteristics they insist must be set forth in additional explicit terms. And if the parties intended only to give the indemnitee a

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subdivision 4 of section 2778, it confirmed this duty.” (emphasis added)).

251. The court stated:
[As we have explained, the duty to defend upon the indemnitee's request, as set forth in subdivision 4 of section 2778, is distinct from, and broader than, the duty expressed in subdivision 3 of the statute to reimburse an indemnitee's defense costs as part of any indemnity otherwise owed. Moreover, the subcontracts at issue in Regan Roofing, like the one before us here, did explicitly indicate a separate and distinct duty to defend the indemnitee, at the indemnitor's own cost and expense, against suits raising claims covered by the indemnity. That duty—like Weather Shield's in this case—necessarily arose when such a claim was made against the indemnitee, and thus did not depend on whether the conditions of indemnity were, or were not, later established.

Id. at 439.
252. Id.
253. Id. at 435.
right to after-the-fact reimbursement of its legal expenses as a component of any indemnity otherwise owed by the indemnitor, they would need no language to say so. That right is already included in every indemnity contract, unless otherwise specifically provided, under subdivision 3 of section 2778.254

The underlined language seems at odds with the broad defense duty that the court previously said exists upon an indemnitee’s tender and “unless a contrary intention appears.”255 If parties must expressly state their intention to limit an indemnitor’s defense duty, regarding tendered claims, to only the reimbursement of those costs incurred due to the indemnitor’s negligence,256 then it seems clear that they would need language to say so. If they do not provide such language, then, per the court’s reasoning earlier in the opinion, they have not “provided otherwise” regarding section 2778(4) and the defense duty that arises upon tender does not, therefore, depend upon actual liability under the indemnity clause.

Aside from that single underlined sentence, it is possible to reconcile the quote above with the opinion’s fuller discussion of section 2778. The point that “after-the-fact reimbursement” exists automatically does not mean that such reimbursement necessarily comprises the full extent of an indemnitor’s defense duty when a contract is silent on the subject. The duty to reimburse an indemnitee exists under section 2778(3), unless the parties agree to something different, and the statute does not condition the reimbursement right upon the indemnitee first tendering its defense.257 Thus, the remainder of the paragraph merely makes the point that a contract need not expressly provide for reimbursement of defense costs for an indemnitee to be able to recover them, to the extent they concern matters embraced by an indemnity provision.

Regardless, this part of the opinion clearly is dictum because it explores hypothetical facts that differed from those before the Crawford court. The Peters/Weather Shield subcontract was not silent regarding defense, and the court

254. Id. at 441 (underlining added).
255. CAL. CIV. CODE § 2778 (2009); Crawford, 187 P.3d at 431.
256. This is essentially the same duty as that imposed by section 2778(3).
257. See discussion supra Part III.A.
found no evidence that "the parties intended only to give the indemnitee a right to after-the-fact reimbursement." 258 Furthermore, this part of the opinion considers the approach of strict contract interpretation urged by Weather Shield but rejected by the court. 259 The court only addressed that approach to show that it would have reached the same result under the alternate rationale: that Weather Shield owed Peters a defense by the contract's express terms regardless of Weather Shield's actual indemnity liability. 260

This part of the opinion is much better characterized as dictum than as part of the court's underlying rationale. As such, the comment that the parties would have needed no additional language to provide only for the reimbursement of defense costs 261 does not undercut the broader defense duty that the court noted exists for every indemnity agreement under section 2778(4) and upon tender of defense, excepting only where the parties indicate otherwise. 262

C. Even if Regarded as Dictum, Crawford's Reasoning Concerning Section 2778 Cannot Be Ignored

It appears unlikely that the Crawford court would consider its analysis of section 2778 as dictum. 263 But even if viewed as such, the statutory analysis remains important. The dicta of the California Supreme Court generally carries with it great authoritative weight, as noted by one California Court of Appeal:

"Even if properly characterized as dictum, statements of the Supreme Court should be considered persuasive."

Twenty years ago, Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate

258. Crawford, 187 P.3d at 441; see also id. at 434 (noting that the defense clause as "confirm[ing]" the broad duty rather than expressing a contrary intention).
259. The Crawford court noted:
We are sensitive to the policy issues raised by Weather Shield and its amici curiae. Nonetheless, for reasons stated at length above, we decline the holding they propose. Even applying the rule of strict construction they espouse, the instant contract already sets forth, in unambiguous terms, an immediate and independent duty to defend.
Id. at 441 (emphasis omitted).
260. Id.
261. Id.
262. Id. at 434.
263. See supra Part VIII.A.
appellate court justices: Generally speaking, follow dicta from the California Supreme Court. That was good advice then and good advice now.264

Therefore, and until the California Supreme Court holds otherwise or the legislature changes the statute, parties in California should anticipate that the courts will apply the Crawford interpretation of section 2778 and hold that unless otherwise provided, section 2778 places in every contract a default duty to assume tendered defense against all claims embraced by an indemnity, regardless of the merit of those claims.265

IX. CONCLUSION AND RECOMMENDATIONS

Despite comments to the contrary, the California Supreme Court has interpreted section 2778 as imposing on indemnitors a defense duty that is at least as broad as that owed by insurance carriers to their insureds.266 Unless expressly disclaimed or limited, this defense duty exists under every indemnity contract upon an indemnitee's tender of its defense for any claim that, if proven, falls within the scope of the indemnity.267 The defense duty that the Crawford decision reads into every indemnity agreement as a default can impose huge, unanticipated burdens on any party that agrees to indemnify another.268 Furthermore, for design professionals, the defense duty may be beyond insurance coverage.269

Rather than enforcing the reasonable expectations of contracting parties, the Crawford court's interpretation of section 2778 arguably denies many parties what they would expect from a plain reading of their contracts. If an indemnity provision is silent regarding defense obligations and requires indemnity only to the extent of the indemnitor's negligence, would a lay person nevertheless know about an unstated duty to defend indemnitees upon tender and without regard to actual liability? Indeed, subcontractors have

266. See supra Part V.
267. See supra Part III.A.
268. See supra Part IV.
269. See supra Part IV.
argued that in negotiating agreements they were not aware of any such unstated duty to defend nor did they understand such obligations. And, as the pre-Crawford case law showed, many of the state’s appellate judges similarly failed to see such a duty.

Although parties remain free to negotiate a different defense duty, recommending that designers and subcontractors negotiate better contract terms is an inadequate solution to this problem. Such negotiations require a high level of legal sophistication or access to outside counsel to assist in pinpointing indemnity-based defense issues where they occur, understanding the particular risks in each contract, devising appropriate remedial language, effectively explaining both the proposed changes and their underlying rationale to a client, and productively negotiating a solution. These tasks entail legal expertise beyond that of most subcontractors and design professionals, or outside legal assistance that most design and construction projects cannot economically support. Indeed, it is probably beyond the legal sophistication of most contracting parties in fields other than design and construction, and nothing in Crawford suggests that courts should not apply this rule to every indemnity agreement.

So what can realistically be done? Going forward, parties asked to sign indemnity agreements can add language that defines a narrower defense obligation, such as one tied to reimbursement for costs to the extent of the indemnitor’s proven negligence. This is what the Crawford court envisioned. Yet such a solution may prove practical for only the largest, most sophisticated, and “best-lawyered” parties. Because a vast majority of contracts involve sums too

270. See, e.g., Reagan Roofing Co. v. Superior Court, 29 Cal. Rptr. 2d 415 (Ct. App. 1994) (noting that Mike Regan, a principal of Regan Roofing Company had declared that he did not see, understand, or have an opportunity to negotiate the indemnity provision’s terms).

271. See infra app. C.

272. Crawford v. Weather Shield Mfg., Inc., 187 P.3d 424, 434 (Cal. 2008) (noting that the statute places these defense obligations “in every indemnity contract, unless the agreement provides otherwise” (emphasis added)).

273. Id. at 436 (“Parties to an indemnity contract can easily disclaim any responsibility of the indemnitor for the indemnitee’s defense, or the costs thereof.”); see also supra note 213 and accompanying text.
small to justify such legal expenses, the Crawford decision leaves many persons exposed to future surprises from a hidden defense duty—even when the agreement otherwise merely restates the parties' equitable indemnity obligations.

A far better solution would be a rule that, unless parties expressly agree otherwise, an agreement to indemnify imposes only the duty to reimburse an indemnitee for defense costs attributable to those matters for which the indemnitor has actual liability. "Equitable indemnity" provides a reasonable and intuitively fair default for parties that do not have a specific indemnity agreement by imposing a duty that corresponds to the extent of a tortfeasor's fault. Parties can negotiate a broader (or narrower) indemnification scope if they want something different. Such a rule would create a default defense duty similarly tied to the extent of the tortfeasor's indemnity duty, and thus to the extent of its fault. If the parties want to specify a defense duty that differs in scope from the indemnity duty, they could always do so by contract. Such a rule regarding defense under indemnity would also more closely track the court's view that the indemnity duty under non-insurance indemnity agreements should be construed differently from those under insurance agreements. That seems more likely to match the reasonable expectations of lay parties.

The California legislature could otherwise accomplish this result by removing subsection four from section 2778. Short of that, the legislature could modify subsection four and restore indemnitors' default defense obligation to what most appellate courts had recognized under Regan Roofing: a duty that applies only to the extent of the indemnity obligation. A demand for defense would still have significance for reimbursement under section 2778(3), because a refusal of a tender would continue to impact the conclusiveness of any subsequent settlement or judgment.

The example below illustrates a modification to achieve that result (additions shown with underlining; deletions

274. See supra notes 222–34 and accompanying text.
275. See discussion supra notes 26–30 and accompanying text.
276. See discussion supra notes 26–30 and accompanying text.
277. See supra Part V.
278. See infra app. C; see supra Part III.C.
279. Crawford, 187 P.3d at 431 (citing CAL. CIV. CODE § 2778(5) (2009)).
shown with double strike-out):

4. To the same extent that indemnity is owed to the person indemnified, the person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so;

Alternatively, the legislature could limit subsection four to apply only in the insurance context—where, as the court declared, a broad duty to defend exists—as in the example below:

4. Under any agreement to provide insurance, the person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so;

Changing any statute—and particularly changing one that has remained unchanged since 1872—could be a long and difficult process. The California Supreme Court could obviate the need for legislation by clarifying its opinion in a manner that restores the rule that most parties, and also most appellate judges, had taken from Regan Roofing. This step would neither require reversing Crawford nor reinstating Regan Roofing. Both of those cases involved subcontracts that contained express defense clauses that clearly created separate, independent defense duties that did not depend on actual indemnity liability or application of section 2778. Thus, on the basis of the subcontract language alone, both indemnitors arguably had promised to defend their clients from such claims, and enforcing that promise need not have required any reference to the indemnity clauses of their respective contracts. Yet the court has declined to so clarify its opinion, having denied review to at least one of the six California Court of Appeal cases that had relied upon Crawford.280

As a matter of public policy, we want parties' contracts to

mean what the parties reasonably understand them to mean. If a contract is silent regarding any duty to defend, it is reasonable to assume that the parties did not intend to create any such duty. In this instance, the California Supreme Court has issued a ruling that, if not addressed, imposes a defense liability on parties in the absence of any contractual expression of intent to assume that burden.

Left uncorrected, the *Crawford* decision creates hidden, unexpected obligations that will exist in every contract unless expressly disclaimed.

Ideally, the court should resolve this problem by clarifying that its opinion should be read as based on explicit language in the defense clause of the Peters/Weather Shield subcontract. If the court will not do so, the legislature should restore the pre-*Crawford* understanding of *Regan Roofing*, an understanding that corresponds to the ordinary expectations of parties both inside the design and construction industries and beyond.

281. *Crawford*, 187 P.3d at 434 (“[Section 2778] places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemneree’s defense, if tendered, against all claims ‘embraced by the indemnity.’”).
APPENDIX A: CALIFORNIA CIVIL CODE §2778

2778. Rules of Interpretation.
In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable;

2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof;

3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion;

4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so;

5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against the former;

6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former;

7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits, which by want of ordinary care he failed to establish in the action.
Four other states—Montana, North Dakota, Oklahoma, and South Dakota—have statutes with exactly the same language as California's Civil Code section 2778.282 In addition, statutes and case law in those states and others either expressly address the defense duties owed under indemnity clauses, or suggest how courts might rule if confronted with circumstances similar to those of Crawford.

<table>
<thead>
<tr>
<th>State</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Neither statute nor case law indicate how Alabama courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Alaska</td>
<td>No statute governs the defense duties owed under an indemnity agreement in Alaska. No Defense Duty: The Alaska Supreme Court in Rogers &amp; Babler v. State, 713 P.2d 795 (Alaska 1986), declined to impose a defense duty where the indemnity agreement was silent regarding defense obligations. “The duty to ‘indemnify and hold harmless’ against claims does not impose on the indemnitor an immediate duty, upon request, to provide and pay for the ongoing defense of claims against the indemnitee.” Defense Duty: The supreme court in Hoffman Construction Co. of Alaska v. U.S. Fabrication &amp; Erection, Inc., 32 P.3d 346 (Alaska 2001), imposed a defense duty independent of indemnification liability when the contract included an express defense provision.</td>
</tr>
</tbody>
</table>

282. See supra note 119.
Appendix B. (continued)

<table>
<thead>
<tr>
<th>State</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>the contract included a provision limiting indemnity “to the extent” of indemnitor's negligence and was silent regarding defense obligations. The Arizona court acknowledged and expressly declined to adopt the Crawford court’s reasoning.</td>
</tr>
<tr>
<td></td>
<td>Statute: ARK. CODE ANN. § 4-56-104 (2009) bars indemnification or defense for an indemnitee's own negligence in any contract involving construction or design services, with exceptions provided for the negligence of the indemnitor or where the contract requires insurance coverage for the indemnity and defense obligations.</td>
</tr>
<tr>
<td></td>
<td>No Defense Duty: The court of appeals, in East-Harding v. Piazza, 91 S.W.3d 547 (Ark. Ct. App. 2002), declined to impose a defense duty where the indemnity agreement was silent regarding defense obligations. Indemnitor's obligation was only to reimburse defense costs to the extent of proven indemnity liability.</td>
</tr>
<tr>
<td>California</td>
<td>—</td>
</tr>
<tr>
<td></td>
<td>No case law indicates how Colorado courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td></td>
<td>No case law indicates how Connecticut courts might rule regarding the defense duties owed under an indemnity agreement and the annotated statutes citing references to CONN. GEN. STAT. § 52-572k.</td>
</tr>
<tr>
<td>Delaware</td>
<td>Statute: DEL. CODE ANN. tit. 6, § 2704 (2009) prohibits indemnification for damages caused, resulting or arising partially or solely by, from or out of the negligence of any party other than the promisor or indemnitor. Further, the section expressly declares it applies to “preconstruction professionals, such as designers, planners and architects.”</td>
</tr>
</tbody>
</table>
**Appendix B. (continued)**

<table>
<thead>
<tr>
<th>State</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>District of Columbia</td>
<td>Neither statute nor case law indicate how District of Columbia courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
</tbody>
</table>
| Florida                   | Statutes: *FLA. STAT. § 725.06* (2009) bars indemnity from damages caused "by any act, omission, or default of the indemnitee arising from the contract . . . unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract, and is part of the project specifications or bid documents, if any." In addition, the statute specifically bars requirements regarding defense of a public entity except "to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party."

*FLA. STAT. § 725.08* further limits all agreements between design professionals and public entities to apply only where harm is "caused by the negligence, recklessness, or intentionally wrongful conduct of the design professional" and its employees.


Defense Duty: The district court in *Padron Warehouse Corp. v. Realty Associates Fund III, L.P.*, 377 F. Supp. 2d 1259 (S.D. Fla. 2005), imposed a defense duty independent of indemnification liability in a case that did not identify whether the contract included any express defense provision. The court articulated a general rule "that an indemnitee under an indemnification agreement is entitled to recover reasonable attorney's fees and legal costs which he is compelled to pay as a result of suits brought against him relating to matters for which he is entitled to be indemnified." Further, "[t]his rule is equally applicable whether the indemnitee is successful in his
Appendix B. (continued)

<table>
<thead>
<tr>
<th>State</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>Statute: GA. CODE § 13-8-2 (2009) provides a bar to indemnification for a party's sole negligence. No Defense Duty: The court of appeal in George L. Smith II Georgia World Congress Center Authority v. Miller Brewing Co., 566 S.E.2d 361 (Ga. Ct. App. 2002), expressly held no obligation to pay the indemnitee's attorney fees where the agreement did not mention any obligation to defend the indemnitee or to pay attorney fees or expenses of litigation.</td>
</tr>
<tr>
<td>Idaho</td>
<td>Neither statute nor case law indicates how Idaho courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Illinois</td>
<td>No statute indicates the defense duties owed under an indemnity agreement in Illinois. No Defense Duty: The appellate court in Gust K. Newberg Construction Co. v Fischbach, Moore &amp; Morrissey, Inc., 196 N.E.2d 513 (Ill. App. Ct. 1964), declined to impose a defense duty independent of indemnification liability where the contract was silent regarding defense obligations. General indemnification by subcontractor for its negligence required it to reimburse the contractor for its costs and attorney's fees caused by subcontractor's negligence; but did not require subcontractor to defend suit brought by subcontractor's employee against general contractor.</td>
</tr>
</tbody>
</table>

In Westinghouse Electric Corp. v. Metropolitan Dade County, 592 So. 2d 1134 (Fla. Dist. Ct. App. 1991), the court of appeal imposed a defense duty independent of indemnification liability where the contract had separate sentences for indemnity and defense.
Appendix B. (continued)

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<tr>
<th>State</th>
<th>Comment</th>
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<tbody>
<tr>
<td>Indiana</td>
<td>No statute indicates the defense duties owed under an indemnity agreement in Indiana. No Defense Duty: The court of appeal in United Consulting Engineers v. Board of Commissioners, 810 N.E.2d 351 (Ind. Ct. App. 2004), declined to impose a defense duty independent of indemnification, although the contract contained an express defense obligation. The court limited the indemnitor's defense duty to the extent of its negligence.</td>
</tr>
<tr>
<td>Iowa</td>
<td>Neither statutes nor case law indicate how Iowa courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Kansas</td>
<td>Statute: KAN. STAT. ANN. § 16-121 (2008) provides a bar to indemnification for a party's own negligence, except where the indemnification is covered by insurance paid for by the promisee. No Defense Duty: The court of appeal in Dillard v. Shaughnessy, Fickel &amp; Scott Architects, Inc., 943 S.W.2d 711 (Mo. Ct. App. 1997) (applying Kansas law), declined to impose a defense duty when the indemnity agreement was silent regarding defense obligations. Subcontractor not required to indemnify general contractor for attorney's fees it incurred to defend itself, but subcontractor required to indemnify general contractor for expenses it incurred to reimburse other parties' attorney's fees, because those expenses fit the definition of contractor's &quot;liability, loss, cost or expenses&quot; under the agreement.</td>
</tr>
</tbody>
</table>
| Kentucky | No statute indicates the defense duties owed under an indemnity agreement in Kentucky. No Defense Duty(?): The court of appeal in ARA Services, Inc. v. Pineville Comm. Hospital, 2 S.W.3d 104 (Ky. Ct. App. 1999), declined to impose a defense duty independent of indemnification, although the contract contained an express defense obligation. Verdict for hospital (indemnatee) and its food service contractor (indemnitor) in personal injury suit by contractor's employee precluded hospital's entitlement to indemnity for attorney fees from contractor, where indemnity only applied to claims attributable to contractor's sole negligence. But, while decision could have rested on the fact that allegations against multiple defendants did not sound in "sole
### Appendix B. (continued)

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<tr>
<th>State</th>
<th>Comment</th>
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<tbody>
<tr>
<td>Louisiana</td>
<td>Statute: LA. REV. STAT. ANN. § 9:2780 (2009) (well for oil, gas, or water, or drilling for minerals) voids any indemnity or defense requirement to the extent that it applies to liability for “the sole or concurrent negligence or fault (strict liability) of the indemnitee.” One of the few statutes to begin so colorfully: “The legislature finds that an inequity is foisted on certain contractors and their employees...” No Defense Duty: The court of appeal in Robin v. Wong, 971 So. 2d 386 (La. Ct. App. 2007), declined to impose a defense duty independent of indemnification where the contract was silent regarding defense obligations. The district court in Nesom v. Chevron U.S.A., Inc., 633 F. Supp. 55 (E.D. La., 1984), declined to impose a defense duty independent of indemnification beyond the extent of reimbursement of costs incurred due to the indemnitee’s negligence, although the contract contained an express defense obligation. Defense Duty: The court of appeal in Star Enterprises v. American Manufacturing Mutual Insurance Co., 847 So. 2d 717 (La. Ct. App. 2003), imposed a defense duty independent of indemnification where the contract contained an express defense obligation.</td>
</tr>
<tr>
<td>Maine</td>
<td>Neither statutes nor case law indicate how Maine courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Maryland</td>
<td>Neither statutes nor case law indicate how Maryland courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>No statute indicates the defense duties owed under an indemnity agreement in Massachusetts. No Defense Duty: The appellate court in Miley v. Johnson &amp; Johnson Orthopaedics, Inc., 668 N.E.2d 369 (Mass. App. Ct. 1996), declined to impose a defense duty independent of indemnification where the contract was silent regarding defense obligations. The court held that an indemnity “from... all claims, losses, liabilities and expenses, including</td>
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Appendix B. (continued)

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<tr>
<th>State</th>
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<td>attorney's fees' . . . is not enough to impose an independent duty to defend.”</td>
</tr>
<tr>
<td>No Defense Duty (Qualified):</td>
<td>The appellate court in <em>Sheehan v. Modern Continental/Healy</em>, 822 N.E.2d 305 (Mass. App. Ct. 2005), declined to impose a defense duty independent of indemnification where the underlying complaint did not allege indemnitor's negligence, although the contract contained an express defense obligation. But, the court noted that liability would exist if the plaintiff's underlying complaint had alleged a basis for indemnification.</td>
</tr>
<tr>
<td>Michigan</td>
<td>No statute indicates the defense duties owed under an indemnity agreement in Michigan.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>No statute indicates the defense duties owed under an indemnity agreement in Minnesota.</td>
</tr>
<tr>
<td>Defense Duty:</td>
<td>The Minnesota Supreme Court in <em>Microtek Medical, Inc. v. 3M Co.</em>, 942 So. 2d 122 (Miss. 2006), abrogated on other grounds by <em>Upchurch Plumbing, Inc. v. Greenwood Utilities Commission</em>, 964 So. 2d 1100 (Miss. 2007) (applying Minnesota law), imposed a defense duty independent of indemnification, although the contract was silent.</td>
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### Appendix B. (continued)

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<th>State</th>
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<tr>
<td>No Defense Duty: The Eighth Circuit in <em>Sargent v. Johnson</em>, 601 F.2d 964 (8th Cir. 1979), declined to impose a defense duty independent of indemnification, although the contract contained an express defense obligation. There is no obligation to cover defense if indemnitee was negligent.</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>No statute indicates the defense duties owed under an indemnity agreement in Mississippi.</td>
</tr>
<tr>
<td>Defense Duty: The Mississippi Supreme Court in <em>Blain v. Sam Finley, Inc.</em>, 226 So. 2d 742 (Miss. 1969), imposed a defense duty independent of indemnification, although the contract was silent regarding defense obligations. The court held the obligation to indemnify for attorney’s fees, costs, or expenses extends to such expenses incurred in the successful defense of suits or the defense of groundless suits, at least where the subcontractor rejects the demand of the contractor to take over the defense.</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>Statute: Mo. ANN. STAT. § 434.100 (2009) (Vernon’s) bars any agreement to indemnify or hold harmless a party from that party’s own negligence, unless the agreement to “indemnify, defend or hold harmless” also “requires the party to obtain specified limits of insurance to insure the indemnity obligation and the party had the opportunity to recover the cost of the required insurance in its contract price.” Pending legislation would add clear statement that the statute includes defense costs and would broaden the prohibition to include the negligence of anyone for whom the indemnitee is responsible.</td>
</tr>
<tr>
<td>Defense Duty: The court of appeal in <em>List &amp; Clark Construction Co. v. McGlone</em>, 296 S.W.2d 910 (Mo. Ct. App. 1956), imposed a defense duty independent of indemnification if indemnitor refused the defense tender, but limited the duty to the extent of the indemnification, if tender accepted. The court held that the obligation to indemnify for attorneys’ fees, costs, or expenses extends to such expenses incurred in the successful defense of suits or the defense of groundless suits, at least where the subcontractor rejects the demand of the contractor to take over the defense.</td>
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Appendix B. (continued)

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<tbody>
<tr>
<td>Nebraska</td>
<td>Neither statutes nor case law indicate how Nebraska courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Nevada</td>
<td>Neither statutes nor case law indicate how Nevada courts might rule regarding the defense duties owed under an indemnity agreement.</td>
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Appendix B. (continued)

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<tr>
<th>State</th>
<th>Comment</th>
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<tbody>
<tr>
<td>New Mexico</td>
<td>Statute: N.M. STAT. ANN. § 56-7-1 (2009) limits indemnification to the extent of an indemnitee's fault, but does not say whether defense duty is similarly limited. No case law indicates how New Mexico courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>North Carolina</td>
<td>No statute(s) indicates the defense duties owed under an indemnity agreement in North Carolina. No Defense Duty: The court of appeal in Cooper v. H.B. Owsley &amp; Son, Inc., 258 S.E.2d 842 (N.C. Ct. App. 1979), declined to impose a defense duty independent of indemnification, although the contract contained an express defense obligation. The court held that even</td>
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### Appendix B. (continued)

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<th>State</th>
<th>Comment</th>
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<tbody>
<tr>
<td>North Dakota</td>
<td>if a contract specifically provides indemnification for an indemnitee's negligence, it still must reflect clear intent to cover attorney's fees and defense costs before they are recoverable. Statute: N.D. CENT. CODE § 22-02-07 (2009) contains language identical to CAL. CIV. CODE § 2778. No Defense Duty: The North Dakota Supreme Court in <em>Barsness v. General Diesel &amp; Equipment Co.</em>, 422 N.W.2d 819 (N.D. 1988), declined to impose a defense duty independent of indemnification where the contract was silent regarding defense obligations. The case does not make any reference to N.D. CENT. CODE § 22-02-07.</td>
</tr>
<tr>
<td>Ohio</td>
<td>Neither statutes nor case law indicate how Ohio courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Statute: OKLA. STAT. tit. 15, § 427 (2009) is language identical to CAL. CIV. CODE § 2778. No Defense Duty: The appellate court in <em>Estate of King v. Wagoner County Board of County Commissioners</em>, 146 P.3d 833 (Okla. Civ. App. 2006), declined to impose a defense duty independent of indemnification, although the contract contained an express defense obligation. The court found attorney fees that an owner independently incurred in defending against plaintiffs' allegations of negligence against owner were not recoverable because the indemnity agreement did not provide for indemnity against owner's own negligence. The case does not make any reference to OKLA. STAT. tit. 15, § 427.</td>
</tr>
<tr>
<td>Oregon</td>
<td>No statute indicates the defense duties owed under an indemnity agreement in Oregon. Defense Duty: The court of appeals in <em>National Union Fire Insurance Co. v. Starplex Corp.</em>, 188 P.3d 332 (Or. Ct. App. 2008), imposed a defense duty independent of indemnification, although the contract was silent regarding defense obligations. The court held that the standard for determining a contractual indemnitor's defense duty to its indemnitee is the same as that for finding an insurer's duty to defend an insured.</td>
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### Appendix B. (continued)

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<th>State</th>
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<tbody>
<tr>
<td>Pennsylvania</td>
<td>Neither statutes nor case law indicate how Pennsylvania courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Neither statutes nor case law indicate how Rhode Island courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Neither statutes nor case law indicate how South Carolina courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Statute: S.D. CODIFIED LAWS § 56-3-10 (2009) contains language identical to CAL. CIV. CODE § 2778. No case law indicates how South Dakota courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Neither statutes nor case law indicate how Tennessee courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Texas</td>
<td>Statute: TEX. REV. CIV. STAT. ANN. § 271.904 (Vernon’s) bars public entities from requiring indemnification or defense beyond the extent of the indemnitor’s negligence in architecture and engineering agreements. Defense Duty: The appellate court in <em>English v. BGP International Inc.</em>, 174 S.W.3d 366 (Tex. App. 2005), imposed a defense duty independent of indemnification where the contract contained an express defense obligation. The court noted that indemnitor’s duty to defend indemnitee may arise even when it is later determined that the indemnitor has no duty to indemnify. Nonetheless, the indemnitor is not required to defend indemnitee if the underlying pleadings do not allege facts within the scope of the indemnity. No Defense Duty: The Texas Supreme Court in <em>Fisk Electric Co. v. Constructors &amp; Associates, Inc.</em>, 888 S.W.2d 813 (Tex. 1994), declined to impose a defense duty independent of indemnification although the contract contained an express defense obligation. Where indemnity agreement did not comply with Texas’s “express negligence test,” subcontractor-indemnitor had no obligation to indemnify contractor-indemnitee for costs or expenses resulting from claim...</td>
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Appendix B. (continued)

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<tr>
<th>State</th>
<th>Comment</th>
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<tbody>
<tr>
<td>Utah</td>
<td>Neither statutes nor case law indicate how Utah courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Vermont</td>
<td>No statutes indicate the defense duties owed under an indemnity agreement in Vermont. Defense Duty: The Vermont Supreme Court in <em>Hamelin v. Simpson Paper (Vermont)</em> Co., 702 A.2d 86 (Vt. 1997), imposed a defense duty independent of indemnification, although the contract was silent regarding defense obligations.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Neither statutes nor case law indicate how Virginia courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Washington</td>
<td>Neither statutes nor case law indicate how Washington courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Neither statutes nor case law indicate how West Virginia courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>No statutes indicate the defense duties owed under an indemnity agreement in Wisconsin. Defense Duty: The Wisconsin Supreme Court in <em>Barrons v. J.H. Findorff &amp; Sons, Inc.</em>, 278 N.W.2d 827 (Wis. 1979), imposed a defense duty independent of indemnification when indemnitor refused indemnitee’s tender, even though the contract was silent regarding defense obligations.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Neither statutes nor case law indicate how Wyoming courts might rule regarding the defense duties owed under an indemnity agreement.</td>
</tr>
</tbody>
</table>
APPENDIX C: TREATMENT OF REGAN ROOFING IN CITING REFERENCES

The table below summarizes the treatment of *Regan Roofing*\(^{283}\) by various courts until the *Crawford* court disapproved of its holding in July 2008. The author obtained this listing from a Westlaw Keycite performed on May 6, 2009.

**Table 1.** California Supreme Court (1 Opinion): 0 positive, 1 negative, 1 published.

<table>
<thead>
<tr>
<th>Published</th>
<th>Treatment</th>
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**Table 2.** California court of Appeal (33 Opinions): 26 positive, 7 negative, 15 published.

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<td>Yes Neg</td>
<td>Disagreement Recognized by</td>
<td>Catalano v. Superior Court, 97 Cal. Rptr. 2d 842, 846 (Ct. App. 2000).</td>
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<td>Not Followed as Dicta</td>
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<tr>
<td>Yes</td>
<td>Pos</td>
<td>Mentioned</td>
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<tr>
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<td>Pos</td>
<td>Cited</td>
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Table 3. California Superior Court (11 Opinions): 11 positive, 0 negative.

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<th>Published</th>
<th>Treatment</th>
<th>Cited</th>
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Table 3. (continued)

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<tr>
<th>Published</th>
<th>Treatment</th>
<th>Case</th>
</tr>
</thead>
</table>

Table 4. California Court of Appeals, 9th Circuit (3 Opinions): 3 positive, 0 negative.

<table>
<thead>
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<th>Published</th>
<th>Treatment</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Pos</td>
<td>Cited Yee v. Hughes Aircraft Co., 92 F.3d 1195, 1195 (9th Cir. 1996).</td>
</tr>
<tr>
<td>Yes</td>
<td>Pos</td>
<td>Cited Battin v. First Interstate Mortgage Co., 87 F.3d 1317, 1317 (9th Cir. 1996).</td>
</tr>
</tbody>
</table>

Table 5. U.S. District Courts (California) (7 Opinions): 7 positive, 0 negative, 3 published.

<table>
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<th>Treatment</th>
<th>Case</th>
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</thead>
</table>
Table 5. (continued)

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<th>Treatment</th>
<th>Case</th>
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</thead>
</table>

Table 6. U.S. District Courts (other than California) (2 Opinions): 1 positive, 1 negative, 0 published.

<table>
<thead>
<tr>
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<th>Treatment</th>
<th>Case</th>
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</thead>
</table>

Table 7. Foreign State Courts (2 Opinions): 2 positive, 0 negative.

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<th>Treatment</th>
<th>Case</th>
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