

## AGCC/LAC NEW CASES OF INTEREST

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### CALIFORNIA

**Where lion's share of damages award to second-tier subcontractor against prime contractor could only have been proper under negligence theory, awards of prejudgment interest and attorneys' fees based on contract were improper**

*Superior Gunite v. Mitzel*, 04 C.D.O.S. 2759 (3/30/04)

The Court of Appeal affirmed the trial court's award of compensatory damages but reversed and remanded prejudgment interest and attorneys' fees awards.

Ralph Mitzel Inc., a general contractor, contracted with the Pomona School District to perform foundation work and grading at a high school. Mitzel subcontracted the structural concrete work to Pinnacle Concrete Construction. After Pinnacle filed for bankruptcy, it subcontracted essentially all of its work to Superior Gunite.

After Mitzel caused Superior to incur delays and additional costs (primarily labor cost overruns), Superior sued Mitzel, Pinnacle and Pomona, but only pursued its claim against Mitzel. Superior and Pinnacle entered an agreement assigning all Pinnacle claims against Mitzel to Superior.

At trial, the court found Superior failed to prove its claim for "pass-through damage," but found Mitzel liable to Superior on its own behalf for negligence and as an assignee of Pinnacle for breach of contract. The trial court awarded Superior \$7,015 in damages incurred by Pinnacle for delayed commencement of the project ("false start damages"); \$406,163 in labor cost overruns (under both contract

and negligence theories); and prejudgment interest and attorneys' fees (based on breach of contract). Mitzel appealed.

The Court of Appeal held that the \$406,163 judgment for breach of contract could not be justified. First, the only claim held by Pinnacle and assigned to Superior was the \$7,015 false start claim. The trial court's damage award excluded delay damages (per the no damages for delay clauses in the contracts), and Superior could not have recovered as assignee of any indemnity claim by Pinnacle because Superior did not pursue or recover any amount from Pinnacle.

Second, Superior did not recover and could not have recovered under a pass-through claim, since the trial court dismissed any pass-through claim Superior might have asserted for lack of proof. As a result, the Court of Appeal did not need to consider that theory. (At footnote 8, the court states that there may be an issue as to "whether a pass-through claim normally applied to government entities can be applied to a nongovernmental entity in California even though a tort remedy for economic loss is available between parties not in privity with each other.")

The court's decision did not affect the \$406,163 damage award, which was also based on negligence, but it did require reduction of the trial court's prejudgment interest and attorneys' fees awards. Superior was entitled to both as to its \$7,015 award. On remand, Superior would also get the opportunity to recover interest (but not attorneys' fees) on its negligence damages to the extent it can prove those damages were "certain or capable of being made certain by calculation" per Civil Code § 3287(a).

**Construction defects claims brought by original purchasers of homes must be determined by judicial referee pursuant to sales agreement**

*Greenbriar Homes Communities, Inc. v. Superior Court*, 2004 DJDAR 3921 (3/4/04, modified 3/30/04)

The Court of Appeal reversed in part the trial court's denial of defendant homebuilder's motion to compel reference of plaintiff homeowners' construction defects claims to a referee.

Greenbriar Homes built and sold homes in Stockton, California. The owners of 69 of those homes sued Greenbriar in separate actions for construction defects. The actions were consolidated. Of the 69 homes, 43 were owned by the original buyers, who were in privity of contract with Greenbriar. The remaining 26 homes were not owned by the original buyers.

The purchase and sales agreements between Greenbriar and the original buyers required that all disputes arising out of the agreements be determined by a judicial referee pursuant to C.C.P. § 638-645.1.

Greenbriar moved to compel the court to order the consolidated action be heard by a referee. The home owners opposed the motion, arguing that the general reference clause was unconscionable and that granting the motion would result in a multiplicity of actions because only the original home buyers could be bound by the clause. The trial court denied the motion on the second ground without ruling on the first. Greenbriar appealed.

Since the parties' consent is required for a general reference, the trial court could not require the non-original buyers to refer their claims, and so, as to those buyers, the trial court's denial of Greenbriar's motion was affirmed.

The original buyers, on the other hand, were bound by the general reference in their home purchase and sales agreements, and, as a result, the Court of Appeal reversed as to those buyers. The court held: the clause was neither procedurally nor substantively unconscionable; the trial court abused its discretion by refusing to enforce the clause due to the possibility of multiple lawsuits; and C.C.P. § 1281.2, which grants discretion not to enforce arbitration agreements in similar circumstances, does not apply to general reference agreements.

**C.C.P. § 1298's special requirements for arbitration clauses in real estate sales contracts are preempted by the federal Arbitration Act**

*Hedges v. Carrigan*, 04 C.D.O.S. 3007 (4/6/04)

Court of Appeal affirmed trial court's denial of defendant home sellers' motion to compel plaintiff home buyers to arbitration their dispute.

In the published portion of its opinion, the Court of Appeal held that C.C.P. § 1298, which imposes notice and format requirements for arbitration clauses in specified real estate contracts, is preempted by the United States Arbitration Act, 9 U.S.C. § 2.

**California Supreme Court to review cases re whether punitive damages awards must be proportionate to compensatory damages award**

*Johnson v. Ford Motor Co.*, 2003 WL 22794432 (11/25/03), *review granted*, \_\_\_ Cal. Rptr. 3d \_\_\_, 2004 WL 721668 (3/24/04); *Simon v. San Paolo U.S. Holding Co. Inc.*, 7 Cal. Rptr. 3d 367, 03 C.D.O.S. 10376 (12/2/03), *review granted*, \_\_\_ Cal. Rptr. 3d \_\_\_, 2004 WL 721668 (3/24/04)

The California Supreme Court has granted review in *Johnson* and *Simon*, two appellate court decisions reaching different conclusions about the effect of the United States Supreme Court's holding in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), that punitive damages must bear a reasonable relationship to the individual injury at issue and the compensatory damages awarded. In *Johnson*, an unreported decision, the Fifth District Court of

Appeal relied on *State Farm* in reducing a \$10 million punitive damages award to \$53,435 because it found the original award was disproportionate to the \$17,811.60 awarded in compensatory damages. In *Simon*, on the other hand, the Second District held that *State Farm* did not deprive California courts of their discretion over the imposition of punitive damages, and the Court of Appeal upheld an award of \$1.7 million in punitive damages, even though the jury awarded only \$5,000 in compensatory damages. While the Court did not grant review in *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 03 C.D.O.S. 10150 (11/25/03), the precedential value of that decision will be affected as well. In *Romo*, the Fifth District Court of Appeal reduced to \$23.7 million a \$290 million punitive damages award it found disproportionate to the \$6.2 million awarded in compensatory damages.

### **FEDERAL**

**Where, based on Davis Bacon Act wage violation complaints against a contractor, Contracting Officer withheld amounts he reasonably determined were needed to protect employees' interests, resulting delays were the contractor's responsibility, even if most of the withholding were not ultimately justified**

*Copeland v. Veneman*, 350 F.3d 1230 (Fed. Cir. 2003, *reh'g denied* 1/15/04)

The Federal Circuit affirmed the denial by the Board of Contract Appeals (BCA) of a contractor's appeal of a contracting officer's final decision to terminate two contracts for default.

Bill Copeland entered into two contracts with the United States Forest Service to construct and reconstruct trails in the San Bernardino National Forest.

During performance, in March 1992, employees of Copeland complained of Davis Bacon Act (DBA) wage violations under one of the contracts. As a result, the contracting officer (CO) requested evidence from Copeland that he had paid his employees appropriate wages. Based on the documentation received, the CO withheld \$30,371.41 in progress payments in April. Shortly thereafter, the Department of Labor (DOL) commenced an investigation and, in July, issued a preliminary determination requesting that the CO withhold a total \$37,905. As a result, the CO withheld another \$5,630 from the next progress payment to Copeland.

Copeland's work on both contracts became increasingly delayed until September 1992, when the CO terminated both contracts for default. Copeland timely appealed to the BCA in 1993, contending that his delay was excusable because it resulted from the CO's erroneous DBA withholdings. The Board dismissed the appeal without prejudice because the issue of Copeland's alleged DBA violations was still pending at the DOL.

In 1999, *seven years after the withholdings*, the DOL concluded that Copeland violated the DBA but that those violations only amounted to \$3,951 (as compared to the \$37,905 withheld amount).

The Board then reinstated Copeland's appeal and, after a hearing, denied the appeal. It held that Copeland did not demonstrate that the CO inappropriately withheld monies and, therefore, he did not establish excusable delay as reason to set aside the default termination. Copeland appealed to the Federal Circuit.

The Circuit Court reviewed the Board's decision under a substantial evidence standard. Withholdings for DBA violations are proper so long as "the amount withheld depended on a reasonable judgment of the [CO] that the withheld amounts were needed to protect the employees' interests." Since Copeland had the burden of showing his delay was excusable, he had to show the Board that the CO acted unreasonably in withholding the amount he did, given the information he had at the time of the withholding. The court held that substantial evidence supported the Board's conclusion that the withholdings were not excessive or unreasonable at the time they were made (*even though they were almost ten times greater than the amount of the actual violations*).

**Under the Miller Act, a subcontractor may recover delay damages using the total cost method and without having to prove fault by the general contractor**

*Lighting & Power Servs., Inc. v. Roberts*, 354 F.3d 817 (8th Cir. 1/13/04)