

AGCC/LAC NEW CASES OF INTEREST

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A contractor's failure to comply with all conditions of its CGL policy may provide a basis for the insurer to deny coverage

Scottsdale Ins. Co. v. Essex Ins. Co., 2002 Cal. App. LEXIS 3776 (Filed: 4/8/02; Published: 5/2/02)

The Court of Appeal reversed the trial court's declaration that defendant insurance company owed contribution to plaintiff insurance company for its settlement of a claim against their common insured, a general contractor.

In early 1990, James Conrad, a licensed architect and general contractor, together with the property owner, Robert Boris, built a single-family house in Laguna Beach, California. In 1991, Conrad and Boris sold the house to Robert and Sandra Opera, with Conrad and Boris splitting the profits from the sale. Soon after they purchased the house, however, the Operas discovered leaks in the house's exterior, and, in 1997, a sewage pump failed, releasing sewage under the house. In addition to the damage from the water infiltration and sewage spill, the Operas and their son were experiencing health problems which allegedly resulted from mold that had formed under the house due to the continuous leaks.

The Operas made a written claim to Conrad who in turn submitted the claim to his insurance agent. The agent referred the claim to Conrad's commercial general liability (CGL) carrier, Alpine Insurance Company. Alpine investigated the claim and gave notice to plaintiff Scottsdale Insurance Company and defendant Essex Insurance Company who, like Alpine, had each provided a CGL policy to Conrad for periods during and after the construction and sale of the house to the Operas. Essex denied the claim after its

investigations revealed that the insurance contract precluded coverage of the joint venture between Conrad and Boris and that Conrad had failed to get additional insured endorsements and indemnification agreements from each of Conrad's subcontractors as required by its policy. Scottsdale also denied the claim, but eventually settled with the Operas for \$225,000. Scottsdale then filed a declaratory action against Essex for equitable contribution. (By this time, Alpine was bankrupt.)

In the declaration action, the trial court disagreed with Essex as to the existence of a joint venture but held that, even if a joint venture did exist between Conrad and Boris, it was not a proper basis to deny coverage because the joint venture did not expand Essex's liability. The trial court also disagreed with Essex that it could deny coverage based on Conrad's failure to secure the additional endorsements and indemnification agreements from his subcontractors. Accordingly, the trial court found in favor of Scottsdale and further found that each carrier's "time-on-the-risk" was a proper allocation of the settlement amount. Essex appealed the court's ruling.

Although the Court of Appeal, unlike the trial court, found that a joint venture did exist between Conrad and Boris, it agreed with the trial court that the joint venture exclusion in the Essex policy would not apply here because Essex's obligations were not expanded by this joint venture. Nevertheless, the Court of Appeal reversed the trial court's judgment, holding that Conrad had no coverage under the Essex policy due to his failure to secure an additional insured certificate and indemnification agreement from each of his 25 subcontractors, as was required by the Essex policy as a condition precedent to coverage. The court commented that "[s]uch endorsements are nonstandard but not unusual." The court also pointed out that plaintiff Scottsdale had a similar requirement, but, unlike the Essex policy, Scottsdale's policy did not condition coverage on compliance with that provision. In its opinion, the court also explained why each of the trial court's specific findings -- that the special endorsement was illusory, an illegal escape clause, in conflict with the "other insurance" provision, impossible to comply with, complied with by Conrad's insurance policy with Scottsdale, and not prejudicial to Essex -- was erroneous. On the last point, the court noted that it found no case requiring a showing of prejudice outside of the notice-cooperation clause context, and, in any event, the court found that Essex was prejudiced because, had Conrad complied with the Essex policy endorsement, there would have been additional insurance under Conrad's subcontractors' policies covering Conrad's vicarious liability for the subcontractors' work.

OSHA regulations could apply to homeowner who hired an unlicensed contractor

Fernandez v. Lawson, 2002 Cal. App. LEXIS 4101 (5/13/02)

Court of Appeal reversed trial court's summary judgment for defendant homeowner on Cal. OSHA claims asserted by an employee of a contractor that defendant had hired.

Truman Lawson, a homeowner, hired Anthony's Tree Service ("ATS") to trim an approximately 50 foot tall palm tree in Lawson's yard. Miguel Fernandez, an ATS employee, was injured during performance of the work for ATS. Fernandez sued Lawson for violating Cal. OSHA.

The trial court found that the work ATS performed required a contractor's license and that neither ATS nor Fernandez possessed such a license. As a result, the court concluded that, under Labor Code section 2750.5, Fernandez would be considered Lawson's "employee" for purposes of civil tort liability. But the court granted Lawson's motion for summary judgment on the ground that, as a matter of law, the Cal. OSHA regulations do not apply to a homeowner who hires someone to trim a tree for his personal benefit. Fernandez appealed, and the Court of Appeal reversed.

First, the court held that summary judgment was inappropriate because there was a triable issue of fact regarding whether Lab. Code § 2750.5 applied. A contractor, and by extension its employees, is estopped from claiming "employee" status under § 2750.5 where (1) the contractor misrepresented to the owner that it held a valid license for the work and (2) the owner relied on the representation. Here, there was conflicting evidence on these issues.

Second, the court held that a homeowner may be subject to Cal. OSHA requirements when he hires a tree trimmer. The court disagreed with the trial court's conclusion that tree trimming is necessarily a "household domestic service," which is excluded from Cal. OSHA coverage. Household domestic service is not defined in Cal. OSHA. The court stated that "the focus should be on the degree of skill or expertise involved and the training and competence required to safely and successfully perform the task." Here, the court concluded that trimming a 50 foot tall palm tree is not a household domestic service.

Thus, if the trier of fact below finds that Lawson was a statutory employer under Lab. Code § 2750.5, then he will be liable for Cal. OSHA violations at the jobsite.

"Pay When and If Paid" clause is not a defense to action on Miller Act payment bond

United States for the Use and Benefit of Walton Technology, Inc. v. Westar Engineering, Inc., 02 C.D.O.S. 4405 (5/22/02)

The Ninth Circuit Court of Appeals reversed the District Court's grant of summary judgment in favor of prime contractor and its surety on subcontractor's Miller Act claim.

Plaintiff subcontractor furnished equipment for a federal project to repaint a Navy crane in the State of Washington. After the prime contractor became delinquent in making rental payments, the subcontractor sued the prime. The subcontractor and prime

contractor settled that suit and executed a settlement agreement providing that the prime would pay the subcontractor a specified sum and that the subcontractor would continue to provide equipment for the duration of the project. The settlement agreement also modified the original subcontract by providing that the prime would only have to make future rental payments to the subcontractor when and if the prime was paid by the Navy.

After the prime failed to make rental payments for the last 12 months of the project, the subcontractor sued on the payment bond for recovery under the Miller Act. Defendants prime contractor and surety claimed that, since the prime had not been paid by the Navy, the “pay when and if paid” clause had not been satisfied, and there were no “sums justly due” to the subcontractor which would entitle it to recovery under the Miller Act. The District Court agreed and granted summary judgment in favor of defendants.

The Ninth Circuit reversed the judgment. The court noted that the terms of a subcontract will typically govern the *measure* of recovery in a Miller Act case. However, the court also noted the Miller Act expressly governs when a subcontractor’s *right* to recovery accrues (90 days after the subcontractor has completed work). Therefore, any terms of the subcontract, such as a “pay when and if paid” clause, dictating the *timing* or *right* to recovery contradict the express terms of the Miller Act. The court held that, absent a “clear and explicit” waiver of the subcontractor’s rights under the Miller Act, such a clause will not be enforced to preclude recovery under the Act.

Builders of cable car turnarounds are protected by statute of limitations applicable to improvements to real property

Robinson v. Chin & Hensolt, 02 C.D.O.S. 4475 (5/22/02)

Trial court’s grant of summary judgment based on statute of limitations affirmed.

Plaintiffs, consisting of 14 San Francisco cable car operators, sued the designer, construction manager, and contractor involved in the rebuilding of three cable car turnarounds for personal injuries arising from the defective design and construction of the turnarounds. The rebuilding of the turnarounds was part of the project to rebuild San Francisco’s cable car system that took place between 1982 and 1984. The plaintiffs alleged that the turnarounds were designed and built in such a way that they were unacceptably difficult to rotate. They also alleged that the turntable latches do not lock in the open position, thus requiring one operator of the two-operator teams assigned to each cable car to rotate the turntable without assistance from the other operator, who has to hold the turntable latch in the open position. Cable car operators had been complaining about these problems since the resumption of cable car operations in 1984.

The issue was whether Code of Civil Procedure Section 337.1, the four-year statute of limitation for patent defects in real property, applied to the design and construction

of the turntables. Plaintiffs argued that the turntables were personal property that was merely attached to the real property of the City, thus making Section 337.1 inapplicable.

The court disagreed with plaintiffs, holding that, although not all personal property becomes real property simply by its attachment to real property, the turntables constituted improvements to real property of the City of San Francisco. The court further stated that the test for determining whether Section 337.1 applies is whether the defendants belong to the classes of construction contractors protected by the statute. In applying this test, the court held that the defendants were not mere manufactures, but, rather, they fell within the classes intended to be protected by Section 337.1.

Third party purchaser can recover on developer/contractor's CGL occurrence-based policy after expiration of the policy period as long as the covered loss occurred during the policy period

Century Indemnity Co. v. Hearrean, 02 C.D.O.S. 4493 (5/22/02)

The Court of Appeal affirmed judgment for defendant insureds in declaratory action brought by plaintiff insurers seeking to deny coverage.

In 1989 and 1990, defendants Roy Hearrean and State Wide Investors, Inc. (collectively, the "Insureds") performed extensive remodeling, including the construction of a nine-story tower, to a hotel in Santa Cruz, California, owned by Mr. Hearrean. During the remodel, plaintiffs Century Indemnity Company and Banker Standard Insurance Company (collectively "Century") provided certain occurrence-based commercial general liability (CGL) policies to the Insureds. In 1991, Mr. Hearrean deeded title to Union Federal Savings Bank (the "Bank") in lieu of foreclosure. The Bank sold the hotel to Kanwell Lodging Group, Inc. in 1994, who then sold it to then Kang Family Partners in 1994.

On February 9, 1996, the Kang Family Partners sued the Insureds and others alleging negligent and defective construction of the tower and other improvements to the hotel. The Insureds tendered the claim to Century who provided a defense under a reservation of rights and eventually settled the Kang action for \$100,000 without contribution from the Insureds. Soon after the initial tender by the Insureds, Century filed a declaratory action disputing coverage. Century then moved for summary judgment on the basis that the current owner and claimant, the Kang Family Partners, purchased the hotel after the expiration of the Century CGL policies and therefore could not show any property damage or bodily injury during the Century policy periods. The Insureds cross-motivated for summary judgment. The trial court denied Century's motion and granted the Insureds' motion. This appeal followed.

The Court of Appeal in affirming the judgment explained that, for "occurrence-based" policies, the covered property damage must have occurred during the policy period regardless of when or who makes the claim. Because Century admitted that the

property damage resulting from defective design and construction by the Insureds occurred during and continued after the policy periods, Century had an obligation to defend and indemnify the Insureds for the covered damages. “To require the claim of the third party, Kang Family Partners, to arise during the policy period, ‘would unduly transform [an occurrence-based CGL policy] into a claims made policy The insurance industry’s introduction of claims made policies into the area of comprehensive liability insurance itself attests to the industry’s understanding that the standard occurrence-based CGL policy provides coverage for injury or damage that may not be discovered or manifested until after expiration of the policy period.’” (internal quotes omitted) (quoting *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 688-689 (1995)).

Ten year statute of limitations for latent defects may be tolled for repairs by defendants after notice of completion was recorded

Jackson Plaza Homeowners Association v. Alcal Roofing and Insulation, 02 C.D.O.S. 4672 (5/29/02) (cert. for partial publication)

Court of Appeal reversed summary judgment for defendant general contractor against plaintiff HOA and for cross-defendant subcontractor against general contractor.

Respondent W. Wong Construction (“Wong”) was the general contractor on the Jackson Plaza condominium project in San Francisco. Respondents Alcal Roofing & Insulation (“Alcal”), Atlas Heating & Ventilating Co., Ltd. (“Atlas”), New West Roofing, Inc. (“New West”), and Gonzalez Roofing & Waterproofing Co. (“Gonzalez”) were subcontractors on the project. A notice of completion was filed for the project on 10/26/85.

The Jackson Plaza Homeowners Association (“HOA”) was organized to manage the property. In late 1985 and early 1986, HOA became aware of several problems with the project, including water leaks in the roof. In 1995, HOA discovered serious water intrusion problems. It filed a construction defects action against Wong, New West, and others on 6/12/96. Wong subsequently filed a cross-complaint for indemnity against respondent subcontractors and others.

Wong and New West moved for summary judgment against HOA and respondent subcontractors move for summary judgment against Wong, on the grounds that HOA’s latent defects claims, and Wong’s related indemnity claims, are barred by the ten-year statute of limitations in CCP § 337.15. The trial court granted the motions. HOA appealed, and Wong cross-appealed.

The First District of the Court of Appeal reversed the judgments in favor of Wong and Gonzalez and affirmed the remaining judgments. The court held that the ten-year limitations period under CCP § 337.15 is tolled against a particular defendant during any time period in which that defendant performs repairs of the allegedly defective work. The

rationale for tolling is that the plaintiff relies on the defendant's actions indicating that the repairs will eliminate the defects. The court declined to follow the Third District's decision in *TNB Mortgage Corp. v. Pacific General Group*, 76 Cal. App. 4th 1116, 1134 (1999), which held that CCP § 337.15 is not subject to equitable tolling for repairs. The court also distinguished *TNB Mortgage*, noting that, unlike the plaintiff in that case, HOA had submitted evidence that Wong had performed significant repair work during the limitations period and that HOA had relied on Wong's promises to repair defects in the project. This evidence raised a triable issue as to whether HOA's claims against Wong were time-barred. However, since HOA did not present any evidence that New West performed any repairs during the limitations period, the summary judgment for New West was appropriate.

Privette and Toland cases do not prevent hirer of independent contractor from being liable to contractor's employee for hirer's direct negligence

Ray v. Silverado Constructors, 02 C.D.O.S. 4707 (5/29/02)

Reversed trial court's grant of summary judgment for defendant property owner and general contractor on plaintiff's negligence claim.

The plaintiff, Yvonna Ray, was the widow of Michael Ray, a foreman for subcontractor Steve P. Rados, Inc. ("Rados"). Rados was hired by general contractor Silverado Constructors ("Silverado") to build several bridges as part of a highway construction project for the Foothill/Eastern Transportation Corridor Agency ("TCA"). During construction, Michael was killed when construction materials blew off a bridge in high winds and struck him in the back of the head.

Yvonna sued TCA and Silverado in tort for negligence, asserting "that TCA and Silverado were actively negligent in failing to carry out their duties of care for the work site, which included the public road." The trial court granted the defendants' motion for summary judgment on the ground that, under *Privette v. Superior Court*, 5 Cal. 4th 689 (1993) and *Toland v. Sunland Housing Group, Inc.*, 18 Cal. 4th 253 (1998), a hirer of an independent contractor is not liable to the contractor's employees (as opposed to innocent bystanders). Yvonna appealed.

The Court of Appeal reversed the summary judgment. The court stated that, in *McKown v. Wal-Mart Stores, Inc.*, 27 Cal. 4th 219, 223 (2002), the California Supreme Court "eliminated any doubt that a direct negligence cause of action may be maintained, against a hirer of an independent contractor without running afoul of *Privette* and *Toland*." Since Yvonna asserted a direct liability claim, her case was different than the one rejected in *Hooker v. Dept. of Transportation*, 27 Cal. 4th 198 (2002), where the Supreme Court held that a hirer of an independent contractor was not liable to the contractor's employee for peculiar risk under a "negligent retention of control" theory absent the hirer's affirmative exercise of control over the site. Where the hirer affirmatively contributes – whether by active conduct or by omission – to the plaintiff's injuries, the hirer will be liable.

Other Cases of Interest

Mayer v. Driver, 02 C.D.O.S. 3813 (5/1/02) (individual partners did not have standing to sue contractor after partnership that owned the property and contractor settled contractor's mechanic's lien claim and partnership's construction defects claim)

Hall v. Court Reporters Bd., 02 C.D.O.S. 4368 (5/20/02) (since a court reporter's failure to pay his subcontractors did not adversely affect the services he provided to his clients, that failure was unrelated to the practice of shorthand reporting and thus was not within the Board's disciplinary jurisdiction)

Yuba Cypress Housing Partners, Ltd. v. Area Developers, 02 C.D.O.S. 4694 (5/29/02) (home purchaser who rescinded real estate contract that violated Subdivided Lands Act, B&P Code §§ 11000, *et. seq.*, was entitled to recover his attorneys' fees under that contract because defendant developer was estopped from arguing that the violation, for which defendant was responsible, voided the contract and its attorneys' fees clause)

Basura v. U.S. Home Corporation, 02 C.D.O.S. 4745 (5/31/02) (C.C.P. § 1298.7, which permits a purchaser to sue for construction defects despite having signed an agreement containing an arbitration clause, is preempted by the Federal Arbitration Act, 9 U.S.C. § 2)