

## **AGCC/LAC NEW CASES OF INTEREST**

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### **CALIFORNIA**

#### **Conspicuous Written Disclaimer in Sales and Express Warranty Documents Provided to Homeowners Precluded Homeowners' Claims Against Home Builder for Breach of Implied Warranty of Quality.**

*Hicks v. Superior Court*, 2004 D.J.D.A.R. 749 (1/22/04), *modified*, 2004 D.J.D.A.R. 782 (1/22/04)

The Court of Appeal denied plaintiff homeowners' petition for writ of mandate on the issue of whether California law precluded the builder of newly constructed homes from excluding from its sales contracts the common law implied warranty of quality.

Plaintiff homeowners purchased new homes from defendant developer Kaufman & Broad Home Corporation ("KB Home"). After discovering alleged design and construction defects in their homes (specifically, the use of allegedly inferior plastic fiber additives to control cracks in concrete rather than welded wire mesh), the homeowners sued KB Home under a number of legal theories, including breach of implied warranty. KB Home moved for summary adjudication on that cause of action on the ground that the buyers had waived any implied warranties under the terms of their sales contracts. The trial court granted the motion, finding that the waiver provisions were sufficiently conspicuous and that they were neither procedurally nor substantially unconscionable.

The homeowners sought a writ of mandate from the Court of Appeal ordering the trial court to reconsider and deny KB Home's summary adjudication motion. The homeowners had argued that the warranty waiver provisions in the sales contract were not sufficiently conspicuous and were unconscionable under the standards imposed by the Song-Beverly Act (Civ. Code §§ 1792, *et seq.*).

The Court of Appeal denied the writ. It held that the Song-Beverly Act applies only to sales of consumer goods and, as such, did not apply to the sale of homes. The court also agreed with the trial court's conclusion that the disclaimer language in the sales contracts was conspicuous in accordance with Commercial Code § 2316 because "a reasonable person against whom [the disclaimer] is to operate ought to have noticed it," and that this conclusion was reinforced by the repetition of the disclaimer in both the disclosure statement and Limited Warranty in the contract. The court further found that the disclaimers were neither procedurally nor substantively unconscionable because there was no adhesion (the evidence showed KB Home would have negotiated the terms and that comparable housing was available), the terms were not overly harsh or one-sided so as to "shock the conscience" (KB Home provided an expanded express warranty in exchange for waiver of the implied warranty), and there was no element of surprise.

**Subcontractor That Was Properly Licensed for Part of the Work Is Entitled to Compensation for the Work Performed While Licensed.**

*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.*, 04 C.D.O.S. 983 (1/30/04)

The Court of Appeal reversed the trial court's order granting defendant contractor and sureties motion for summary judgment against plaintiff subcontractor.

Niederhauser Metal Works Company, Inc. ("Niederhauser") was the metal works subcontractor for construction of Disney's Grand Californian Hotel. Niederhauser entered into two subcontracts with MW Erectors, Inc. – one for structural steel work and the other for ornamental metals work. After Niederhauser terminated MW Erectors, MW Erectors sued Niederhauser and its payment bond sureties for amounts allegedly owing on the two contracts.

The defendants moved for summary judgment on the grounds that MW Erectors did not have a Class C-51 structural steel license when the first contract was executed (though it obtained such a license shortly after performance began) and did not have a Class C-23 ornamental metal contractor license when the second contract was executed or when any of the work under that contract was performed. The trial court granted the motion, and MW Erectors appealed.

The Court of Appeal reversed. With regard to the first contract, the court held that MW Erectors' lack of licensure at contracting did not preclude

recovery for the work it performed after it obtained the required license. The court looked at Bus. & Prof. Code § 7031(a), which generally prohibits a contractor from maintaining an action to recover “compensation for any *act or contract* where a license is required . . . without alleging that he or she was a duly licensed contractor at all times during the performance of that *act or contract* . . . .” (Emphasis added.) The court found the section’s plain language allows recovery for an act performed while licensed, even if it is performed under a contract that was executed before the contractor was licensed. The court added that its construction of section 7031 was supported by the policy underlying the section, *i.e.*, the public would be protected because contractors could only recover compensation for acts they performed while they were properly licensed.

The court rejected MW Erectors’ argument that the defendants were judicially estopped from contending that MW Erectors was unlicensed because Niederhauser had filed a cross-complaint against the general contractor, Turner Construction Company, and a mechanic’s lien against the property based on MW Erectors’ work. The court reasoned that, even if the cross-complaint qualified as an “inconsistent position” (the first requirement for judicial estoppel), there was no prejudice to MW Erectors (the second requirement) because the trial court had dismissed the cross-complaint.

With regard to the second contract, the court found that the trial court’s grant of summary judgment was improper as there were disputed issues of material fact concerning whether the metal work MW Erectors performed was structural, such that its Class C-51 license was sufficient, or purely ornamental, such that a Class C-23 license was required.

Finally, the court rejected the defendants’ contention that both contracts were illegal and void *ab initio* because MW Erectors was not properly licensed when it signed them. Relying on the California Supreme Court’s holdings in *Gatti v. Highland Park Builders, Inc.*, 27 Cal. 2d 687 (1946), and other cases, the court held that the “void-for-illegality doctrine” is not applied in every instance of technical noncompliance with licensing requirements. Rather, trial courts should examine the contractor’s qualifications to determine whether voiding the contract is necessary to protect the public.

## **FEDERAL**

### **California Regulations Establishing Minimum Wages and Benefits for State-Registered Apprentices Are Not Preempted by ERISA or NLRA.**

*Associated Builders & Contractors of Southern California, Inc. v. Nunn*, 04 C.D.O.S. 389 (9th Cir. 1/16/04)

The Ninth Circuit affirmed the District Court's denial of contractor association's request for an injunction to prevent California officials from implementing amendments to the California regulations that established minimum wages and benefits on public and private construction projects for State-registered apprentices.

The Associated Builders brought an action in the U.S. District Court for the Central District of California challenging 8 Cal. Regs. §§ 208(b) and (c) on the grounds that these regulations are preempted both by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 101, *et seq.*, and by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* The district court determined Associated Builders had little likelihood success on the merits because the regulations they challenged were part of the same scheme that the United States Supreme Court held not to be preempted by ERISA in *California Div. of Labor Standards v. Dillingham*, 519 U.S. 316 (1997) ("*Dillingham I*"), and that the Ninth Circuit, on remand, held not to be preempted by the NLRA in *Dillingham v. Sonoma County*, 190 F.3d 1034 (9th Cir. 1999) ("*Dillingham II*").

Under the California scheme, building contractors can hire registered apprentices and pay them at a special rate that is typically lower than the journeyman rate which is otherwise required under prevailing wage law. The California Code of Regulations sets the special apprentice rate at 8 Cal. Code Regs. §§ 208(b) and (c) for public and private projects, respectively. The 2002 amendments to the regulations, challenged by Associated Builders, recalibrated the wage requirements for registered apprentices on private construction jobs to reflect varied market conditions throughout the State. These regulations are entirely voluntary; they do not impose any obligations on contractors who do not employ apprentices from State approved apprenticeship programs.

On appeal, the Ninth Circuit agreed with the district court and affirmed its denial of Associated Builders' request for injunction. The court held that the ERISA preemption analysis was controlled by *Dillingham I*. That case held that the Labor Code section governing apprentice programs did not violate ERISA preemption because it "functions irrespective of . . . the existence of an ERISA plan" and is indifferent "to the funding, and attendant ERISA coverage, of apprenticeship programs." Likewise, the California regulations did not specifically make ERISA plans essential to their operation and did not act immediately or exclusively upon ERISA plans. The court also was persuaded by the fact that Congress did not intend ERISA to preempt regulation in areas of traditional State concern and that regulation of apprentice standards was such an area. Finally, the court found that California regulations do not have a "forbidden connection" because they "do not bind ERISA plans to anything." While the regulations offer incentives, they do not dictate the choices facing ERISA plans.

Unlike its ERISA preemption claim, which concerned both public and private project apprenticeship regulations, Associated Builders' NLRA preemption claim challenged only the private project regulations. In *Dillingham II*, the Ninth Circuit held that California statutory provision regulating apprenticeship standards on public works was not preempted by NLRA. For similar reasons, the court concluded that the NLRA did not preempt similar regulations for private projects. The Ninth Circuit's holding in *Dillingham II* turned on the court's determinations that the statute at issue was a regulatory, rather than proprietary, action, and that California's apprenticeship regulatory scheme "does not affect the right to bargain collectively." Here, the Ninth Circuit held that § 208(c) of the California regulations was not preempted by the NLRA because the establishment of wage and benefit minimums for apprenticeships is not a policy area that Congress intended to leave unregulated, the regulation affects union and non-union employees equally, and it neither encourages nor discourages the collectively bargaining processes subject to the NLRA.

**Doctrine of Sovereign Immunity Does Not Protect Construction Manager for California Public Agency from Liability Under the Federal False Claims Act.**

*United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 04 C.D.O.S. 439 (9th Cir. 1/20/04)

The Ninth Circuit reversed and remanded the district court's grant of summary judgment in favor of the defendant, Daniel, Mann, Johnson & Mendenhall ("DMJM"), which allegedly had submitted false claims in its role as construction manager for the California State University at Northridge ("CSUN").

A. Amir Ali, a *qui tam* relator, sued DMJM and the CSUN for their alleged submission of false claims. Ali was an employee of CSUN in January 1994 when the Northridge earthquake occurred. CSUN retained DMJM as its construction manager in December of 1994 after it had terminated Ali's employment. Ali filed a *qui tam* complaint under the federal False Claims Act, 31 U.S.C. § 3729, *et seq.*, alleging that CSUN submitted false claims to the Federal Emergency Management Agency ("FEMA") for repairs not related to the Northridge earthquake, and he amended the complaint to include allegations against DMJM. CSUN was later dismissed pursuant to the parties' joint stipulation.

DMJM moved for summary judgment. The district court granted the motion, holding DMJM was not subject to liability under the FCA because it was acting as an agent of the State and was therefore protected under the doctrine of sovereign immunity. Ali appealed.

The Ninth Circuit reversed the district court's decision. While acknowledging its prior holding in *Bly-Mage v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001), that "States and State agencies enjoy sovereign immunity from liability

under the FCA", the court declined to extend that protection to a State agency's private contractor construction manager, even though the *qui tam* relator's complaint alleged that the manager, DMJM, was an agent of the public owner (CSUN).

The applicable test for sovereign immunity is the "arm-of-the-state test." Under that test, the court examines five factors to determine whether the agent of a public entity is protected: "(1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity." In this case, the court found that, even assuming that managing the reconstruction of state university buildings is a central government function (test factor no. 2), the four other test factors weighed against granting DMJM immunity.