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NEW CASES CHANGING THE WAY YOU DO BUSINESS

Several new cases came out in 2015 that will affect the way you do business in the future.

If you have any further questions regarding construction related issues, please do not hesitate to contact Kevin T. Cauley, Esq. at (619) 236-8821 or by email at kevin@sscmlegal.com.

***State Ready Mix, Inc. v. Moffatt & Nichol* (January 8, 2015)**

State Ready Mix, Inc. ("State") wrote the concrete mix design and prepared a bad batch of concrete that was used to construct a harbor pier. State blamed the bad concrete on the civil engineer who drafted the pier plans and helped the general contractor by gratuitously reviewing State's concrete mix design.

When State was sued to recoup the cost of replacing the concrete, it filed a cross-complaint for equitable indemnity and contribution against the civil engineer, Moffatt & Nichol ("Moffatt"). The trial court sustained, without leave to amend, Moffatt's demurrer to the second amended cross-complaint. State appealed.

A Court of Appeal affirmed and concluded that the cross-complaint was barred by the economic loss rule. State cannot seek equitable indemnity for contribution for damages caused by the breach of its contract. State's appeal was premised on the theory that Moffatt had a duty to "sound the alarm" when State submitted a concrete mix design that increased the risk of making substandard concrete. State claimed that the moral blame fell on Moffatt. The Court of Appeal concluded if State wanted to see who is at fault, it should look in the mirror. State failed to follow its own concrete mix design. Common sense compelled the conclusion that State alone is responsible for the bad concrete.

***Stofer v. Shapell Industries, Inc.* (January 15, 2015)**

Plaintiff Donna Stofer purchased a home from Dr. Laux. Almost two years later, she sued the homebuilder, Shapell Industries, Inc. ("Shapell"), for strict liability, negligence, and fraudulent concealment. Plaintiff claimed Shapell built the home on unstable and uncompacted "fill" soil and with an inadequate foundation, causing substantial differential movement and numerous defects such as cracked floors, walls, and ceilings.

Shapell moved for summary judgment contending it did not conceal any material information and plaintiff did not have standing to sue because her claims accrued while Dr. Laux owned the home.

The trial court granted the motion as to the fraudulent concealment claim but denied it as to the other claims. The court held a bench trial on the accrual issue and entered judgment for Shapell concluding plaintiff had no standing to sue. Plaintiff appealed.

The appellate court held there was a triable issue of material fact regarding whether Shapell fraudulently concealed information about the property's soils conditions. The appellate court also found that plaintiff was entitled to a jury determination when the disputed factual issues of when and to whom the cause of action accrued." The court found a trial court may decide whether a cause of action for construction defect accrues to the plaintiff where the facts underlying that determination are undisputed. However, where, as here, the material facts regarding accrual are disputed or require credibility determinations, the jury must make factual findings.

Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc. **(February 20, 2015)**

The Court of Appeal answered the question whether the second place bidder on a public works contract may state a cause of action for intentional interference with prospective economic advantage against the winning bidder if the winner was only able to obtain lowest bid status by illegally paying its workers less than the prevailing wage. The Court of Appeal found that answer to be yes. If the plaintiff alleges it was the second lowest bidder and therefore would have otherwise been awarded the contract because that fact gives rise to a relationship with the public agency that made plaintiff's award of the contact reasonably probable. The high bidder contended that losing bidders are barred from suing their successful competitors for intentional interference because there was no existing relationship with which to interfere and no reasonable probability that any contract would have ever been awarded. The appeals court held that as the result of the reasonable probable economic expectancy that it would be awarded the contract if it was the lawful and lowest bidder, the unsuccessful bidder did fulfill the requirement of an existing relationship.

Rideau v. Stewart Title of California **(April 14, 2015)**

Earl and Marina Rideau entered into an agreement with a developer to purchase a condominium unit. Stewart Title was the escrow company for the deal. Stewart Title was to receive funds from the Rideaus and later release funds to a fund control company under the escrow instructions. The escrow instructions included a "hold harmless" provision stating that the Rideaus and the sellers agreed to defend Stewart Title against claims arising from the instructions and provided for recovery of attorney fees. After the project failed, the Rideaus lost their deposit. The Rideaus sued Stewart Title for breach of contract and lost. The Rideaus appealed and on remand, the court entered judgment in the Rideaus' favor on the breach of contract claims but denied their motion for an award of attorney fees.

California Civil Code section 1717 allows all parties to a contract the reciprocal right to contractual attorney fees in enforcing a contract even if the contract only specifies the right to

one party. Indemnification agreements, however, are unilateral non-reciprocal agreements and this section does not impose an obligation on the indemnitee to indemnify his indemnitor for attorney fees. In this action, the court found the Rideaus were claiming rights independent of the indemnity situation and therefore the indemnity clause was invoked.

Pacific Caisson & Shoring v. Bernards Bros. Inc. **(May 18, 2015)**

Gold Coast Grilling defaulted under a stipulated judgment entered against it. Pacific Caisson & Shoring, Inc. ("Pacific"), a company owned by the same owners as Gold Coast, later worked under a subcontract with Bernards Bros. The Contractors State License Board suspended Gold Coast's license and Pacific's license (as an associated license of Gold Coast) for two months in 2003 for failing to notify the CSLB within 90 days of the unsatisfied stipulated judgment. Later, Pacific sued Bernards Bros. for compensation for worked performed. The court found Pacific did not qualify for the substantial compliance exception under California Business & Professions Code section 7031(e) that would entitle it to recover despite the lapse in license.

The Court of Appeal found that Pacific did not act in good faith because their failure to notify the unpaid judgment was based on their fear of license suspension.

Davis v. Fresno Unified School District **(June 1, 2015)**

A taxpayer alleged that the education provisions permitting lease-leaseback arrangement with a local school district did not apply to situations where it was alleged that:

(1) the agreement was not a genuine lease but simply a traditional construction agreement;
(2) the agreement did not include a financing component for the construction of the project; and
(3) the arrangement did not provide for the district's use of the new facilities "during the term of the lease."

The court also ruled that the taxpayer had adequately alleged the contractor's preconstruction services for the district may be a conflict of interest under the Government Code because the contractor was arguably a "district employee" with a financial interest in the LLB.

However, the court in *Davis* said that if the district had filed a "validation" action seeking the approval of its LLB arrangement, a taxpayer lawsuit could not have gone forward. The case will now go back to the trial court for a ruling whether the Fresno lease-leaseback arrangement meets the requirement of California law.

Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc. **(July 2, 2015)**

General contractor Valley Crest Landscape filed a cross-complaint against subcontractor Missions Pools of Escondido in connection with an underlying lawsuit that had settled. Valley Crest sought to recover litigation expenses pursuant to an express indemnity clause in the party's subcontract. Mission Pools requested a jury trial on Valley Crest's claim. The trial judge characterized Valley Crest's claim as a request for equitable remedy of specific performance of an indemnity provision and found that Mission Pools was not entitled to a jury trial. The trial court found in favor of Valley Crest.

Generally, a litigant has a right to jury trial over legal actions but not equitable actions. The form of relief sought in the complaint is a reliable indication whether the action is legal or equitable. Actions at law usually seek money judgment for damages while equitable actions seek some form of specific relief. Here, Valley Crest sought reimbursement for money damages for the litigation fees and the amount it contributed to settle the underlying case. Hence, Valley Crest's express indemnity claim was legal and not equitable. Valley Crest was entitled to a jury trial.

***Fluor Corp. v. Superior Court* (August 20, 2015)**

Hartford Accident & Indemnity Co. ("Hartford") had insured the original Fluor Corp. since 1971. The parties' policies contained a consent-to-assignment clause limiting the insured's ability to assign its interest absent Hartford's consent. Beginning in the mid-1980s, various Fluor entities became embroiled in numerous asbestos-related lawsuits. In a reverse spinoff, Fluor 1 formed Fluor 2 in 2000.

Although Hartford paid defense costs in connection with the asbestos-related claims, it later sued Fluor to resolve coverage disputes arguing it had no obligation to defend or indemnify Fluor 2 because it did not consent to the assignment of claims for coverage. Fluor moved for summary adjudication, asserting the application of Insurance Code section 520. Insurance Code section 520 specifically restricts an insurer's ability to limit an insured's right to transfer or assign a claim for insurance coverage. Section 520 bars an insurer, after a loss has happened, from refusing to honor an insured's assignment of the right to invoke the insurance policy's coverage for such a loss. The California Court of Appeal found that generally consent-to-assignment clauses are enforceable and precludes the insured's transfer of the right to invoke coverage without the insured's consent even after the coverage-triggering event has already occurred. However, following a discussion of relevant history and language of section 520, the California Supreme Court concluded that section 520 did apply to third party liability insurance like the Fluor situation. It sent the case back to the superior court for further review.

***Judicial Council of California v. Jacobs Facilities, Inc.* (August 20, 2015)**

The Judicial Council of California ("JCC") entered into a facilities maintenance and repair contract with Jacobs Facilities ("Facilities"), a wholly owned subsidiary of Jacobs Engineering Group ("Jacobs"). Facilities possessed the requisite license when it commenced the work. Jacobs, however, subsequently reorganized, transferred the employees working on the contract to another wholly owned subsidiary ("Management") and, in the process, permitted the Facilities license to lapse. Meanwhile, Facilities remained the signatory on the contract until the parties entered into an assignment of the contract to Management.

JCC then sued Facilities and Management alleging disgorgement of $18 million in compensation under Business and Professions Code section 7031(b), stating they did not have an appropriate license.

In a bifurcated trial, the court deferred the hearing on the defendants' substantial compliance claim, but after the jury found for the defendants, the hearing was not held.

The Court of Appeal stated that because Facilities allowed its license to expire and it became unlicensed for a portion of time, its compensation was subject to forfeiture under the Business

and Professions Code. However, it remanded the case for a consideration of the substantial compliance defense.

James L. Harris Painting & Decorating, Inc. v. West Bay Builders, Inc. **(August 27, 2015)**

James L. Harris Painting & Decorating, Inc. ("Harris") sued West Bay Builders ("West Bay") for a breach of contract and violating the prompt payment statutes. Harris also sought to hold West Bay's bond insurer, Safeco, liable. West Bay filed a cross-complaint against Harris for breach of contract arising out of the same construction project. Ultimately, the jury found both sides had failed to perform and declined to award damages to either side. It also found West Bay did not act in good faith in withholding payments from Harris. The trial court entered judgment accordingly. West Bay and Safeco moved for attorney fees under the prompt payment statute. Finding that neither side prevailed, the trial court denied the motion.

The Court of Appeal held that the trial court did have discretion to deny a motion for attorney fees under a fee shifting provision in the absence of a prevailing party. Moreover, although the statute did not define the term prevailing party, the court upheld the trial court's order denying West Bay's motion for fees.

Jeff Tracy, Inc. v. City of Pico Rivera **(September 15, 2015)**

Land Forms built Rivera Park, a city park in Pico Rivera. At the time that Land Forms bid the project, it stated it held a class A and class C-27 license. The notice of bid from the city required bidders to have a class A general engineering license. Pico Rivera paid Land Forms over $5 million over the course of the project. Land Forms sued Pico Rivera for breach of contract alleging the City improperly withheld $518,154 in liquidated damages. Pico Rivera cross-complained alleging that Land Forms' class A license was invalid because the responsible managing employee used to obtain the class A license was not an employee of Land Forms and failed to supervise the project. The trial court held a bench trial on the validity of the class A license over Land Forms' objections and request for a jury trial. It found Land Forms did not hold a valid license and ordered it to disgorge over $5 million to Pico Rivera.

The appellate court found that the contractor has the burden to prove it held a valid license. Holding a valid license is not a special defense but a required element of plaintiff's case in chief. Therefore, the court abused its discretion by denying Land Forms' request for a jury trial on the validity issue.

Vita Planning & Landscape v. HKS Architects **(September 25, 2015)**

HKS, a Texas corporation, was hired by C.E. Mammoth to provide architectural services for a planned luxury hotel in Mammoth Lakes, California. Vita, a California corporation, entered into an agreement with HKS to perform landscape architectural services for the planned hotel. The contract included a forum selection clause that required Vita to settle disputes under the contract with HKS in Texas.

A contract provision is void and unenforceable under Code of Civil Procedure section 410.42 if it requires a subcontractor, with principle offices in California, to litigate or otherwise settle a dispute with a contractor in its home state when the subcontractor performed work for the

construction or improvement of a project in California. The Court of Appeal found the forum selection clause void.

***United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (December 18, 2015)**

United Riggers & Erectors was a subcontractor for Coast Iron & Steel. Following the project's completion, United demanded payment from Coast for change orders and damages that Coast allegedly caused by its own mismanagement. Coast refused to pay anything, including United's share of retention. Coast eventually paid United's share of retention but none of the claimed damages. The trial court decided in Coast's favor and awarded it attorney fees and costs.

The Court of Appeal held prompt payment statutes govern the payment of retention and are common in the construction industry. In this instance, Coast did not dispute United's entitlement to withheld retention payments. Rather, the dispute related to change orders and other damages. As such, the trial court erred with respect to the delayed retention claim. Moreover, it should have awarded United penalties, including attorney fees for delayed retention payments.

***Noe v. Superior Court*, 237 Cal.App.4th 316 (2015)**

In this case, the Court of Appeal clarified the California Labor Code section 226.8, which imposes a penalty of up to $25,000 per violation against an employer who "engages in" an act of "willful misclassification" of a worker, creates no private right of action. The Court of Appeal also held any employer may not be held vicariously liable under section 226.8 based solely on the acts of a co-employer.

***Hartford Casualty Insurance Co. v. J.R. Marketing, L.L.C.*, 61 Cal.4th 988 (2015)**

The California Supreme Court addressed the question of an insurer's right to seek reimbursement of fees from independent counsel representing an insured in litigation. The court held on the facts before it, the insurer could seek reimbursement. The court emphasized some key rights for the insured. It stated that when the third party sued includes some claims that are potentially covered and some that are clearly outside the policy's coverage, the law nonetheless implies the insurer's duty to defend the entire action. The court said the proper test for resolving an insurer's claim of excessive billing is whether the charges were objectively reasonable at the time they were incurred under the circumstances then known to counsel. It held the burden of proving that defense fees were in fact unreasonable and unnecessary falls entirely on the insurer.

***JMR Construction Corp. v. Environmental Assessment and Remediation Management, Inc.* (December 30, 2015)**

JMR, as general contractor for a public works project, entered into two separate electrical and plumbing subcontracts with EAR. SureTec issued separate bonds guaranteeing EAR's performance. While the project was ongoing, JMR informed EAR about alleged delays and other issues. Following completion of the project, JMR successfully sued EAR and SureTec for breach of contract and foreclosure of the performance bond and obtained a $315,000 award. EAR challenged the trial court's use of the *Eichleay* method of calculating extended home office overhead damages.

The Court of Appeal affirmed. It stated extended home office overhead is generally recoverable as an element of delay damages. The *Eichleay* formula is a method of allocating those home office overhead costs to a project that have been extended or delayed. Whether the measure of damages is legally permissible, a trial court's choice of that measure is reviewed for abuse of discretion.

Though no California case has ever endorsed the use of the *Eichleay* formula, it is nevertheless used in trial courts and arbitration proceedings. Hence, the trial court did not abuse its discretion in applying the *Eichleay* formula in calculating the damages.