



January 27, 2011

Indemnity - Assignee of Indemnity Rights Entitled to Reimbursement of Defense Costs

Searles Valley Minerals Operations, Inc. v. Ralph M. Parson Service Co., et al.
Court of Appeal, Fourth District (January 21, 2011)

An indemnitee may contract with an indemnitor for defense and indemnification for liability arising out of the indemnitor's work or actions. In this case, the issue is whether the indemnitee may assign its indemnity rights, including the incurring of defense costs, to a third party.

In 1974, Kerr-McGee Chemical Corporation ("KM") entered into a contract with Parson Service Company ("Parson") for the design and construction of a soda ash processing plant on KM's property. The design and construction included installation of a pneumatic conveyer system. The construction contract contained an indemnity provision, which held that Parson would defend and indemnify KM for personal injury or death arising out of Parson's or its subcontractors' negligence in connection with the job. The contract also permitted KM to assign its rights under the agreement.

Searles Valley Minerals Operations Inc. ("Searles") subsequently purchased the plant from KM. As part of the purchase agreement, Searles agreed to indemnify KM for any accidents or injuries resulting in KM being sued. Under the agreement, KM, in turn, assigned its indemnity rights against Parson under the construction contract. In 2001, Michael Moore, a Searles employee, was killed while working at the plant. Moore was attempting to remove a door of the



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pneumatic conveyor system when the accident occurred. Moore's heirs filed a wrongful death action against KM, Parson and Parson's subcontractor. KM tendered its defense to Searles and Parson. Searles accepted KM's defense. Parson rejected the tender.

The case proceeded to trial where the jury found Parson's subcontractor 25% at fault and Searles 75% at fault. The jury assigned no fault to KM or Parson. The Moore family was awarded \$6.75 million. Searles incurred over \$800,000 in attorney fees, costs, and expenses from providing KM with a defense in the case.

After judgment was entered for the Moore family, Searles filed a complaint for express indemnity seeking reimbursement from Parson for costs incurred in defending KM. Parson demurred to the complaint, arguing that Searles failed to allege sufficient facts, since there were no allegations that KM suffered any damage. Searles opposed the demurrer, contending that as KM's assignee, it was entitled to recover KM's defense expenses. The trial court sustained the demurrer without leave to amend. Searles appealed. The Fourth District Court of Appeal reversed.

The issue for the Court of Appeal was whether the fact that Searles paid KM's defense expenses, after Parson rejected KM's tender of defense, precluded Searles from recovering KM's defense costs- when KM did not incur any out-of-pocket losses. The Court held that the defense and indemnification provision in the KM-Parson contract was clear and enforceable. Searles then purchased those indemnity rights. The jury found Parson's subcontractor to be 25% responsible for Moore's accident. Searles, as assignee of KM's indemnity rights, had the right to pay for KM's defense after Parson rejected KM's tender, and recover the costs for paying for it. It was not critical to the Fourth District that KM did not directly incur a loss. Searles, as the assignee, "stood in the shoes" of KM. Because it incurred defense costs defending KM, it was entitled to reimbursement. The judgment of dismissal was therefore reversed.

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COMMENT

This case holds that an assignee of contract indemnification rights stands in the shoes of the indemnitee, and can pursue a claim for not only indemnification, but defense costs incurred.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/E049927.PDF](http://www.courtinfo.ca.gov/opinions/documents/E049927.pdf)

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