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IN THE

SUPREME COURT OF CALIFORNIA

KIRK CRAWFORD, et al.,

Plaintiffs and Respondents,

vs.

WEATHER SHIELD MFG, INC.,

Defendants and Appellant.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case No. G032301

AMICUS CURIAE BRIEF OF JELD-WEN, inc. IN SUPPORT OF APPELLANT WEATHER SHIELD, MFG., INC.

Jeff G. Harmeyer, Esq., Bar No. 149173
McAtee • Harmeyer LLP
110 West "A" Street, Suite 950
San Diego, California 92101
(619) 231-9800 Telephone
(619) 234-3800 Facsimile
Email: Harmeyer@mh-legal.com

Attorneys for Amicus Curiae
JELD-WEN, inc.

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INTRODUCTION

This Supreme Court's review of the holding in *Crawford v. Weather Shield* (2006) 38 Cal.Rptr.3d 787 ("*Crawford*") provides this Court with an excellent opportunity to emphasize the distinctions between an indemnity clause contained in a construction contract and the duties arising out of an insurance policy. This Supreme Court recognizes that the language of an indemnity clause contained in a non-insurance contract, including terms describing the scope of the indemnification, will be construed against the indemnitee, whereas language describing the scope of the indemnity obligation in an insurance policy will be construed against the indemnitor (insurer). Because it confused these differing rules of interpretation, the *Crawford* majority misinterpreted the scope of the defense duty in an indemnity clause contained in a construction contract by improperly interpreting the clause as if it were contained in an insurance policy.

It is beyond dispute that the contract language selected by the developer to define the scope of the defense and indemnity obligation is arcane, confusing and anything but plain English. The developer should not be allowed to impose harsh obligations on Weather Shield without clearly articulating those obligations in plain and simple English, so that it

is certain that the parties recognized and bargained for a defense obligation which exceeds the scope of the indemnity.

II.

ISSUE PRESENTED FOR REVIEW

Whether the indemnity clause contained in the construction contract sets forth, in sufficiently clear and explicit terms, a defense obligation that is broader than the indemnity obligation.

III.

THE INTERESTS OF JELD-WEN, inc.

JELD-WEN designs and manufactures windows in California which are sold to housing developers. JELD-WEN enters into subcontracts with these developers. Many of the subcontract agreements contain indemnity provisions similar to the provision analyzed by the Court in *Crawford*. JELD-WEN relies on an interpretation of contractual indemnity provisions consistent with the Supreme Court holding in *Goldman v. Ecco-Phoenix* (1964) 62 Cal.2d 40 ("*Goldman*"). Through *Crawford*, the Fourth District, Division Three refuses to follow *Goldman* and numerous Court of Appeal decisions including *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265

("*Heppler*") and *Regan Roofing v. Superior Court* (1994) 24 Cal.App.4th 425 ("*Regan Roofing*"). *Crawford* departs precedent and declares a new standard of review for contractual indemnity provisions which operates to retroactively change the intended obligations of JELD-WEN's subcontract agreements.

IV.

LEGAL ARGUMENT

A. *Crawford* Should Be Overturned Because It Improperly Analyzes an Indemnity Clause in a Construction Contract as if it Were an Insurance Policy

Through the majority opinion in *Crawford*, Division Three of the Fourth District Court of Appeal creates a new standard of review for indemnity provisions in construction contracts. The *Crawford* court refuses to follow this Court's guidance in *Goldman* and instead creates a new standard whereby the duty to defend is analyzed separately and differently from the duty to indemnify. This Supreme Court should overturn *Crawford* because: (1) the opinion refuses to follow the Supreme Court decision in *Goldman*; (2) the opinion improperly and inappropriately attempts to distinguish the decisions of the Fourth District, Division One in *Regan Roofing* and *Heppler*; (3) the opinion misanalyzes the indemnity provision

at issue; (4) the opinion fails to appreciate the development of the duty to defend in the context of insurance; (5) the opinion mistakenly applies Civil Code Section 2778 to an indemnity clause contained in a construction contract; and (6) the opinion will promote illegitimate construction defect litigation.

Prior to embarking on this analysis, it is important to emphasize the difference between an indemnity clause contained in a construction contract and a policy of insurance. A policy of insurance can be termed a "contract of indemnity" because the sole purpose of the contract is protection or indemnification of the insured. The only interest conveyed by the indemnitor (the insurer) to the indemnitee (the insured) is this protection or indemnification. In contrast, an indemnity clause contained in a construction contract is not a "contract of indemnity," because the primary purpose of a construction contract is not to provide protection from harm. Indeed, the primary purpose of a non-insurance contract could be the sale of property, provision of equipment or services, or as here, the provision of window product. An indemnity clause contained in a contract other than an insurance policy (sometimes referred to herein as "a contractual indemnity provision") is interpreted and analyzed quite differently from a policy of insurance, because the sole purpose of a policy of insurance is to provide protection in exchange for payment of a premium. The *Crawford* Court

erred because it failed to recognize this fundamental distinction between a contractual indemnity provision and a policy of insurance.

In this context, JW provides the following to assist the Supreme Court in review of the *Crawford* opinion.

1. *Crawford* Does Not Follow the Supreme Court Decision in *Goldman*

Crawford holds that a contractual indemnitor has a duty to defend even when there is no duty to indemnify because the indemnitor is without fault. To reach this holding, *Crawford* misanalyses the Supreme Court's holding in *Goldman*. In *Goldman*, this Court properly connected the duty to defend with the duty to indemnify when analyzing an indemnity clause contained in a construction contract. It is clear that *Goldman* refused to impose a current defense obligation when the duty to indemnify was not yet determined. The procedural status of the underlying action reviewed in *Goldman* makes this finding certain, when the Court states as follows:

> On the basis of the subcontract, Clovis demanded that Ecco defend and indemnify Clovis against any liability to Butlar. When Ecco refused so to defend or to acknowledge any indemnification obligation, Clovis filed the present action for a declaration of its rights under the subcontract. The trial court, while submitting no findings as to whether the negligence of Clovis or Ecco contributed to the accident, held

> Ecco obligated to hold Clovis harmless for Butlar's injuries. (Emphasis added) (*Goldman* at 42.)

In this context, *Goldman* analyzed the contractual defense and indemnity obligations as coextensive. The Supreme Court set forth the issue as follows:

> Since Butlar was an employee of Ecco, Clovis urges the application of the hold-harmless clause requiring Ecco to indemnify and defend Clovis against any liability to Butlar regardless of whether the negligence of either party contributed to the injury. (Emphasis added) (Id. at 43.)

Goldman found that the duty to defend under a contractual indemnity provision is not triggered until the indemnitee is found negligent, stating its holding succinctly as follows:

> The judgment is reversed, and the case remanded for a determination of whether the negligence of Clovis [indemnitee], if any, contributed to Butlar's injuries, or whether the negligence of Ecco [indemnitor], if any, solely caused Butlar's injuries. (Id. at 49.)

Through this holding, *Goldman* remanded the defense and indemnity issue for a prerequisite determination of negligence. In this way, *Goldman* recognized that absent clear and explicit language to the contrary, these duties are coextensive.

The defense language in the indemnity provision at issue in *Goldman* is expansive, yet the Supreme Court refused to impose a defense obligation independent of the indemnity obligation. The provision analyzed in *Goldman* states as follows:

> The Contractor [indemnitor] shall assume the defense of and indemnify and save harmless the City and County of San Francisco, the Director of Pubic Works, and their officers and employees, from all claims, loss, damage, injury and liability of every kind, nature and description, directly or indirectly arising from the performance of the contract or work, regardless of responsibility for negligence; and from any and all claims, loss, damage, injury and liability, howsoever the same may be caused, resulting directly or indirectly from the nature of the work covered by the contract, regardless of responsibility for negligence. (Emphasis added) (*Goldman* at 43, n.2.)

The "defense" language analyzed in *Goldman* is far more "clear and explicit" than the language analyzed in *Crawford*, yet *Goldman* remands the case for determination of negligence, the common trigger for the coextensive defense *and* indemnity obligation.

Crawford ignores this aspect of *Goldman* and instead analyzes the "defense" and "indemnity" obligations separately, as if the construction subcontract is an insurance policy. This critical error leads *Crawford* down a slippery slope which results in an analysis of an indemnity clause contained in a contract as if it were a policy of insurance.

Just two years after *Goldman*, this Supreme Court exhibits a striking contrast when analyzing the defense obligation arising through an insurance policy. In *Gray* v. Zurich (1966) 65 Cal.2d 263 ("*Gray*") the Court does not cite or discuss *Goldman*, recognizing that the duties arising under an indemnity provision contained in a contract have no application to analysis of the duties arising out of an insurance policy.[1] *Crawford* misses this point, and attempts to make the contractual indemnitor the insurer of the indemnitee. For this reason, the *Crawford* analysis is flawed.

In *Gray*, the insurer agreed to defend any suit "even if any of the allegations are groundless, false, or fraudulent." (Id. at 267.) In analyzing the duty to defend, the *Gray* Court stated:

> Since the policy sets forth the duty to defend as a primary one and since the insurer attempts to avoid it only by an unclear exclusionary clause, the insured would reasonably expect, and is legally entitled to, such protection.
>
> * * *
>
> In interpreting an insurance policy we apply the general principle that doubts as to meaning must be resolved against the insurer and that any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect. (Emphasis added.)
> (Id. at 268 - 269.)

[1] It is important to note that Justice Tobriner authored *Goldman* and *Gray*, and emphasized that indemnity provisions contained in contracts are analyzed exactly the opposite of the defense and indemnity obligations arising under an insurance policy.

In *Goldman*, the Court applies the opposite standard. Indemnity clauses contained within a non-insurance contract are construed against the indemnitee, whereas an insurance policy is construed against the indemnitor (insurer). The *Goldman* court states:

> Although the cases have held that one may provide by agreement for indemnification against his own negligence [citations omitted], the agreement for indemnification must be clear and explicit; the agreement must be strictly construed against the indemnitee. In view of the general rule that an implied indemnity does not reach to protect the indemnitee from a loss to which his negligence has contributed, we must look at least for an express undertaking in the document that he is to do so. If one intends to do more than merely incorporate the general rule into the written document, he will be required to fix the greater obligation in specific terms. And the extent of the purported indemnitor's liability must be determined from an objective assessment of the language of the instrument. (*Goldman* at 44.)

The *Goldman* Court's holding is based on the obvious distinctions between contractual indemnity and insurance. The *Goldman* Court recognizes these important distinctions, stating as follows:

> It is true that the indemnification contract resembles the insurance contract and that we would interpret the insurance policy against the draftsman, but a major reason for so reading such a policy emanates from its role as an adhesion contract, particularly from the status of the insurance company as the dominant bargainer in dealing with the public. These characteristics do not appear here; the situation is in fact reversed: the general contractor takes bids from competing subcontractors, and, if anything, the general contractor occupies the better bargaining position. As the

> court said in *Indenco, supra,* "The contract between Indenco, Inc., and Evans here is not like an insurance policy to be construed against one party. Rather, its terms were admittedly arrived at by negotiations between two parties." (Citation omitted) [¶] Further, and more important, the general contractor, not the subcontractor, *drafted* the printed form of agreement upon which the general contractor relies for reimbursement for its own negligence. While *Tunkl* does not purport to *invalidate* indemnification agreements, the policy reasons which prompted *Tunkl* do point to the need for *precision* in an agreement which would impose the obligation of indemnification. (Citation omitted) (Emphasis in original). (Id. at 49).

Goldman provides no logical support for *Crawford's* attempt to separate "defense" and "indemnity" obligations in a construction contract clause, with indemnification analyzed in accordance with *Goldman* and defense analyzed as if it were a contract of insurance.

In *Crawford*, the Court of Appeal fails to apply this rule of *Goldman* and does not perform an objective assessment of the language. While admitting that the indemnity obligation must be construed against the indemnitee, *Crawford* instead construes the purportedly separate defense obligation against the indemnitor. This is the irrefutable result of *Crawford* based on the indemnity language reviewed and the conclusions drawn in the opinion. The indemnity language analyzed in *Crawford* states as follows:

> Contractor does agree to indemnify and save Owner harmless against all claims for damages to persons or to property and claims for loss, damage and/or theft of homeowners' personal property growing out of the execution of the work, and at his own expense to defend any suit or action brought against Owner founded upon the claim of such damage or loss or theft; . . . (Emphasis added.) (*Crawford* at 791, n.2.)

Crawford concedes that this indemnity provision requires indemnification only if the indemnitor is found to be negligent. (Id. at 793.) However, based on the same language, *Crawford* declares that the defense obligation arises whether or not the indemnitor is found to be negligent. In this way, *Crawford* creates a new standard of review for contractual indemnity provisions -- one rule that applies only to the indemnity portion -- which is construed against the indemnitee -- and a new second rule which applies only to the defense portion -- which is construed against the indemnitor. In other words, *Crawford* first assumes that the defense and indemnity obligations are not coextensive, and then construes the defense language against Weather Shield, the indemnitor.

Specifically, *Crawford* analyzes the scope of the *indemnity* obligation through the express terms of the agreement and strictly construes the language against the indemnitee. In direct contrast -- and applying a different standard of review -- *Crawford* finds that the *defense* obligation triggers regardless of the negligence of the indemnitee or the indemnitor,

despite no contractual language whatsoever on this subject. It is obvious that the *Crawford* opinion analyzes the purported separate duties of defense and indemnity by utilizing separate standards of review for each duty, much like *Gray*'s analysis of insurance duties. *Crawford* thereby violates the holdings in *Goldman* and *Gray* by failing to recognize that the duty to defend is separate from the duty to indemnify only in the insurance context, not in an indemnity clause contained in a contract for another purpose (i.e., the provision of window product).

2. *Crawford* Refuses to Follow the Appellate Decisions in *Regan Roofing* and *Heppler*

The *Crawford* opinion not only ignores *Goldman*, but also refuses to follow numerous Court of Appeal decisions, including the Fourth District Division One holdings in *Regan Roofing* and *Heppler*. *Crawford* creates a split of authority in the interpretation of indemnity clauses contained in contracts. If *Crawford* is not overturned, contracting parties will need to revise their indemnity language in order to comply with the variances in interpretation within the Fourth District Court of Appeal.[2]

[2] JELD-WEN relied on the holdings in *Goldman*, *Regan Roofing* and *Heppler* when it negotiated the terms of its indemnity agreements. *Crawford* retroactively changes these agreements, expanding a defense obligation specifically denied in an identical indemnity provision in *Heppler*.

The *Crawford* opinion initially maligns *Regan Roofing*, stating as follows:

> In granting the petition requiring the trial court to vacate its order, the [*Regan Roofing*] court issued what must be characterized as a somewhat enigmatic opinion, i.e., one that straddled both the substantive and procedural issues in the case. (*Crawford* at 819.)

Crawford then confuses the duty to defend in the insurance context with the duty to defend arising through an indemnity clause in a construction contract. *Crawford* willingly exposes this mistaken analysis as follows:

> Two, the *Regan Roofing* court did not directly confront the question of whether a duty to defend might exist separately from a duty to pay a settlement or judgment because of the mechanics of an obligation to actually defend an existing suit. Thus the court does not address the chicken-egg conundrum inherent in any promise (however so narrow in scope) to "defend" another, or the solution to it, brilliantly articulated almost forty years ago by Justice Traynor (sic) in the passage from *Gray v. Zurich*. (Id. at 820.)[3]

Regan Roofing found that the duty to defend was not necessarily broader than the duty to indemnify in the context of contractual indemnity as opposed to an insurance policy. (*Regan Roofing* at 436.) *Crawford* fails to maintain this critical separation, and mistakenly relies on *Gray*, an insurance case. *Regan Roofing* recognizes that indemnity clauses in

[3] Justice Tobriner authored *Gray v. Zurich*, not Justice Traynor. Justice Traynor concurred.

construction subcontracts are not interpreted like an insurance policy. (Id. at 436-437).

In *Heppler*, the Fourth District, Division One entertained precisely the same indemnity provision as *Crawford* and came to the opposite conclusion. This ironic circumstance was recognized in *Crawford* when the Court stated at footnote 32 as follows:

> Indeed, we recognize that the form indemnity provision at issue in *Heppler* is identical to the one before us today. (Emphasis added.) (*Crawford* at 822, n.32.)

Regardless, through a constrained analysis of *Heppler*, *Crawford* divides away the defense portion of the indemnity and construes it against the indemnitor. *Crawford* admits that *Heppler* -- following the lead of *Goldman* -- subsumed defense into the indemnity obligation, stating as follows:

> Here, we recognize that there is some textual support for the idea that when the *Heppler* court said "indemnity," it did mean, yes, defense costs as well. [citation omitted]. In the opening paragraph of its discussion, the *Heppler* court uses the word "indemnity" as if it subsumes defense costs. (*Crawford* at 826.)

In this way, *Crawford* fails to recognize that *Heppler* diligently followed *Goldman*, where the defense was also subsumed in the analysis of the

indemnity obligation. It is the *Crawford* opinion that refuses to follow the *Goldman* precedent in this regard. *Heppler* and *Regan Roofing* understood that the defense obligation is analyzed as co-extensive with the scope of the indemnity obligation in the context of a contractual indemnity provision, as opposed to insurance. *Crawford* misses this critical distinction and the result is a misinterpretation of the scope of the duty to defend.

3. *Crawford* Misanalyzes the Indemnity Provision at Issue

Throughout the *Crawford* opinion, there is continual confusion of the rules for interpretation of insurance policies with the rules for interpretation of indemnity provisions in contracts. Although insurance coverage is not even at issue, the opinion provides significant speculation on its potential impact. (See *Crawford* at 802-803.) In discussing the defense obligation, the opinion inappropriately discusses in detail the Supreme Court decision in *Buss v. Superior Court* (1997) 16 Cal.4th 35, a decision which exclusively concerns the duty to defend arising out of an insurance policy. (See *Crawford* at 806 - 807.)

Interestingly, *Crawford* continually asserts that it is not applying insurance principles and is instead strictly construing the subject indemnity

provision against the indemnitee. In attempting to distinguish *Regan Roofing*, *Crawford* addresses the subject indemnity provision and states:

> Here, by contrast, we have clarity -- the contract is structured so that parties agreed to a (limited, to be sure) defense obligation independent of the obligation indemnify against a judgment or settlement. (Id. at 833.)

This supposed "clarity" is certainly not found in the provision itself. (See provision at pg. 5 infra.) The indemnity provision at issue in *Crawford* makes no clear statement which separates the defense obligation from the indemnity obligation. However, *Crawford* attempts to assist us in the interpretation of the meaning of the provision, stating as follows:

> First of all, readers should note the conjunctive nature of the clause: It is joined by an "and," with the first part involving a promise "to indemnify" and a second part involving a promise "to defend." Next, readers should notice the internally self-referential structure. The trigger of the promise to defend is in the second half of the clause, but it refers back to the first half. Thus, if one asks: "What has the subcontractor promised 'to defend'"? The answer is: "any suit or action brought against Owner founded upon the claim of such damage or loss or theft." And if one asks, "What is this 'claim of such damage or loss or theft'"? The answer is: "all claims for damages to persons or to property and claims for loss, damage and/or theft of homeowners personal property growing out of the execution of the work." [¶] Such language is surely clear enough. (Id. at 813.)

The conclusion that "such language is surely clear enough" is ludicrous. The opposite conclusion is far more reasonable given the convoluted

explanation of the clause by the *Crawford* majority, and especially when a contractual indemnity provision must be construed against the indemnitee. The provision is certainly not "clear enough" to mandate a defense without negligence or fault. A subcontractor reading this indemnity provision would certainly have no reason to believe he or she was signing an agreement whereby the subcontractor would have to pay for the developer's defense even when the subcontractor is without fault.

The *Crawford* majority's attempt to explain the supposed "clarity" of the provision is itself a muddled mess. Certainly if the parties to the contract had intended that the defense was a separate obligation to be provided whether or not the indemnitor was negligent, more clear and explicit language could have been chosen to convey this simple proposition. (See *Guy F. Atkinson v. Schatz* (1980) 102 Cal.App.3d 351, 357.) Instead, *Crawford* construes the purportedly separate defense obligation against the indemnitor (Weather Shield) and in favor of the indemnitee (Developer) in direct contravention of *Goldman*, resulting in a defense obligation which arises without fault.

4. *Crawford* Fails to Appreciate the Development of the Duty to Defend in the Context of Insurance

Prior to *Gray v. Zurich*, Courts across the land analyzed the defense obligation arising out of an insurance policy as coextensive with the duty to indemnify. If there was no duty to indemnify, there could be no duty to defend. Insurers were free to deny a defense when it appeared there would be no indemnity obligation. If the indemnity obligation was eventually triggered, reimbursement of all defense costs became necessary. There was no insurer's "breach of duty" in denying the defense at the onset. (See *Fisher, Broadening the Insurer's Duty to Defend: How Gray v. Zurich Insurance Co. Transformed Liability Insurance Into Litigation Insurance*, 25. U.C. Davis L. Rev. 141, 146-150 (1991).)

After *Gray v. Zurich*, courts dramatically changed their analysis of the duty to defend in the context of insurance. The insurer's duty to defend became recognized as "broader than, independent of, and separate from the duty to indemnify. . . ." (*Randall, Redefining The Insurer's Duty to Defend* 2 Conn.Ins.L.J. 221, 250 - 252 (1997).) The insurer's duty to defend is no longer automatically coextensive with the duty to indemnify, but is now a separate and distinct protection bargained for as part of the premium paid for the policy.

This separation of an insurer's duty to defend from its duty to indemnify developed because of public policy reasons unique to insurance. (See *Gray* at 269 - 273, 278 and *Fisher*, supra, 25 U.C. Davis L.Rev. 141, 150-158.) Those public policy considerations do not exist when analyzing an indemnity clause contained in a non-insurance contract.

Here, the *Crawford* majority wishes to extend the insurance analysis to contractual indemnity. There is no legitimate basis for this extension. The rule for interpretation of a contractual indemnity provision should remain as follows: Absent a compelling, clear and explicit contrary intention, expressed through the terms of the agreement, the duty to defend will be analyzed as coextensive with the duty to indemnify.

5. California Civil Code Section 2778 Does Not Apply to an Indemnity Provision Contained in a Construction Contract

The *Crawford* majority, the Appellant, Respondents and many Amicus Curiae, through the briefs submitted to this Supreme Court, attempt to apply the provisions of Civil Code Section 2778 to an indemnity clause contained in a construction contract. Before this Supreme Court takes this leap of faith on the applicability of Civil Code Section 2778 in this context, it should first investigate the historical context and legislative intent of this

code provision, and determine its relevance to an indemnity clause in a construction contract. This Court will find that Section 2778 applies to insurance policies, not indemnity clauses contained in non-insurance contracts.

California Civil Code Section 2778 was enacted in 1872 as the product of the California Code Commission, also known as the Revision Commission, a panel of three members of the California legal community appointed by the Governor in May, 1872 to draft a complete system of the laws. A review of the commission's actions shows that much of the California Civil Code was achieved by simply enacting New York state law provisions proposed by their Code Commissioners in a proposed Civil Code of New York. In fact, this is precisely the genesis of California Civil Code Section 2778.

Section 2778 is an exact replica of New York Civil Code Section 1530. Section 1530 was enacted as law by the State of New York in 1865 and was known as "Fields Draft," because the entire effort was propelled and guided by the originator of the American Codification System, David Dudley Field. To this day, Civil Code Section 2778 contains the identical language set forth by the State of New York in Civil Code Section 1530 in the year 1865.

There is good reason to believe that New York Civil Code Section 1530 was intended to address only "a contract of indemnity," not an indemnity provision contained in a contract for another purpose. In fact, the preamble of New York Civil Code Section 1530 remains identical to the preamble of current California Civil Code Section 2778 and states as follows:

> In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: (Emphasis added) (Civil Code Section 2778).

In using the phrase "a contract of indemnity," the New York Code Commission used then present day nomenclature for an insurance agreement. (*Fisher, supra* at 146.) Indeed, an insurance policy today is still technically referred to as "a contract of indemnity."

A detailed review of the law referenced in support of New York Civil Code Section 1530 reveals that each case entertained the indemnity

obligation in the context of an insurance bond or other "contract of indemnity."[4] It appears certain that New York intended Section 1530 to provide a framework for interpreting insurance bonds or "contracts of indemnity" not ancillary indemnity provisions contained in a contract for another purpose, i.e., a contract to provide windows.

Similarly, early California cases discuss indemnity in the context of a surety bond or a contract of indemnity.[5] There is no logical reason to

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[4] Scott v. Tyler (1852) 14 Barbour 202 (action upon a bond of indemnity); Chace v. Hinman (1832) 8 Wendell 452 (suit brought on a bond); Webb v. Lansing (1838) 19 Wendell 423 (action on a bond accompanying of real property); Churchill v. Hunt (1846) 3 Denio 321 (action of debt on bond); Gilbert v. Winman (1848) 1 Comstock 550 (action of debt upon a bond); Westervelt v. Smith (1853) 2 Duer 449 (action upon bond); Westervelt v. Smith (1853) 7 New York 78 (action on execution of bond); Aberdeen v. Blackmar (1844) 6 Hill 324 (action based upon contract to indemnify); Campbell v. Jones (1830) 4 Wendell 306 (action upon executed bond); Collinge v. Heywood (1839) 9 Adolphus & Ellis 633 (action on contract to indemnify); Reynolds v. Doyle (1840) 1 Manning & Granger 753 (action on contract to indemnify); Mott v. Hicks (1823) 1 Cowan 513 (promise to indemnify on a debt); Warwick v. C. Richardson (1842) 10 Messon & Granger 753 (action upon a bond); Trustees of Newburgh v. Galatian (1825) 4 Cowan 340 (action upon debt on bond); Beers v. Pinney (1834) 12 Wendell 309 (action upon bond of indemnity); Given v. Driggs (1803) 1 Caines 450 (action of debt on bond of indemnity); Lee v. Clark (1841) 1 Hill 56 (action upon debt on bond); Riley v. Seymour (1828) 1 Wendell 143 (action on a bond); Thomas v. Hubbell (1857) 15 New York 405 (action on a bond); Luddington v. Pulver (1831) 6 Wendell 404 (action on debt on bond); Bridgeport Fire and Marine Ins. Co. v. Wilson (1860) 7 Bosworth 427 (action upon a bond of indemnity).

[5] Welton v. Adams (1854) 4 Cal. 37, 39 "the Court below erred in refusing to compel the respondents to execute a bond of indemnity"; Price v. Dunlap (1885) 5 Cal. 483, 483 "the plaintiff tendered a bond of indemnity to the defendant . . ."; Castro v. Wetmore (1860) 16 Cal. 379, 380 "the complaint alleges the tender of a bond of indemnity . ."; Randolph v. Harris (1865) 28 Cal. 561, 563 "there is no averment in the complaint to the effect that the plaintiff had tendered to the

believe that in 1872 the California Legislature intended to incorporate New York Civil Code Section 1530 for any purpose other than the interpretation of insurance provisions.

From this background, it appears certain that California Civil Code Section 2778 is limited to the interpretation of "a contract of indemnity" which is another name for an insurance bond or a policy of insurance. Section 2778 therefore has no application to this Court's review of *Crawford's* interpretation of an indemnity provision contained in a construction contract between Weather Shield and the developer.

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defendant a good and sufficient bond of indemnity . . ."; Strong v. Patterson (1856) 6 Cal. 156, 157 "by the provisions of the statute in such cases, it would be necessary for the plaintiff to tender the Sheriff a sufficient bond of indemnity . . ."; Taylor v. Seymour (1856) 6 Cal. 512, 513 "a bond of indemnity having been tendered to . . ."; Davidson v. Dallas (1857) 8 Cal. 227, 228 "whereupon bonds of indemnity were required . . ."; Davidson v. Dallas (1860) 15 Cal. 75, 78, "separate bonds of indemnity were given . . . "; Comstock v. Breed (1859) 12 Cal. 286, 288 "this suit was brought on a bond of indemnity . . ."; White v. Fratt (1859) 13 Cal. 521, 522 "plaintiff . . . requested an indemnifying bond . . . "; Stark v. Raney (1861) 18 Cal. 622, 624 "this is an action upon a verbal agreement to indemnify the plaintiff . . ."; Dennis v. Packard (1865) 28 Cal. 101, 101 "plaintiffs . . . with the defendants here as sureties, then gave the Sheriff an indemnifying bond . . ."; Roussin v. Stewart (1867) 33 Cal. 208, 211 "the action is on a bond to indemnify . . ."; Lott v. Mitchell (1867) 32 Cal. 23, 25 "the undertaking was a mere bond of indemnity . . ."; Lewis v. Jones (1868) 34 Cal. 629, 632 "both bonds of indemnity were given . . ."; Long v. Neville (1868) 36 Cal. 455, 456 "he has no use for indemnifying bonds . . ."

In *Goldman v. Ecco Phoenix* (1964) 62 Cal.2d 40 -- the seminal case for interpretation of an indemnity clause contained in a construction contract -- this Supreme Court did not refer to Civil Code Section 2778 to guide its interpretation analysis. We could either assume that the Supreme Court was unaware of Civil Code Section 2778, or that the Supreme Court, in its wisdom, recognized that Section 2778 applied to "a contract of indemnity" and not an indemnity clause contained in a construction contract.

More importantly, and dispositive on the non-applicability of Civil Code Section 2778 in this context, the same rules of interpretation cannot be implemented when insurance and a contractual indemnity provision are to be analyzed "in reverse" as *Goldman* held. (Id. at 49). How can the same rules of interpretation be applied when the indemnitor and indemnitee are reversed from the perspective of bargaining power and drafter of the agreement? How can the same rules apply when public policy considerations are also reversed in the analysis? The only logical conclusion is that Civil Code Section 2778 was intended to apply only to "a contract of indemnity" (i.e., an insurance policy) as specifically set forth in the provision itself. (Civil Code Section 2778).

It is unfortunate that the *Crawford* Court, many legal practitioners and numerous published Court of Appeal opinions have mistakenly consulted Civil Code Section 2778 for guidance in the interpretation of indemnity clauses contained in commercial contracts.[6] This Supreme court should end the confusion and relegate Section 2778 to its intended purpose of assisting in the interpretation of "a contract of indemnity," (i.e., insurance).

6. The *Crawford* Majority's Interpretation of this Indemnity Provision Will Promote Illegitimate Construction Defect Litigation

Crawford's interpretation of this indemnity provision will fuel illegitimate construction defect litigation. Should *Crawford*'s new analysis of contractual indemnity be adopted by this Supreme Court, plaintiffs and their counsel will become the arbiters of the defense obligation. The *Crawford* majority impliedly finds that it is the plaintiffs' claim which triggers the defense obligation. If the plaintiffs' allege damage or defect and sue the developer, the *Crawford* majority will look to this claim to determine the defense obligation of the developer's subcontractors.

[6] See for example the annotations to Civil Code Section 2778 where many court's misapply these rules.

Plaintiffs and their attorneys understand that a defense obligation can be turned into settlement leverage and eventually, financial settlement. Plaintiffs will assert claims broadly to include allegations of damage and defect to virtually every component of the residential project. Each of the subcontractors will be obligated to defend not only themselves, but also their developer adversary. Plaintiff's counsel can then simply sit back and "watch the fur fly" at an expensive pace. The subcontractors will eventually be forced to pay tribute to avoid the cost of proving they did nothing wrong.

It is difficult enough to defend against unsupportable claims in a Complaint in order to vindicate your work product and protect your integrity. It is far too much to expect a party to pay for another's defense, even when the party is eventually vindicated through a jury verdict.

It is this reality that Justice Tobriner was addressing when he connected the defense and indemnity obligations in *Goldman*. Defendants should be allowed to challenge the allegations of wrongdoing without suffering undue financial hardship. The *Crawford* majority would punish non-responsible litigants and provide motivation for filing illegitimate claims.

It seems California hardly needs to promote residential construction defect litigation. This litigation is already out of control, impacting the types of developments constructed[7] and causing insurance costs to skyrocket.[8]

If window manufacturers are forced to finance residential construction defect litigation even when their product is not defective, their only options are to discontinue business operations in California or significantly raise the price of their product. Selection of either option will be passed along as higher costs to the California consumer. Inevitably, it is the residential homebuyer who will suffer from the contractual indemnity interpretation proposed by the *Crawford* majority.

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[7] Application For Leave to File Amicus Curiae Brief In Favor Of Defendant, Appellant And Petitioner On Behalf Of California Framing Contractor's Association at 9-10, Crawford v. Weather Shield Mfg, Inc., 38 Cal.Rptr.3d 787 (2006) (No. G032301) citing to L. Lutzenheiser, "Residential New Construction: Market Transformation Research Needs", CIEE Market Transformation Research Scoping Study (Washington State University, December 10, 1999), at pp.12-13.

[8] Application For Leave to File Amicus Curiae Brief In Favor Of Defendant, Appellant And Petitioner On Behalf Of California Framing Contractor's Association at 15-17, Crawford v. Weather Shield Mfg, Inc., 38 Cal.Rptr.3d 787 (2006) (No. G032301) citing to Dunston & Swenson, "*Construction Defect Litigation and the Condominium Market*" (California Research Bureau, "Note", Vol. 6, No. 7, Nov. 1999), at p.6 and Stretch, "California Residential Construction Efforts Reduce Risks of Defect Litigation", Insurance Journal (January 2, 2006).

V.

CONCLUSION

An insurer's duty to defend is broader than the duty to indemnify for public policy reasons unique to insurance. An indemnity provision in a construction contract is not insurance, and must not be analyzed as if it were. In this case, the contractual indemnity provision fails to set forth a separate duty to defend in clear, explicit and precise terms. Therefore, pursuant to *Goldman*, the developer's contractual indemnity provision fails to expand the duty to defend beyond the duty to indemnify.

For these reasons, amicus curiae JELD-WEN, inc. respectfully urges this Court to overturn the *Crawford* majority opinion based on the important, substantive distinctions between a contractual indemnity provision and insurance policies.

Dated: McATEE • HARMEYER LLP

By: _____
JEFF G. HARMEYER
Attorney for Amicus Curiae JELD-WEN, inc.

CERTIFICATE OF WORD COUNT

PURSUANT TO RULE OF COURT 14(c)(1)

I, JEFF G. HARMEYER, declare:

1. I am an attorney at law duly licensed to practice before all Courts of the State of California and a partner of McAtee • Harmeyer LLP, attorneys of record for Amicus Curiae JELD-WEN, inc.

2. According to my computer, the word count, including footnotes of this Amicus Curiae Brief is 5,804 words..

Executed on the 5th day of January, 2007 at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____

JEFF G. HARMEYER