SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP
ATTORNEYS AT LAW

Construction & Infrastructure Law BLOG
New Legal Developments in the Construction & Infrastructure Industry

Construction & Infrastructure Law Blog

Posted at 12:11 PM on February 25, 2011 by Sheppard Mullin

The Year 2010 In Review: Design And Construction Defects Litigation

This article is the first in a series summarizing construction law developments for 2010.

By Candace Matson, Harold Hamersmith & Helen Lauderdale

1. *Centex Homes v. Financial Pacific Life Insurance Co.*, 2010 U.S. Dist. LEXIS 1995 (E.D. Cal. 2010)

After settling numerous homeowners' construction defect claims – and more than ten years after the homes were substantially completed – a home developer brought suit against one of the concrete fabrication subcontractors for the development seeking indemnity for amounts paid to the homeowners, as well as for damages for breach of the subcontractor's duties to procure specific insurance and to defend the developer against the homeowners' claims. The subcontractor brought a motion for summary adjudication on the ground the developer's claims were barred by the ten year statute of repose contained in Code of Civil Procedure Section 337.15.

The District Court agreed the developer's claim for indemnity was barred by Section 337.15. And it held that because the damages recoverable for breach of the subcontractor's duty to purchase insurance are identical to the damages recoverable through the developer's indemnity claim, the breach of duty to procure insurance claim also was time-barred. The District Court, however, allowed the claim for breach of the duty to defend to proceed. The categories of losses associated with such a claim (attorneys' fees and other defense costs) are distinct from the damages recoverable through claims governed by Section 337.15 (latent deficiency in the design and construction of the homes and injury to property arising out of the latent deficiencies).

2. *UDC – Universal Development v. CH2M Hill*, 181 Cal. App. 4th 10 (6th Dist. Jan. 2010)

Indemnification clauses in construction agreements often state that one party to the agreement – the "indemnitor" – will defend and indemnify the other party from particular types of claims. Of course, having a contract right to a defense is not the same as actually receiving a defense. Any indemnitor attempting to avoid paying for defense costs can simply deny the tender of defense with the hope that when the underlying claim is resolved the defense obligations will be forgotten. In the past, when parties entitled to a defense – the "indemnitees" – had long memories and pressed to recover defense costs, indemnitors attempted to justify denying the tender by claiming their defense obligations coincided with their indemnity obligations and neither arose until a final determination was made that the underlying claim was one for which indemnity was owed.

The California Supreme Court rejected this justification for denying an immediate defense obligation in *Crawford v. Weather Shield*, 44 Cal. 4th 541 (2008). And in *UDC – Universal Development vs. CH2M Hill*, 181 Cal. App. 4th 10 (2010), the Sixth District Court of Appeal followed the Supreme Court's lead, repeating that the right to a defense is separate and distinct from the right to indemnity under a typical indemnity clause, the right arises immediately upon assertion of a claim, and the right exists regardless of whether the claim is ultimately proven.

UDC was the developer of a condominium project. It contracted with CH2M Hill to provide engineering and environmental planning services for the project. Their agreement called for CH2M Hill to indemnify UDC for all claims "that arise out of or are in any way connected with any negligent act or omission" of CH2M Hill. It also required CH2M Hill to provide UDC with a defense to any action brought on any claim covered by the indemnity obligation. After the project was completed, the homeowners' association filed suit against UDC for defective conditions at the project due in part to negligent planning and design of open spaces and common areas. The complaint did not attribute negligence to any

particular subcontractor but instead contained general allegations of deficient services by architects, engineers, and consultants.

UDC filed a cross-complaint for equitable, comparative, and express contractual indemnity against numerous subcontractors on the project, including CH2M Hill. It also tendered the defense of the homeowners' association's lawsuit to all cross-defendants. CH2M Hill declined the tender. UDC succeeded in settling all of the cross-claims except those asserted against CH2M Hill.

At trial, the parties agreed the jury would decide the factual issues of negligence and breach of contract and the court thereafter would apply the contract's indemnity provisions. The jury concluded CH2M Hill had not been negligent and had not breached its contract with UDC. With these favorable conclusions in hand, CH2M Hill argued to both the trial and appellate courts that it had no duty to defend UDC. According to CH2M Hill, such a duty could only arise after a finding that CH2M Hill had been negligent.

Both the trial and appellate courts rejected CH2M Hill's argument. Instead, they ruled that a duty to defend is separate from a duty to indemnify, and the duty to defend necessarily occurs ***before*** the duty to indemnify arises and ***before*** any negligence determination is made. CH2M Hill also unsuccessfully urged the courts that it owed no duty to defend the developer because the homeowners' association's complaint did not specifically allege that CH2M Hill was negligent. The appellate court concluded that the developer's right to a defense did not turn on whether the plaintiff named a particular subcontractor in its complaint. The plaintiff's general allegations of deficient design services by engineers for the project, together with the developer's cross-complaint for indemnity attributing responsibility to CH2M Hill for the plaintiff's damages, were sufficient to trigger CH2M Hill's duty to defend.

The *UDC* and *Crawford* decisions eliminate any lingering uncertainty about when the obligation to provide a defense arises: under a typically worded indemnity clause, the duty to defend requires immediate action by an indemnitor after the defense of a claim is tendered. But whether these decisions will alter real world conduct by indemnitors and result in their taking an active responsibility for the defense of claims from the outset is far less certain.

3. *Great Lakes Construction, Inc. v. Jim Burman, et al.*, 186 Cal. App. 4th 1347 (3d Dist. July 2010)

After a homeowner posted unfavorable comments about two contractors on the internet, the contractors sued the homeowner for libel. The contractors' complaint prompted a predictable series of pleadings, starting with the homeowner's cross-complaint for breach of contract and negligence against the contractors and designers for substandard work, followed by the contractors' cross-complaint against one of its subcontractors for breach of contract and indemnity. In the ensuing litigation, the homeowner and subcontractor were represented by the same attorney. The contractors successfully moved to disqualify the lawyer for the homeowner and subcontractor based on the conflict that existed in the lawyer's joint representation of them. The Court of Appeal reversed. No legally protected interest of the contractors was violated by the joint representation of their opponents by a single lawyer; the lawyer owed the contractors no duty of loyalty. Therefore the contractors did not have standing to seek the lawyer's disqualification.

Authored By:

Candace L. Matson is a partner in Sheppard Mullin's Los Angeles office where she specializes in construction law. Harold E. Hamersmith is a partner in the firm's Los Angeles office specializing in design and construction contracts, claims, and defects litigation, and public contract law. Helen J. Lauderdale is a special counsel specializing in construction litigation in Sheppard Mullin's Los Angeles office.