

The Morrison Law Journal  
April 2010  
Volume V, Edition 4

Another Win For Developers In Construction Defect Cases:  
Court Rules That Developer's Failure To Procure Contractor's License  
Will Not Bar Recovery Of Defense Fees Under Express Indemnity Subcontract

By: Edward F. Morrison, Jr., Esq.  
Brett C. Drouet, Esq.

As many are aware, California Business and Professions Code section 7031 bars a contractor from recovering compensation for work it performs in its capacity as an unlicensed contractor (and provides that the person who utilizes the unlicensed contractor's services may recover all compensation paid to the unlicensed contractor, i.e. "disgorgement"). The Courts, consistent with the California Supreme Court decision in Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, have broadly construed Business and Professions Code section 7031 to apply to all types of actions seeking to enforce a mechanics' lien, to recover for breach of a construction contract, or to obtain the reasonable value of labor and materials furnished, regardless of the equities (or inequities). See, Lewis & Queen v. N. M. Ball Sons (1957) 8 Cal.2d 141; Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal.App.4th 929 and Wright v. Issak (2007) 149 Cal.App.4th 1116.

A question which has arisen however, is whether a person or entity who does not hire the unlicensed contractor may still raise the Business and Professions Code section 7031 bar to defeat a claim against it by an unlicensed entity. That question had apparently been answered in part in Ranchwood Communities Limited Partnership v. Jim Beat Construction Co. (1996) 49 Cal.App.4th 1397 ("Ranchwood Case") where the Court of Appeal, Fourth District, held (in a split decision) that an unlicensed developer could not recover against a subcontractor on an express indemnity contract (the Court did hold that claims for equitable indemnity were permitted, however).

In a departure from the Ranchwood Case, the California Court of Appeal, Sixth District, has changed course and held that a developer defendant could recover defense costs from a subcontractor based on an express indemnity contract irrespective of its licensure status.

That decision was reached in UDC-Universal Development v. CH2M Hill (2010) 181 Cal.App.4th 10 ("UDC Case"). In the UDC Case, a homeowners association brought an action against the developer and an engineering subcontractor for property damage resulting from defective conditions at the development. The developer (UDC-Universal Development ("UDC")) later filed an indemnity cross-complaint against, among others, engineering contractor CH2M Hill ("CH2M").

During the pendency of the litigation, CH2M filed a Motion for Summary Judgment against UDC on the bases that the lawsuit was time barred and because UDC had acted as unlicensed contractor. The Motion for Summary Judgment was denied.

The matter then proceeded toward trial. One week before the trial started, the California Supreme Court handed down its ruling in Crawford v. Weather Shield Manufacturing Inc. (2008) 44 Cal.4th 541 ("Crawford Case") whereby it held that a clause in an indemnity contract which provided for a duty to defend triggered an immediate duty to defend (upon tender) and the duty to defend would remain in effect irrespective of a finding of no negligence on the part of the indemnitor at trial. The parties stipulated that the matter would proceed to a jury trial and that the Trial Court would later determine whether there was a duty to defend UDC under the indemnity contract.

The jury then returned a verdict finding that CH2M was not negligent and had not breached its contract with UDC. However, based on the Crawford Case, the Trial Court ruled that UDC was still entitled to its defense costs in defending the homeowners association's construction defect case and denied CH2M's demand for attorney's fees as a prevailing party. CH2M appealed. On appeal, the Court of Appeal ruled that the Crawford Case applied (it rejected a retroactivity argument proffered by CH2M) and further ruled that the Business and Professions Code section 7031 bar did not apply because the defense costs sought by UDC did not constitute a claim for compensation for UDC's services. The Court of Appeal acknowledged that its decision was in tension with the Ranchwood Case.

The UDC case is an important decision as it is the first major holding to interpret the Crawford Case. However, beyond its treatment of the Crawford Case (which is broad), the Court in the UDC Case explains that an unlicensed entity will not be subject to the statutory bar under Business and Professions Code section 7031 where its claim is for reimbursement of defense fees arising from a construction defect case. While the UDC Case is in tension with the Ranchwood Case, the authors anticipate that the Trial Courts will give significant weight to the reasoning in the UDC Case.

About the Authors: Edward F. Morrison, Jr. is the founding partner and Brett C. Drouet is a partner of The Morrison Law Group, a professional corporation. Their biographies can be viewed at [www.morrisonlawgroup.com](http://www.morrisonlawgroup.com).

Publication Note: The Morrison Law Group wishes to disseminate this publication to all clients and colleagues of the Firm who wish to receive it. Should any recipient desire to be removed from the distribution list, or wishes to have a colleague added, please contact Jim Van Dusen at The Morrison Law Group at 213 356-5504 or [vandusen@morrisonlawgroup.com](mailto:vandusen@morrisonlawgroup.com).

Disclaimer Note: The legal article presented above is intended to provide general information which may be of interest or use to clients and colleagues of The Morrison Law Group and should not be construed as legal advice on any matter.