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April 14, 2006

California Supreme Court:
350 McAllister Street
San Francisco, CA 94102-4797

RE: Crawford v. Weather Shield Mfg., S141541
California Civil Code § 2782

Dear California Supreme Court:

This letter requests that you grant the petition for review of the above-referenced case, but only with regard to a single issue of enormous importance to public safety and well-being: the proper construction of California Civil Code § 2782.

I. About the American Subcontractors Association

The American Subcontractors Association, Inc. ("ASA"), is a non-profit corporation supported by the membership dues paid by its approximately 5000 member businesses trading as construction subcontractors and suppliers throughout the country, including the 400 plus members of its five chapters in the State of California.

Because of ASA's unique, national perspective as a representative of construction industry subcontractors, ASA's applications for leave to submit *amicus curiae* briefs have been approved in many jurisdictions, including California in *Vandenberg v. Superior Court* (1999) 21 Cal. 4th 818. ASA has participated *amicus curiae* in many jurisdictions with regard to proper interpretation of construction anti-indemnification statutes, of which California Civil Code § 2782 is one. See *Barton-Malow v. Grunau*, 835 So.2d 1164 (Fla.App. 2nd Dist. 2002) (duty to defend not severable from duty to indemnify where hold harmless clause was void under Florida's anti-indemnity statute); *Walsh Construction v. Mutual of Enumclaw*, 104 P.3d 1146 (Or. 2005) (application of anti-indemnity statute to "additional insured" requirements); *Chrysler Corp v. Merrell & Garaguso, Inc.*, 796 A.2d 648 (Del. 2002) (anti-indemnification statute "may, under certain circumstances," bar remedy for

breach of “additional insured” requirements); *Star Electrical Contractors v. Stone Building Company*, 863 So.2d 1071 (Ala. 2003) (electrical subcontractor entitled to a trial to determine whether it must hold general contractor harmless against lawsuit by injured employee of drywall subcontractor), *clarifying* 796 So.2d 1076.

II. This Case is Important to Public Safety and Quality Construction

This case implicates one of the most important public policy pronouncements on the construction industry by California’s Legislature, California Civil Code § 2782. The statute is designed to preserve financial incentives for businesses in the construction industry that discourage defective construction and protect public and worker safety. Construction and demolition operations, by their very nature, carry the potential for both tremendous public benefit and individual, catastrophic harm. For example, according to figures collected by the U.S. Bureau Labor Statistics, the construction industry accounts for 5% of employment in the United States, but accounts for 20% of workplace fatalities. Defective construction can also result in tremendous financial burdens for individual businesses and families, as demonstrated by cases like *American Family Mutual Insurance v. American Girl, Inc.*, 652 N.W.2d 123 (Wis. 2004) (damage to warehouse valued at \$4.1 million to \$5.9 million) *reconsideration denied* 679 N.W.2d 548 (2004), and *Lamar Homes, Inc v. Mid-Continent Casualty Company*, 2005 U.S. App. Lexis 21441 (Texas Supreme Court Docket No. 05-0832) (family home with defective foundation).

To counteract the “moral hazard problem” that arises when economic actors are not financially responsible for their own negligent conduct, either directly or through higher insurance premiums, California’s legislature, and the legislatures of thirty-seven (37) other states, have enacted laws to prohibit construction businesses from transferring the consequences of their own negligence to others through the device of a construction contract. See ASA’s “Subcontractors Chart of Anti-Indemnity Statutes,” attached as Exhibit “1” and expressly incorporated herein by reference.

III. The Court of Appeal’s Decision Allows Lawyers to ‘Plead Around’ Vital Public Policy

In its 71-page decision in *Crawford v. Weather Shield, Mfg., Inc.*, S141541, G032301, the Court of Appeal for Division Three of the Fourth Appellate District took only a single page (page 60) to eviscerate California Civil Code § 2782, both as it existed at the time this case arose, and as it continues to exist for commercial and road building segments of the construction industry (the Legislature amended § 2782 last year to even more tightly regulate indemnity obligations in residential construction contracts). See definition of “construction contract” at Civil Code § 2783, *and see* Assembly Bill 758 (2005) (amended §

2782 by replacing word “which” with “that” in subparagraphs (a) and (b), and by adding subparagraphs (c) and (d)).

Specifically, the Court of Appeal ruled that § 2782 did not apply to the construction contract clause at issue although the clause clearly did “purport to indemnify the promisee against liability ... arising from the sole negligence or willful misconduct of the promisee,” in direct violation of the statute. The clause required a window manufacturer to indemnify a residential developer against “claims for loss, damage and/or theft ... growing out of the execution of the work,” without exception for claims caused by the sole negligence of the developer, and although “theft” is clearly a form of “willful misconduct.”

The Court of Appeal ruled that although the statute clearly regulates contract terms (“agreements ... which purport ...”), it could nonetheless limit the statute’s application with reference to the claims underlying the contract, rather than apply the statute to the contract itself. The Court of Appeal thereby created an easy route for lawyers to ‘plead around’ the application of an otherwise crystal-clear “public policy” statement by the legislature: broad form (type one) indemnity agreements “are against public policy and are void and enforceable.” By implication, the Court of Appeal also ruled that an obligation to provide for “defense” could be enforced although the underlying agreement for indemnity is void and unenforceable. Such an exception would completely swallow the rule, hopelessly undermining the public policy of California’s Legislature clearly expressed in Civil Code § 2782. *Compare Barton-Malow v. Grunau*, 835 So.2d 1164 (Fla.App. 2nd Dist. 2002)(court refused to find separate duty to defend where indemnity provision found invalid).

IV. The Court of Appeal’s Decision Undermines Safety and Quality in Construction

ASA does consider California Civil Code § 2782 to be a thoroughly inadequate solution to the problem of “moral hazard” in construction, not only because its tightest limits are applicable only to residential construction, but also because California’s courts have already limited application of the statute to contract clauses that directly require indemnity, without regard for other contract clauses, such as requirements to name others as “additional insureds” on one’s own general liability insurance policy, that take an indirect route to the same result. See *Chevron v. Bragg Crane & Rigging*, 180 Cal.App.3d 639, 225 Cal. Rptr. 742 (1986).

Nonetheless, the Court of Appeal has added insult to injury by even further limiting the meager protections provided by Civil Code § 2782 to preserve public safety and to protect the public from defective construction. According to the jury in this case, the window framer performed its work negligently. The developer, who selected and supervised the window framer, is to be held completely

harmless by a separately contracted window manufacturer, even from payment for its own defense, against a lawsuit that resulted from negligent work that it was responsible to supervise, and not from any work performed by the window manufacturer. The California public deserves better.

Sincerely yours,

Sincerely,

LAW OFFICES OF
CRAWFORD & BANGS, LLP

BY: E. SCOTT HOLBROOK, JR.
For the Firm


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SUBCONTRACTORS CHART OF ANTI-INDEMNITY STATUTES

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Alabama				No statute.
Alaska	✓			Alaska Stat. § 45.45.900. Exception for hazardous substances.
Arizona	✓ (private work)	✓ (public work)		Ariz. Rev. Stat. §§ 32-1159, 34-226, 41-2586. Exception for entry onto adjacent land.
Arkansas				No statute.
California	✓	✓ (residential construction defect only)		Civ Code §§ 2782 [AB 758 (2005)], 2783. Exception for entry onto adjacent land.
Colorado		✓ but see comments		Colo. Rev. Stat. § 13-50.5-102 only protects against obligations to indemnify a public owner, which is of inconsequential value to subcontractors.
Connecticut		✓		Conn. Gen. Stat. § 52-572k (P.A. 01-155).
Delaware		✓	See comments.	Del. Code, Title 6, § 2704. <u>See Chrysler v. Merrell & Garaguso</u> , 796 A.2d 648 (Del. 2002) (a.i. requirement “may, under certain circumstances, be unenforceable,” but <i>endorsement</i> is enforceable).
D.C.				No statute.
Florida		✓ (public work)		For private work, Fla. Stat. § 725.06 [SB 428 (2001)] requires only a monetary limitation and reproduction in bid documents and specs.
Georgia	✓ but see comments			Ga. Code § 13-8-2 has been gutted by intermediate-level appellate decisions creating an exception for hold harmless obligations that are insured. <u>See Federal Paper</u> , 53 F.Supp.2d 1361 (N.D.Ga. 1999) (reviews case authorities).
Hawaii	✓			Hawaii Rev. Stat. § 431:10-222.
Idaho	✓			Idaho Rev. Stat. § 29-114.
Illinois		✓		Ill. Compiled Stat., 70 ILCS 35/1-3.
Indiana	✓			Ind. Code § 26-2-5, “dangerous instrumentality” exception.
Iowa				No statute.
Kansas		✓		Kansas Stat. § 16-121 [HB 2154 (2004)]; <i>see also</i> Kansas Fairness in Private Construction Contract Act [SB 33 (2005)], § 3(b)(3) (bars subrogation waivers on claims paid by liability or workers’ comp insurance).
Kentucky		✓		Kentucky Rev. Stat., chap. 371 [HB 449 (2005)].
Louisiana				La. Rev. Stat. § 38:2216.G only protects primes on public works. <u>Compare</u> the Louisiana Oilfield Indemnity Act, La. Rev. Stat. Ann. § 9:2780, applied in <u>Babineaux v. Reading & Bates Drilling</u> , 806 F.2d 1282 (5 th Cir. 1987) (both “hold harmless” and “additional insured” void).
Maine				No statute.
Maryland	✓			Md. Code, Cts and Jdcl Pro, § 5-401.
Massachusetts		✓		Mass. Gen. Laws, ch. 149, § 29C.
Michigan	✓			Mich. Comp. Laws § 691.991.
Minnesota		✓		Minn. Stat. §§ 337.01, 337.02. Exception permits owners to indemnify environmental liabilities.

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SUBCONTRACTORS CHART OF ANTI-INDEMNITY STATUTES

State	Bars Indemnity for Sole Fault	Bars Indemnity for Sole or Partial Fault	Closes Additional Insured Loophole	Comments
Mississippi		✓		Miss. Code § 31-5-41.
Missouri		✓		Mo. Rev. Stat. § 434.100. Expressly allows additional insured.
Montana		✓	✓	Montana Rev. Code § 28-2-2111 [HB 482 (2003)] prohibits requirements to “insure or defend,” but authorizes OCP, PMPL.
Nebraska		✓		Neb. Rev. Stat. § 25-21,187.
Nevada				Nev.Rev. Stat. § 616B.025 provides no protection; see <u>Amer. FSB v. County of Washoe</u> , 802 P.2d 1270 (Nev. 1990).
New Hampshire				N.H. Rev. Stat. § 338-A:1 only prohibits indemnity of design professionals.
New Jersey	✓			N.J. Stat. § 2A:40A-1.
New Mexico		✓	✓	N.M. Stat. § 56-7-1 [SB 280 (2003)] prohibits requirements to “insure or defend,” but authorizes OCP, PMPL.
New York	✓			N.Y. Gen. Oblig. Laws § 5-322.1.
North Carolina		✓		N.C. Gen. Stat. § 22B-1.
North Dakota				N.D.Cent.Code 9-08-02.1 prevents owner shifting design risk.
Ohio		✓	See comments.	Ohio Rev. Code § 2305.31. <u>Compare Buckeye Union Ins. v. Zavarella Bros.</u> , 699 N.E.2d 127 (Ohio 8 th App. 1997) (a.i. barred) and <u>Stickovich v. Cleveland</u> , 757 N.E. 2d 50, 61 (Ohio 8 th App. 2001) (a.i. permitted).
Oklahoma				Okla. Stat § 15-422 affords no protection.
Oregon		✓	✓	Or. Rev. Stat. § 30.140 prohibits subcontractor’s “surety or insurer” from indemnifying another’s negligence. <u>Walsh Construction</u> , 104 P.3d 1146 (Or. 2005).
Pennsylvania				Pa. Stat., Title 68, § 491, prohibits indemnity of design professionals.
Rhode Island		✓		R.I. Gen. Laws § 6-34-1.
South Carolina		✓		S.C. Code § 32-2-10.
South Dakota	✓			S.D. Codified Laws § 56-3-18.
Tennessee	✓			Tenn. Code § 62-6-123.
Texas		✓ (public work; injuries excluded)		Government Code § 2252.902 [SB 311 (2001)]. Civ. P&R Code § 130.002 only prohibits indemnity of design professionals.
Utah		✓		Utah Code § 13-8-1 exception permits indemnity of owner.
Vermont				No statute.
Virginia	✓			Va. Code § 11-4.1.
Washington		✓		Wash. Rev. Code § 4.24.115.
West Virginia	✓			W.Va. Code § 55-8-14.
Wisconsin				Wis. Stat. § 895.49 provides no protection; see <u>Gerdman v. U.S. Fire Ins. Co.</u> , 350 N.W.2d 730 (Ct. App. 1984).
Wyoming				No statute.

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