Construction Law Update

March 2005

THE YEAR 2004 IN REVIEW: ANNUAL CONSTRUCTION LAW UPDATE

I. *Alternative Dispute Resolution*

A. Arbitration

Azteca Construction, Inc. v. ADR Consulting, Inc. 121 Cal. App. 4th 1156 (3d Dist. Aug. 25, 2004)

A dispute arose out of a written contract pursuant to which ADR had agreed to provide consulting services to Azteca. The contract required the dispute to be resolved through the American Arbitration Association. In compliance with Code of Civil Procedure Section 1281.9, the proposed arbitrator submitted a disclosure statement which revealed the proposed arbitrator's possible non-neutrality. Pursuant to Section 1281.91 of the Code of Civil Procedure, Azteca demanded disqualification of the proposed arbitrator. The AAA, pursuant to its internal construction industry rules, determined that there was no good cause for disqualification and the arbitration proceeded. After the arbitration concluded, Azteca petitioned to vacate the award under Code of Civil Procedure Section 1286.2(a)(6)(B). The Court of Appeal reversed the trial court's finding that Azteca had waived the applicable statutory provisions by agreeing to AAA arbitration. The Court of Appeal explained that statutory provisions regarding arbitrator disqualification may not be waived or superseded by a private contract and found that the proposed arbitrator here should have been disqualified under Section 1282.91 before the arbitration began. The Court directed the trial court to grant Azteca's petition to vacate the award.

Hedges v. Carrigan 117 Cal. App. 4th 578 (2d Dist. Apr. 6, 2004)

Home purchasers sued sellers, sellers' broker, and their own broker after discovering defects in their residence that defendants allegedly failed to disclose. Sellers' broker filed a petition to compel arbitration pursuant to the residential purchase agreement. The trial court concluded that there was no enforceable arbitration agreement because the arbitration provision in the purchase agreement was not initialed by sellers. Thus the trial court denied broker's petition and broker appealed.

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On appeal, plaintiffs contended that the arbitration clause in the residential purchase agreement was unenforceable because it failed to comply with California Code of Civil Procedure Section 1298 (imposing various notice and format requirements on arbitration clauses in specified real estate agreements). The Court of Appeal declined to address whether the arbitration clause complied with Section 1298 and instead the court itself advanced the issue of whether the preemption doctrine would apply to the arbitration agreement. Agreeing that the parties here did not enter into a contract to arbitrate and affirming the trial court order, the Court of Appeal went on to conclude that the United States Arbitration Act, 9 U.S.C. § 2 (the Act), would preempt a statutory requirement or judicial holding that compliance with CCP § 1298 is a condition precedent to enforcement of an arbitration clause contained in one of the specified contracts. The Act makes unlawful any state policy enforcing all of a contract's basic terms (e.g., price, service, credit), but not its arbitration clause. The Act applied to the subject purchase agreement because federal financing of the home purchase rendered the agreement one involving interstate commerce. In a concurring opinion, Justice Mosk criticized the majority's decision to raise *sua sponte* the constitutional issue of preemption where the parties had waived that issue by failing to raise it at trial or on appeal. Justice Mosk also observed that the factual record in this case failed to establish a sufficient connection between the transaction and interstate commerce so as to result in the Act preempting state arbitration law in this case.

B. Mediation

Rojas v. Superior Court (Coffin) 33 Cal. 4th 407 (Jul. 12, 2004)

Owner of an apartment complex mediated and settled a dispute with the general contractor who built the complex. Subsequently, tenants in the complex sued owner and contractor for damages caused by construction defects. The tenants moved to compel discovery of the mediation files from the underlying dispute while owner and contractor argued that California Evidence Code Section 1119 protected such files from discovery. Clarifying the scope of Section 1119, the California Supreme Court held that because photographs, witness statements and raw test data qualify as "writings" under California Evidence Code Section 250, if they are "prepared for the purpose of, in the course of, or pursuant to" a mediation then they are protected from disclosure under Section 1119. The Court further held that derivative material "that is prepared for the purpose of, in the course of, or pursuant to, a mediation" is not discoverable "upon a showing of good cause," refusing to apply the analysis used in attorney work product disputes. Finally, the Court found that a writing, which qualifies as "evidence" under California Evidence Code section 140, is protected only if it was "prepared for the purpose of, in the course of, or pursuant to, a mediation" and a party cannot secure protection for a writing merely by using it at a mediation.

C. Judicial Reference

Greenbriar Homes Communities, Inc. v. Superior Court (Couris) 117 Cal. App. 4th 337 (3d Dist. Mar. 8, 2004)

Homeowners brought claims against petitioner to recover for damages allegedly caused by petitioner's defective construction. Homeowners included original purchasers (those who had bought their homes from petitioner) and non-original purchasers who were not in privity of contract with petitioner. The sale agreements between petitioner and the original purchasers required all disputes to be determined by a judicial referee. As to the non-original purchasers, the Court of Appeal upheld the trial court's denial of petitioner's motion to compel judicial reference, finding that the non-original purchasers, "[h]aving never consented to judicial reference, [ ] cannot now be forced to participate in a general reference by the court." As to the original purchasers, the Court of Appeal vacated the trial court's ruling denying petitioner's motion to compel judicial reference, finding that the reference provision in the sales agreement was not unconscionable. The Court of Appeal also rejected homeowners' argument that the potential for multiple actions invalidated the parties' reference agreement, holding that a court may not invalidate a valid contractual agreement, such as the sales agreement at issue, without statutory authorization therefor.

II. *Civil Procedure*

Arntz Builders v. Superior Court (County of Contra Costa) 122 Cal. App. 4th 1195 (1st Dist. Sep. 30, 2004)

Provision in construction contract between Arntz and County purportedly waiving the change of venue provisions of Code of Civil Procedure Section 394 (providing that any party may move for a change of venue where a county brings an action within that county against a resident of another county) is void because a party "may not waive the benefits of a statute enacted primarily for a public purpose." The public purpose underlying Section 394 "is to guard against local prejudices which sometimes exist in favor of litigants within a county as against those from without."

Northern California Carpenters Regional Council v. Warmington Hercules Associates 124 Cal. App. 4th 296 (1st Dist. Nov. 22, 2004) (review filed 1/3/05)

Defendants, contractors and subcontractors on public works project filed motion to strike the complaint filed by a labor organization and an individual which alleged that defendants failed to comply with prevailing wage requirements. The trial court denied defendants' anti-SLAPP motion, finding that defendants did not meet their burden of showing that the complaint arose from exercise of their protected rights. The Court of Appeal affirmed, holding that plaintiffs' action falls within Section 425.17, the public interest exception to the anti-SLAPP statute, because plaintiffs do not seek any relief directly benefiting themselves. The court also found that Section 425.17 applies here even though defendants' motion to strike was filed, but not heard, before the Section's effective date.

Superior Gunite v. Mitzel 117 Cal. App. 4th 301 (2d Dist. Mar. 30, 2004)

Subcontractor performing foundation work at public high school construction project assigned its claims against defendant general contractor to plaintiff sub-subcontractor. Sub-subcontractor won a judgment against general contractor for breach of contract and negligence. The Court of Appeal reversed the trial court's award of damages based on breach of contract because sub-subcontractor failed, as assignee of

subcontractor in privity, to assert any claims under subcontractor's agreement with general contractor. In addition, sub-subcontractor could not recover on a pass-through theory where trial court dismissed such a claim as not proven, the case was not tried on a pass-through theory basis, and on appeal sub-subcontractor did not challenge the trial court's dismissal of that theory.

Sylmar Air Conditioning v. Pueblo Contracting Services, Inc. 122 Cal. App. 4th 1049 (2d Dist. Sep. 29, 2004)

Trial court granted Pueblo's SLAPP motion to strike a cause of action in Sylmar's original cross-complaint despite Sylmar's filing of amended cross-complaint three days before hearing on the SLAPP motion. The Court of Appeal affirmed, finding that Sylmar's amendment of its pleading as a matter of right did not invalidate the rule expressed in *Simmons v. Allstate Insurance Co.*, 92 Cal. App. 4th 1068 (2001), that there is no express or implied right in the anti-SLAPP statute to amend a pleading to avoid a SLAPP motion. Thus, Pueblo was entitled to its attorneys' fees and costs as the prevailing defendant on its meritorious SLAPP motion.

III. *Construction Defects and Claims*

BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc. 119 Cal. App. 4th 848 (4th Dist. Jun. 21, 2004)

A school district contracted with an architect for construction of a high school and contracted with two general contractors for the same project. The District filed claims for breach of contract and professional negligence against the architect, who filed a cross-complaint against both general contractors. The architect sought equitable indemnity for the contractors' alleged failure to perform work in a timely manner, thus delaying the project and causing the architect damages. The trial court sustained the contractors' demurrers without leave to amend and the Court of Appeal affirmed, finding that there is no basis for equitable indemnity where no action sounding in tort is alleged. The doctrine of equitable indemnity is "based on a duty owed to the underlying plaintiff." Here, where designer's allegations flowed only from contractors' alleged breach of contract, the designer's claims were "an improper attempt to recast a breach of contract cause of action as a tort claim."

Bramalea California, Inc. v. Reliable Interiors, Inc. 119 Cal. App. 4th 468 (4th Dist. May 13, 2004)

Bramalea, a residential real estate developer, was sued by homeowners for construction defects. Bramalea could not recover attorneys' fees incurred after it tendered its defense to subcontractors, but before it tendered its defense to subcontractors' insurers, where fees were entirely paid by the insurers and Bramalea suffered no out-of-pocket loss. Bramalea could not recover under Code of Civil Procedure section 1032 because where the parties settled and admitted no liability, Bramalea was not a prevailing party. The collateral source rule did not apply because Bramalea's causes of action were based entirely in contract, not tort.

Coldwell Banker Residential Brokerage Co., Inc. v. Superior Court (Salazar) 117 Cal. App. 4th 158 (4th Dist. Mar. 29, 2004)

Mother and son alleged they became ill from undisclosed toxic mold contamination in the mother's recently purchased home. The minor son, who was not a party to the real estate transaction, brought various tort claims against the seller's real estate broker. The Court of Appeal granted the broker's demurrer without leave to amend, reversing the trial court's decision that the son could state tort causes of action against the brokers. The Court of Appeal held that the inspection and disclosure duties of residential real estate brokers under Civil Code Section 2079 apply exclusively to prospective purchasers. Thus the son could not state tort claims against the brokers here because the brokers did not owe him a duty of care.

Gaggero v. County of San Diego 124 Cal. App. 4th 609 (4th Dist. Nov. 2, 2004)

Because County's construction and operation of a landfill is an "improvement" within the meaning of the 10-year statute of repose provided by Code of Civil Procedure Section 337.15, subsequent owner's action, brought more than 10 years after County sold the property and based on alleged defects in the design, construction, or operation of the landfill, was time-barred.

Hicks v. Superior Court (Kaufman and Broad Home Corporation) *previously published at* 115 Cal. App. 4th 77 (2d Dist. January 22, 2004)
(review granted by California Supreme Court May 12, 2004)

Home buyers sought to recover the cost of repairing defective concrete foundations under their homes via claim for breach of implied warranty of quality against developer. The sales agreement, disclosure statement, and express warranty agreement signed by home buyers provided certain limited warranties and expressly stated that the home owner accepted the limited warranties in lieu of all other warranties, express or implied, including merchantability and fitness for a particular purpose. The Court of Appeal held this disclaimer precluded home owners' claims for breach of implied warranty. The California Supreme Court has granted review.

Lewis Jorge Construction Management, Inc. v. Pomona Unified School District 34 Cal. 4th 960 (Dec. 23, 2004)

The Court of Appeal affirmed the trial court's award of $3,148,197 for potential lost profits which contractor claimed it would have earned on future projects it never won because of its reduced bonding capacity resulting from developer's allegedly unlawful termination of construction contract. The Supreme Court reversed, holding that potential lost profits were not available as general damages because such profits are not the "natural and necessary result of the breach of every construction contract involving bonding." Further, the Court explained that because lost profits on future unawarded contracts were not reasonably foreseeable to District, such profits were unavailable as special damages.

Mesa Vista South Townhome Association v. California Portland Cement Company *previously published at* 118 Cal. App. 4th 308 (4th Dist.May 4, 2004)
(review denied and opinion de-published Aug. 11, 2004)

A homeowners association, which was responsible for maintaining the concrete slabs and foundations at a condominium complex, brought a negligence claim, among others, against the supplier of allegedly defective concrete for

the complex. Because of the severe sulfate content of the soils at the complex, concrete with a relatively low water-cement ratio was required. The concrete supplier furnished cement mixed with too much water thereby making it vulnerable to damage from sulfate attack. The trial court found that the concrete itself had suffered submicroscopic damage from sulfate attack and that the concrete would disintegrate over time unless an intervention was made. The trial court concluded that the supplier was negligent in furnishing concrete with the improper design mix and awarded damages with respect to the deteriorating concrete. Distinguishing *Aas v. Superior Court*, 24 Cal. 4th 627 (2000) (holding that the economic loss rule bars recovery for construction defects that have not caused appreciable harm), the Court of Appeal affirmed. The Court stressed that, unlike *Aas*, the existence of appreciable harm was clear in this case and that "continued degradation of the foundations" will possibly lead to "the loss of structural integrity." Applying the balancing test articulated in *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799 (1979), the Court found that all six factors of the *J'Aire* balancing test were satisfied – most critically, the requirement of "certainty that the plaintiff suffered injury" – which weighed in favor of liability for negligence. The California Supreme Court recently de-published this decision, thereby reaffirming the *Aas* approach to the economic loss doctrine.

Shekhter v. Seneca Structural Design, Inc. *previously published at* 121 Cal. App. 4th 1055 (2d Dist. Aug. 24, 2004) (review denied and opinion de-published Nov. 17, 2004)

Where plaintiff owners of apartment complex sued design and construction companies alleging that defendants failed to properly design, engineer, and construct repairs to the complex after an earthquake, the trial court sustained demurrers to plaintiffs' negligence claim because plaintiffs failed to allege damage to property other than the property repaired. The Court of Appeal reversed, explaining that requiring damage to property other than the repaired structure would "improperly apply principles applicable to defective products to a case premised upon negligent design and engineering" and is not required by the relevant case law.

Siegel v. Anderson Homes, Inc. 118 Cal. App. 4th 994 (5th Dist. May 20, 2004)

Plaintiffs, subsequent purchasers of homes built by defendant Anderson Homes, brought claims for strict liability and negligence for alleged pre-existing defects and structural damage that plaintiffs discovered after purchasing their homes. The construction defects at issue were not "reasonably discoverable" except through an intrusive inspection of the roof and walls. The trial court entered a judgment in favor of defendant, finding that plaintiffs lacked "standing," absent an assignment of rights by the original owners to the plaintiffs, to assert claims arising from pre-existing defects. The Court of Appeal, adopting an "accrual at the time of discovery" rule, reversed and held that a cause of action for latent construction defect accrues when an owner discovers, or ought to have discovered, the property damage.

Weseloh Family Limited Partnership v. K.L. Wessel Construction Co., Inc. 125 Cal. App. 4th 152 (4th Dist. Dec. 21, 2004)

Property owner and general contractor brought negligence claims against design professionals (engineers) after failure of portion of retaining walls designed by engineers. Where it was undisputed that engineers were retained by subcontractor who built retaining walls, that a portion of the retaining walls failed, that engineers had no role in the construction of the walls, that engineers had not entered into a contract with either owner or general contractor, that engineers were never compensated by owner or general contractor for their design work, engineers met their burden as party moving for summary judgment of producing evidence that the negligence claims failed because engineers owed no duty of care to owner or general contractor. Where owner and general contractor failed to produce evidence showing that engineers' design was primarily intended to affect the plaintiffs, the closeness of plaintiffs' injury to engineers' conduct, any moral blame implicated by engineers' conduct, or how imposing expanded liability on design engineers under similar circumstances would prevent future harm, plaintiffs failed to satisfy their burden of proving the existence of a duty of care or of a triable issue of material fact relevant to determination of the duty issue. The trial court properly granted engineers' motion for summary judgment.

Consumer Version of SB 800 Guide

CBIA's Risk Management Task Force has completed work on the consumer version of the SB 800 Guide. Two new pamphlets were developed in an effort to inform homebuyers of the new law and the benefits associated with an alternative to litigation. The first pamphlet is a glossy tri-fold that provides an overview of the "Fix-It" Law. The second pamphlet provides more detailed information and includes the text of the bill.

IV. ***Permits and Zoning***

Horwitz v. City of Los Angeles (Beglari) 124 Cal. App. 4th 1344 (2d Dist. Dec. 15, 2004) (review filed Jan. 24, 2005)

Trial court properly issued writ commanding the City to revoke all building permits and the certificate of occupancy related to a particular residence where permits were issued in violation of mandatory requirements of zoning ordinance. Los Angeles Planning Commission's ruling in favor of resident – which allowed renovation to the residence to encroach approximately 14 feet into the area of the required front-yard setback – was clearly erroneous because City has no discretion to issue a permit in the absence of compliance with the mandatory set-back requirements.

V. ***Insurance***

Fire Insurance Exchange v. Superior Court (Altman) 116 Cal. App. 4th 446 (2d Dist. Mar. 2, 2004)

A group of homeowners whose homes were damaged in the 1994 Northridge earthquake brought claims against their insurance companies to recover under their policies and for damages, alleging breach of contract, insurance bad faith, fraud and negligence. The trial court found the policy at issue to be ambiguous and certain exclusions related to land stabilization and building code upgrades to be invalid and unenforceable. The insurance companies filed a petition for a writ of mandate. The Court of Appeal analyzed the "plain, unambiguous language of the policy" and reversed the trial court's finding that the policy included the cost of repairing the land under damaged structures. The Court of Appeal affirmed the trial

court's finding that the policy includes coverage for the increased costs of repair or replacement of damaged buildings where such increased costs are due to the need to conform to updated building codes. The Court concluded that the statutory language of Insurance Code Section 2071 (setting forth the standard form fire insurance policy) did not control because the policy did not "substantially comply" with Section 2071. Thus, the Court applied the "usual rules of policy interpretation." The Court found that the policy exclusion for loss caused by "enforcement of any ordinance or law regarding construction" was ambiguous, therefore any doubt must be resolved in favor of coverage.

F&H Construction v. ITT Hartford Insur. Co. of the Midwest 118 Cal. App. 4th 364 (3d Dist. May 5, 2004)

F&H Construction was general contractor for construction of a water pumping plant. F&H's subcontractor manufactured steel pile caps with A-36 grade steel instead of the required A-50 grade steel, and F&H was compelled to repair its subcontractor's defective work in order to deliver the project on time. F&H filed suit against the subcontractor's insurer under the subcontractor's commercial general liability insurance policy, seeking damages for the cost of modifying the defective pile caps and the lost bonus for early completion of the project. The trial court upheld the insurance company's motion for summary judgment and the Court of Appeal affirmed, finding that F&H's alleged damages did not constitute "property damage" under the insurance policy. The policy at issue described "property damage" as "[p]hysical injury to tangible property." The Court observed that F&H's alleged economic damages were not "property damage" because "the incorporation of a defective component or product into a larger structure does not constitute property damage unless and until the defective component causes physical injury to tangible property in at least some other part of the system." The Court also explained that the "mere failure of a defective product to perform as intended" does not constitute property damage.

Garamendi v. Golden Eagle Insurance Co. 116 Cal. App. 4th 694 (1st Dist. Mar. 4, 2004)

Subcontractor filed an answer to complaint alleging construction defects but, on the eve of trial, it was discovered that subcontractor's corporate status had been suspended; thus subcontractor could not participate in the litigation. Subcontractor's insurer declined to intervene on its own behalf. The Court of Appeal ruled that subsequent judgment entered against subcontractor was not a default judgment under Section 580 of the Code of Civil Procedure and therefore subcontractor's insurer was obligated, under Insurance Code Section 11580, for the full amount of the valid judgment against subcontractor covered by insurer's policies. The Court of Appeal remanded for a determination of whether subcontractor's insurer was estopped from asserting its coverage defenses because it failed to defend subcontractor at trial.

Hartford Casualty Insurance Company v. Mt. Hawley Insurance Company 123 Cal. App. 4th 278 (2d Dist. Oct. 21, 2004)

Subcontractor agreed to indemnify general contractor against all costs arising out of subcontractor's work on a construction project. Subcontractor's insurer sought equitable contribution from general contractor's insurer after paying to defend and settle a lawsuit brought by subcontractor's employee who was injured on the job. The court found that here, where general contractor's and subcontractor's insurers were subrogated to the rights of their respective insureds, and the parties had bargained for subcontractor to bear all risk associated with the type of injury at issue, subcontractor's insurer is not entitled to contribution. The court reasoned that to apportion the loss in this case based on an equitable principle would negate the contractual indemnity agreement and impose liability on general contractor's insurer when general contractor bargained with subcontractor to avoid that very result.

Jordan v. Allstate Ins. Co. 116 Cal. App. 4th 1206 (2d Dist. Mar. 18, 2004)

Homeowner's insurance policy expressly excluded coverage for losses caused by "wet or dry rot" or "collapse," but an exception to the collapse exclusion provided "additional coverage" for an "entire collapse." The Court of Appeal found the policy ambiguous as to whether coverage applied to the partial "collapse" of plaintiff's home caused by a water-conducting fungus known as Meruliporia Incrassata. The Court of Appeal, explaining that exceptions to exclusions must be construed in favor of the insured, reversed the trial court's summary judgment in favor of the insurer and remanded for a determination of whether coverage applied.

Opinion of Lockyer, A.G., 87 Cal. Op. Atty Gen. 121, No. 03-1102 (Aug. 26, 2004)

A member of the California State Assembly requested an opinion regarding the following three issues: (a) is an insurer required to report to the California Architects Board a settlement or arbitration award exceeding $5,000 that involves a claim alleging that an insured architect has engaged in wrongful conduct; (b) what type of "settlement" of what type of "claim" must an insurer report to the Board; and (c) is an insurer required to report to the Board a settlement or arbitration award exceeding $5,000 that is paid on behalf of an architectural firm where the claim alleges that there was wrongful conduct with respect to the architectural services performed? The AG opined that, under Business and Professions Code Section 5588, an insurer is required to report such a settlement or arbitration award. Further, Section 5588's reporting requirements are triggered by claimant's allegation of wrongdoing alone and may not be avoided by an architect's or insurer's refusal to concede fault or by the lack of a finding of fault by an arbitrator. Regarding the second issue, under Section 5588 "settlement" of a "claim" is any agreement resolving all or part of a demand for money which is based on an insured architect's alleged wrongful conduct. To qualify as a claim under Section 5588, the demand must be premised on the license holder's alleged "fraud, deceit, negligence, incompetency, or recklessness in practice" and the value of the claim as measured by the settlement amount or arbitration award must exceed $5,000. Finally, as to the third issue, because an architectural firm furnishes services under the responsible control of a licensed architect, an insurer's payment of a settlement or arbitration award exceeding $5,000 on behalf of an architectural firm must be reported to the Board with respect to the architect having "responsible control," where the claim or action for damages is based on alleged wrongful conduct regarding the architectural services performed.

"Responsible control" is defined in Business and Professions Code Section 5535.1 as "that amount of control over the content of technical submissions during their preparation that is ordinarily exercised by architects applying the required professional standard of care."

Palacin v. Allstate Insurance Co. 119 Cal. App. 4th 855 (4th Dist. Jun. 22, 2004)

Palacin purchased a condominium owner's insurance policy from Allstate. The Allstate policy incorporated the homeowners' association rules and covered real property items that were Palacin's "insurance responsibility" as expressed or implied under the rules. The rules, as expressed in the condominium complex's CC&R's, provided that the homeowners' association would insure all improvements within the development, however the homeowner could separately insure any improvements made by an owner within her unit. Allstate later denied Palacin's claim for water damage to her walls and floors on the grounds that the homeowners' association was wholly responsible for the loss. Palacin sued Allstate for breach of contract. The trial court sustained Allstate's demurrer, finding that the homeowners' association was solely responsible for Palacin's loss. The Court of Appeal reversed, holding that Allstate's demurrer should be sustained, however Palacin should be granted leave to amend her complaint to allege that her claimed property damage was not covered by the homeowners' association's policy (thus triggering coverage under Allstate's policy) and/or to allege that the items damaged constitute separately insured "improvements" that were Palacin's insurance responsibility.

Travelers Casualty and Surety Co. v. Century Surety Co. 118 Cal. App. 4th 1156 (4th Dist. May 21, 2004)

Plaintiff and defendant insurers issued policies covering a framing contractor who was sued for alleged construction defects that caused continuous injury during the period of time each policy was in effect. Each insurer was sole provider of coverage during the time its policy was in effect. Plaintiff's and defendant's policies contained mutually repugnant "other insurance" clauses: plaintiff's policy provided for pro rata contribution from other available insurance while defendant's policy included an "escape clause" providing that, if other insurance is available to the insured, defendant's policy is "excess of" such insurance. The appellate court held that, notwithstanding defendant's escape clause, defendant had a duty to contribute to settlement and defense costs incurred by plaintiff because giving effect to defendant's policy would impose on plaintiff "the burden of shouldering that portion of a continuous loss attributable to the time when defendant was the only liability insurer covering [the framing contractor]."

Travelers Casualty and Surety Co v. Transcontinental Insurance Co. 122 Cal. App. 4th 949 (4th Dist. Jul. 14, 2004)

Insurer issued an excess insurance policy to a real estate developer which provided for defense of developer in the event that the specified "underlying insurance policy" was exhausted. The trial court found that excess insurer had no duty to defend developer because, where subcontractors' policies named developer as an "additional insured," subcontractors' insurance was unexhausted "primary" insurance. The Court of Appeal reversed, finding that insurer owed a duty to defend because the defense obligation was dependent only on exhaustion of the "underlying insurance policy" – not any other insurance policy – and the applicable underlying policy had, in fact, been exhausted.

Watts Industries, Inc. v. Zurich American Insurance Company 121 Cal. App. 4th 1029 (2d Dist. Aug. 24, 2004)

Insurer refused to defend insured manufacturers of parts for municipal water systems in underlying action by municipalities alleging injury to their water systems. The trial court granted plaintiffs summary adjudication, holding that insurer had a duty to defend in the underlying action because there was a triable issue of fact regarding the possibility of coverage. The Court of Appeal affirmed, holding that the underlying allegations of harm raised a possibility of coverage sufficient to trigger a duty to defend, that the claim that plaintiffs' parts containing hazardous materials were incorporated into municipalities' water systems also raised a possibility of coverage, and that insurer did not show that all alleged damage was excluded under policy provisions applicable to defective products and "impaired property." Finally, the Court held that the remedies sought by municipalities, including reimbursement of costs to replace plaintiffs' substandard parts, were remedial and not prophylactic where the underlying suit alleged that injury to the water systems and contamination of the water with lead had already occurred.

VI. *Suretyship*

Travelers Casualty and Surety Company v. Amoroso 2004 WL 1918890 (N.D. Cal. Aug. 24, 2004)

Contractor claimed that surety, in its capacity as surety, had verbally promised that it would use $3 million paid to it by contractor to pay contractor's subcontractors, suppliers, and overhead expenses and to issue stop notice release bonds so contractor could continue working. Instead, surety allegedly failed to take these actions and issued hold funds letters to owners of contractor's projects directing owners not to pay contractor. Court dismissed without leave to amend contractor's claim against surety for breach of the implied covenant of good faith and fair dealing. The court found that, where the written indemnity agreement between the parties contained an integration clause, any oral contract between the parties was not valid and contractor could not claim implied rights based on invalid contracts. The court also found that surety did not breach the implied covenant as to the written indemnity agreement where the agreement expressly stated that surety had the exclusive right to settle all claims against contractor, that surety had the express right to demand the $3 million collateral paid by contractor and the express right to use those funds in its discretion. The doctrine of the implied covenant of good faith and fair dealing cannot be used to create implicit rights that contradict the express terms of an agreement.

VII. *Labor and Employment*

Associated Builders and Contractors of Southern California v. Nunn 356 F.3d 979 (9th Cir. Jan. 16, 2004) [as amended by 2004 WL 292128 (9th Cir. Feb. 17, 2004)]

Associated Builders and Contractors ("ABC") sought an injunction to prevent California officials from implementing

amendments to 8 Cal. Code Regs. § 208(b)-(c), the subsections establishing minimum wages and benefits on public and private construction projects for state-registered apprentices. ABC argued that the amended regulations are preempted by the Employee Retirement Income Security Act ("ERISA") and by the National Labor Relations Act ("NLRA"). The district court denied ABC's motion for a preliminary injunction because the Supreme Court previously held that the regulatory scheme of which Section 208 is a part is not preempted by ERISA and because the Ninth Circuit previously held the same scheme is not preempted by NLRA. The Ninth Circuit affirmed, holding that Section 208 as amended is not preempted by ERISA because: Section 208 does not "act immediately or exclusively upon ERISA plans; apprenticeship standards are a traditional area of state concern; Congress has explicitly encouraged continued standards; and California does not compel contractors or apprenticeship training programs to participate in its incentive-based regulatory scheme." The Ninth Circuit also held that Section 208(c) is not preempted by the NLRA because the regulations establish minimum labor standards for registered apprentices and do not interfere with the apprentices' NLRA-protected rights to bargain collectively.

Independent Roofing Contractors of California Unilateral Apprenticeship Committee v. California Apprentice Council 114 Cal. App. 4th 1330 (3d Dist. Dec. 22, 2004)

The California Apprenticeship Council invalidated a decision by the Division of Apprenticeship Standards to expand the geographic area for Independent Roofing Contractors' apprenticeship program. The trial court denied Independent Roofing Contractors' petition for a writ of mandamus to overturn the Council's decision. The Court of Appeal affirmed, finding that California Code of Regulations Title 8, Section 212.2 (establishing notice-and-comment procedure for proposed apprenticeship program standards) applies to proposals to expand the geographic region of apprenticeship programs and that failure to notify real parties in interest of Independent Roofing Contractors' proposed expansion invalidated the Division's approval. The Court also held that Independent Roofing Contractors lacked standing to assert rights of prospective apprentice because group standing is recognized only on behalf of actual members whose "rights are threatened as a result of a challenged action."

Westside Concrete Co. v. Dept. of Industrial Relations, Div. of Labor Standards Enforcement 123 Cal. App. 4th 1317 (2d Dist. Oct. 14, 2004)

Ready-mix concrete company challenged opinion letters issued by Division of Labor Standards Enforcement (DLSE) regarding meal and rest periods as "underground" regulations adopted in violation of the Administrative Procedure Act (APA), Government Code section 11340, et seq. Agencies are free to provide private parties with advice letters which are "no more than a restatement or summary, without commentary, of the agency's prior decisions." Such advice letters are not subject to the rulemaking provisions of the APA. Because a factual dispute existed as to whether the subject DLSE opinion letters were intended by the agency to be of general application as to the applicability of the off-duty meal period requirements to the statewide ready-mix industry, the trial court improperly found that as a matter of law the advice letters were not subject to the APA. The Court of Appeal reversed the trial court order sustaining DLSE's demurrer without leave to amend.

Senate Bill No. 1809 (Dunn) – approved by the Governor on August 11, 2004

Amends sections 98.6 and 2699, adds sections 2699.3 and 2699.5, and repeals section 431 of the Labor Code to provide relief from frivolous cases being filed by private attorneys for Labor Code violations under the previously enacted "Private Attorneys General Act" (SB 796 (Dunn)).

VIII. *Licensing*

Handyman Connection of Sacramento, Inc. v. Sands 123 Cal. App. 4th 867 (3d Dist Oct. 29, 2004)

Plaintiff contractor appealed trial court judgment affirming Contractors' State License Board decision that plaintiff violated four aspects of Contractors' State License Law related to solicitation and obtaining of a contract to perform home improvement work. The Court of Appeal affirmed the trial court judgment as to all violations except the charge of using an improper business name. The court explained that in an administrative mandate case where the only sanction under review is a fine – not revocation, suspension, or restriction of one's license – no fundamental vested right is implicated even though the contractor's violation may be disclosed publicly. In such a case, the trial court may not exercise independent judgment as to administrative findings of fact but must determine only whether substantial evidence supported the administrative findings of fact.

MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works, Inc. *previously published at* 115 Cal. App. 4th 512 (4th Dist. Jan. 30, 2004)
(review granted by California Supreme Court May 12, 2004)

General contractor, Niederhauser, entered into two contracts with subcontractor MW Erectors for metal work on Disney's Grant California Hotel. One contract provided for MW Erectors to perform structural steel work while the other contract called for certain "ornamental" metals work. MW did not obtain a Class C-51 structural steel contractor license until after it began performing, and never held a Class C-23 ornamental metal contractor license. MW brought an action alleging that Niederhauser had wrongfully terminated both the contracts and claiming monies allegedly owed MW under both. The trial court granted Niederhauser's motion for summary judgment on the basis that Business and Professions Code section 7031 precluded compensation for work performed under both contracts. (Section 7031(a) precludes compensation where a contractor does not allege that he was licensed "at all times during the performance of that act or contract.") With respect to the structural steel contract, the Court of Appeal reversed the trial court judgment, finding that the plain language of Section 7031 distinguishes between an "act" and a "contract" and allows a contractor to recover for acts performed while it was licensed. The Court also reversed the trial court judgment as to the ornamental steel contract because an issue of material fact existed regarding whether a C-51 structural steel license was a superior and therefore sufficient license for ornamental work. Finally, the Court of Appeal held that the two contracts "are not void [for illegality] just because MW was unlicensed on the date of signing."

IX. *Liens/ Waivers/ Lis Pendens*

A. Lien and Waivers

D'Orsay International Partners v. Superior Court (Jeffrey C. Stone, Inc.) 123 Cal. App. 4th 836 (2d Dist. Oct. 29, 2004)

Where general contractor provided design and planning services for a construction project, but no actual visible work was commenced at the project and no materials were delivered to the site, owner was entitled to an outright release of contractor's mechanics' lien. Because contractor recorded a mechanics' lien – not a design professionals' lien – provisions of the design professionals' lien law authorizing filing of a design lien despite lack of commencement of construction do not apply. The general rule is that a mechanics' lien (in contrast to a design professional's lien) does not attach unless and until actual visible work on the land has begun. In cases where no actual construction has commenced prior to recordation of the lien, the design professionals' lien law provides the exclusive remedy and the prior exception to mechanics' lien law requirements where owner prevents construction is no longer operative.

Tesco Controls, Inc. v. Monterey Mechanical Co. 124 Cal. App. 4th 780 (3d Dist. Dec. 6, 2004)

The City of Chico contracted with defendant Monterey Mechanical to expand the City's municipal wastewater treatment plant project. Monterey entered into a subcontract with Stratton Electric. Stratton retained plaintiff Tesco Controls to furnish certain electrical instruments. Monterey and Stratton then entered into a joint check agreement for the express benefit of Tesco whereby Monterey agreed to pay Tesco by joint check made out to Tesco and Stratton. Stratton then would endorse the check and make it payable to Tesco "as payment in full of the related invoice." On March 12, 1999, Tesco received a check for $194,762.13 drawn on Stratton's account, but Stratton's check never cleared. Meanwhile, on March 15, 1999, Tesco gave Monterey a lien waiver and release conditioned upon receiving a progress payment of $50,000. The waiver expressly provided that it only covered services and material furnished through January 31, 1999. Monterey paid $50,000 to Stratton and Tesco which Tesco deposited in its bank. As of March 31, Tesco was still owed approximately $370,000. Tesco issued a second conditional lien waiver and release dated May 11 whereby it agreed to release its mechanics' lien rights for services rendered through March 31 upon payment from Monterey of $370,000 (which sum Tesco was paid). When the contract was completed, Tesco was still owed $194,762, the amount of Stratton's bounced check, and Stratton filed for Chapter 11 bankruptcy protection. Tesco sought to recover from Monterey the approximately $194,000 it undisputedly provided in goods and services after March 31 which Monterey refused to pay. The trial court found that the March 15 lien release waived Tesco's lien rights only up to the amount of the $50,000 actually paid to Tesco and not as to the rest of the money owed for materials supplied and services performed through January 31. The Court of Appeal reversed, concluding that Tesco, by executing the conditional lien release, waived its lien rights for services rendered and materials provided up to the date provided – even if those services and materials were not compensated. However, such waiver was limited to those express lien rights and, by executing the release, Tesco did not foreclose its ability to exercise lien rights on sums that became due after the release date.

B. Lis Pendens

Castro v. Superior Court (California Savings) 116 Cal. App. 4th 1010 (2d Dist. Mar. 11, 2004)

Two parties disputed ownership of a $1 million residence. Defendants held record title and claimed the property was a gift while plaintiffs argued that it was a business investment between the parties. Plaintiffs filed an action to restore title and recorded a lis pendens. Defendants brought a motion to expunge the lis pendens; however plaintiffs withdrew the lis pendens before a ruling on the motion. Under Code of Civil Procedure section 405.38, a prevailing party on a motion to expunge a lis pendens is entitled to attorneys' fees. The trial court denied defendants' request for attorneys' fees because the court found that a party is not liable for statutory attorneys' fees where it withdraws a lis pendens prior to a court order expunging the lis pendens. Defendants petitioned for a writ of mandate. The Court of Appeal held that "when a lis pendens is withdrawn while a motion to expunge is pending, the moving party is not automatically entitled to attorney fees, nor automatically denied attorney fees, under section 405.38." The Court found that the trial court incorrectly applied an "inflexible rule" and that a "practical approach," which requires an analysis of "the extent to which each party has realized its litigation objectives," should be applied in this context. Using the practical approach to determine which is the prevailing party, a court must consider whether the moving party would have prevailed on the motion. Notwithstanding this holding, the Court of Appeal dismissed defendants' petition as moot because the parties had settled and dismissed the action with prejudice.

Mix v. Superior Court (Bheniwal) 124 Cal. App. 4th 987 (4th Dist. Dec. 7, 2004)

In 1992 the Legislature toughened the standard by which to judge a motion to expunge a notice of lis pendens when the trial court has already substantively rejected the recording party's claim. The post-1992 standard provides that, where the claimant loses at trial, the lis pendens must be expunged unless the trial court is willing to find it is probable that its own decision will be reversed on appeal. Here, trial court's denial of owner's motion to expunge a lis pendens was reversible error where trial court improperly applied weaker pre-1992 standard which merely required claimant to show that it had a "substantial issue on appeal."

X. *Public Works of Improvement*

A. Affirmative Action

C&C Construction, Inc. v. Sacramento Municipal Utility District 122 Cal. App. 4th 284 (3d Dist. 2004)

The trial court found that the Sacramento Municipal Utility District's ("SMUD") race-based affirmative action program, which was designed to eliminate contracting disparities, violated section 31 of article I of the California Constitution. Section 31 was adopted by California voters in 1998 as Proposition 209 and subdivision (a) prevents the state from discriminating against or granting preferential treatment to any individual on the basis of race in public contracting. Subdivision (e) of section 31 provides

an exception if action must be taken to establish or maintain eligibility for any federal program where ineligibility would result in a loss of federal funds to the state. SMUD conceded that its affirmative action program violated subdivision (a) and the only issue was whether the "federal funding" exception applied. The Court of Appeal affirmed the trial court's decision that SMUD failed to establish an affirmative defense under subdivision (e) because it produced no evidence of express federal contractual conditions, laws, or regulations that made approval of federal funds contingent upon race-based discrimination by SMUD.

Coral Construction, Inc. v. City and County of San Francisco 116 Cal. App. 4th 6 (1st Dist. Feb. 24, 2004)

Coral Construction, a specialty highway contractor, filed an action against the City and County of San Francisco, alleging that City's Minority/Women/Local Business Utilization Ordinance violates the California Constitution. The trial court granted City's motion for summary judgment on the ground that Coral had failed to demonstrate it would be bidding on an "identifiable City contract" subject to the ordinance in the near future. The Court of Appeal reversed, holding that Coral had standing because it demonstrated it was "able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." The Court of Appeal rejected City's contention that, to have standing, a plaintiff must identify a "*specific* contract it will bid on *in the near future* in order to demonstrate an injury that is 'actual or imminent.'" (emphasis in original). Finally, the Court of Appeal declined to decide the merits of the constitutional challenge because, the Court observed, such issues cannot be decided in the first instance on appeal. Thus, the Court remanded the case for further proceedings.

B. Bidding

Diede Construction, Inc. v. Monterey Mechanical Co. 125 Cal. App. 4th 380 (1st Dist. Dec. 28, 2004)

General contractor bidding on a public works project to remodel a city hall learned, after the bids were opened but before general contractor executed a contract with the city, that the proposal submitted by its HVAC subcontractor contained a $300,000 clerical error. General contractor executed the contract with the city, secured replacement contractors when subcontractor refused to honor its bid and sought to recover from subcontractor the additional costs incurred for the HVAC work. The Court of Appeal held that statutory provisions for the relief of mistaken bidders do not apply to mistaken bids submitted by a subcontractor to a general contractor. Under *Saliba-Kringlen Corp. v. Allen Engineering Co.*, 15 Cal. App. 3d 95 (1971), if general contractor can establish that it reasonably relied on subcontractor's mistaken bid, general contractor is entitled to recover from subcontractor the additional costs paid to a substitute contractor.

Emma Corp. v. Inglewood Unified School District 114 Cal. App. 4th 1018 (2d Dist. Jan. 6, 2004)

Emma Corporation, a licensed building contractor, submitted the low bid on a school construction project proposed by the Inglewood School District. After submitting the bid, Emma discovered that a clerical error caused the bid to be nearly $800,000 too low. Emma timely submitted a letter to the District requesting withdrawal of its bid. The District realized that the letter did not comply with the bid withdrawal statutes (Pub. Contract Code § 100 et seq.), but did not inform Emma of this fact and "set out a plan of action aimed at maximizing the likelihood that [Emma] would, in fact, fail to meet the technical requirements" of the Public Contract Code. The District later awarded Emma the contract at its original price. Emma refused to perform and sued the District for rescission. The trial court entered judgment for Emma, finding that the District's response to Emma's attempted bid withdrawal estopped the District from enforcing the contract. The Court of Appeal affirmed, finding that the doctrine of equitable estoppel will not be applied against the government only if to do so would nullify a strong rule of public policy adopted for the benefit of the public. Here, to allow the enforcement of Emma's bid would discourage honest contractors from bidding for public projects, decrease competition for public projects and drive up the cost to taxpayers. Furthermore, taxpayers do not "have an interest in lowering the costs of public projects by unfairly cheating mistaken bidders out of a portion of a project's true costs." Thus, the District, which "deliberately induced Emma's failure" in withdrawing its bid, was properly estopped from enforcing the contract.

Marshall v. Pasadena Unified School District 119 Cal. App. 4th 1241 (2d Dist. Jun. 29, 2004)

Definition of "emergency" in Public Contract Code section 1102 applies to the entire Public Contract Code, including section 20113 which in an emergency allows a school district to award a contract without inviting bids. School District's termination of a construction contract for convenience was not an emergency, i.e., a "sudden, unexpected occurrence that poses a clear and imminent danger." Because no emergency existed, the District's subsequent award of negotiated contract to another contractor, Hayward, was invalid. The District was required to pay Hayward for the work Hayward actually performed on the project because where no-bid contract award was approved by the District's Board of Education and the Los Angeles County Superintendent of Schools, Hayward was entitled to believe the contract award was valid.

Pall Corporation v. Orange County Water District 2004 WL 2943822 (Cal. App. 4th Dist. Dec. 21, 2004)
(not certified for publication or ordered published)

The apparent lowest bidder, U.S. Filter (USF), on a project to supply microfiltration equipment for a water reclamation plant was allowed to delete provisions from its proposal which rendered the proposal nonresponsive. These provisions included warranty limitations which conflicted with the Invitation to Proposers' statement that the water districts "will reject and will not consider any proposal that has any exceptions to the Contract Documents or requests for modifications to the Contract Documents." After the water districts allowed USF to delete the warranty provisions and awarded the contract to USF, the second lowest bidder, Pall Corp., filed a complaint against the districts. The Court of Appeal reversed the trial court's grant of summary judgment in favor of defendant water districts because, the Court found, there existed a "triable issue of fact as to whether the exception to the warranty was a variance that affected the amount of USF's bid or gave USF an advantage or benefit not

allowed by other bidders." Such a variance or advantage could conflict with the basic rule of competitive bidding that "bids must conform to specifications, and that if a bid does not so conform, it may not be accepted . . .a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential." Whether USF's original warranty limitation was an inconsequential variance presented a triable issue of fact that could not be resolved as a matter of law on summary judgment.

Assembly Bill 2397 (Horton) – approved by the Governor on August 23, 2004

This bill increases, from six to 36 months, the period of ineligibility for bidding that the State Department of General Services may impose on contractors for a variety of violations of existing state contracting law.

C. Building Standards

Plastic Pipe and Fittings Association v. California Building Standards Commission 124 Cal. App. 4th 1390 (2d Dist. Dec. 15, 2004)

State agencies, in exercising discretion under California Building Standards law to disallow use of cross-linked polyethylene (PEX) pipes, were entitled to rely on expert environmental consultant's opinion letter advising that PEX may present an unreasonable risk of harm and that information in the administrative record was insufficient to dispel concerns. The consultant's letter constituted substantial evidence of the agencies' conclusion. Statute requiring an agency to review model code standards within one year of the code's publication is discretionary rather than mandatory and an agency's failure to adopt the model code within one year after its publication does not render the agency's subsequent adoption of the code procedurally unfair. Finally, enactment of proposed building standards allowing the use of PEX is a "project" under the California Environmental Quality Act because the regulations at issue may have a reasonably foreseeable indirect environmental impact for the reasons expressed by the environmental consultant.

D. False Claims

United States, Ex Rel. Ali v. Daniel, Mann, Johnson, & Mendenhall 355 F.3d 1140 (9th Cir. 2004)

Construction management firm employed by university to coordinate reconstruction of buildings damaged by the January 1994 Northridge earthquake was not immune from suit for false claims submitted to the Federal Emergency Management Agency. The management firm was a private corporation and was not acting as an arm of the state. Therefore it is not shielded by the doctrine of sovereign immunity.

E. Transit Projects

Senate Bill No. 1130 (Scott) – approved by the Governor on July 27, 2004

Amends sections 20209.12, 20209.13, and 20209.14 of the Public Contract Code to extend by two years the "sunset date" on legislation authorizing design-build authority for transit districts. The provisions of this bill apply only to "transit projects" which do not include state highway construction or local street and road projects.

Senate Bill No. 1210 (Torlakson) – approved by the Governor on September 27, 2004

Amends section 217, and adds and repeals sections 217.1, 217.8 and 217.9, of the Streets and Highways Code by extending a Caltrans pilot project to demonstrate the design-sequencing method of contracting. Amendments inserted into the bill require Caltrans to develop consistent criteria for selection.

XI. *Safety/Personal Injury*

Bell v. Greg Agee Construction, Inc. 125 Cal. App. 4th 453 (4th Dist. Dec. 29, 2004)

General contractor which did not affirmatively contribute to injury of subcontractor's employee was not subject to liability under peculiar risk doctrine for employee's injury even though subcontractor lacked workers' compensation insurance at the time of the injury. Because subcontractor's employee was not prevented from seeking compensation from the state's Uninsured Employers Fund, there was no justification for imposing vicarious liability on general contractor.

Elsner v. Uveges 34 Cal. 4th 915 (Dec. 20, 2004)

Roofing subcontractor's employee, injured when a scaffold collapsed beneath him at a construction site, brought a third party action against general contractor asserting several causes of action including negligence and premises liability. The Supreme Court affirmed the Court of Appeal's ruling that, because of 1999 amendments to Labor Code section 6304.5, plaintiffs may use Cal-OSHA provisions to show a duty or standard of care to the same extent as any other regulation or statute, whether the defendant is their employer or a third party. The only exception to this rule is that, where the state is the defendant based on actions it took or failed to take in its regulatory capacity, Cal-OSHA provisions remain inadmissible to show liability based on breach of the statutory duty to inspect worksites and enforce safety rules.

Lewis v. Chevron USA Inc. 119 Cal. App. 4th 690 (1st Dist. Jun. 18, 2004)

Eight years after Chevron sold a property, Lewis was injured on the property when a hot water pipe burst due to a poorly soldered pipe joint. The trial court granted Chevron's motion for summary judgment based on the fact that Chevron had sold the property eight years before Lewis' accident and did not possess or otherwise control the property since the sale. On appeal, Lewis conceded that, before the accident, no one could have known of the existence of the defective connection concealed inside the joint of the water pipe. The Court of Appeal affirmed, finding that, absent concealment, a prior owner of real property is not liable for injuries caused by a defective condition on the property long after the prior owner relinquished ownership, even if the prior owner negligently created the condition.

SNEAK PEEK AT 2005

American Casualty Company of Reading, Pa. v. General Star Indemnity Company 2005 WL 231903 (Cal. App. 2d Dist. 1/27/05) Case No. B172017

While Civil Code section 2782 may preclude enforcement of a promise of indemnity in a construction contract, it does not limit the enforcement of an "additional insured" endorsement provided to the indemnitee by the indemnitor's liability insurer pursuant to the terms of an indemnity agreement.

Baldwin Builders v. Coast Plastering Corp. 2005 WL 231395 (Cal. App. 4th Dist. 1/21/05) Case No. D043422

Where a unilateral attorney fee clause included in indemnity agreement between general contractor and subcontractor is not included as an item of loss or expense under the indemnity agreement, but instead separately provides for the recovery of attorneys' fees incurred in enforcing the indemnity agreement, the reciprocity principles set forth in Civil Code section 1717(a) apply and authorize a prevailing indemnitor/subcontractor to recover attorneys' fees so incurred. Where indemnitor/subcontractor is required to provide its lack of fault in defending against claim under the indemnity, it is entitled to recover the fees so incurred.

Carmel Development Company v. RLI Insurance Co. Cal. App. 6th Dist., Case No. H026360 (filed 1/12/05; certified for publication 2/3/05)

Where RLI Insurance and Fireman's Fund Insurance insured the same risk and had competing "other insurance" clauses, RLI was not obligated to contribute to Fireman Fund's settlement of a personal injury lawsuit against the insured because the language of the RLI policy made that policy excess to the coverage Fireman's Fund provided.

County of Solano v. Lionsgate Corp. 2005 WL 289778 (Cal. App. 1st Dist. 2/8/05)

In connection with dispute regarding Lionsgate's performance of a contract to replace a bridge, arbitrator properly determined that the contract authorized arbitration of the County's allegations of False Claims Act violations where contract brought all claims for contract-related "compensation," as well as "damages," within the scope of arbitration. Arbitrator improperly awarded prejudgment interest from the date of the arbitrator's findings and conclusions, at which point County's damages were not certain. Under Civil Code section 3287(a), County was entitled to prejudgment interest as of the date of the final award, and not from earlier date, because at time of final award the award itself became a contractual obligation.

Electrical Electronic Control, Inc. v. Los Angeles Unified School District 2005 WL 272996 (Cal. App. 2d Dist. 2/4/05) Case No. B172858

Trial court was entitled to find that payment bond issued for a portion of a public works contract did not cover all subcontractors who worked on any other portion of that contract. Public entity's failure to ensure that payment bond was obtained did not render it liable, under the "tort of another" theory, for attorneys' fees incurred by unpaid subcontractor during subcontractor's attempts to recover from other entities the amounts it was owed.

Reclamation District No. 684 v. State Dept. of Industrial Relations 125 Cal. App. 4th 1000 (3d Dist. Jan. 13, 2005)

District contracted with manufacturing firm to place fill on a levee but did not require payment of prevailing wages. The project constituted a "public work" pursuant to Labor Code section 1720 ("[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds"), thus the work was subject to the prevailing wage laws. (Labor Code section 1720, et seq.)

Building Code Review

In January 2005, the state's Building Standards Commission (BSC) voted to subject the NFPA 5000 building code to a formal review before its adoption. The BSC's "Coordinating Council" will conduct public hearings in February before making a recommendation to the BSC in March. Groups including the homebuilding industry, local governments and building officials have warned that the NFPA 5000 code could cause serious conformity problems for California's code writers.

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