

## AGCC/LAC NEW CASES OF INTEREST

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### **Amendment to Cal-OSHA did not eliminate bar on use of standards or violations as evidence in employee tort actions against third parties**

*Elsner v. Uveges*, 03 CDOS 1249 (2/7/03)

The Court of Appeal reversed the trial court's judgment in favor of the plaintiff, an employee of a roofing subcontractor, against the general contractor, ruling that the court erred in allowing plaintiff to submit evidence of Cal-OSHA standards and violations to show breach of the standard of care.

Carl Uveges was the general contractor on a project to build a pair of two-story, single family homes. Hoffman Roofing was one of Uvega's subcontractors on the project. During construction, Rowdy Elsner, a roofer employed by Hoffman, was injured due to allegedly unsafe scaffolding installed by another subcontractor on the project.

Elsner sued Uvegas in tort, asserting causes of action for negligence, premises liability, failure to provide a safe place to work, and peculiar risk. Before trial, Uvegas moved *in limine* to exclude any references to Cal-OSHA regulations and their alleged violation, arguing such references are inadmissible for any purpose in an employee's third party action under Labor Code § 6304.5, as applied by *Spencer v. G.A. McDonald Constr. Co.*, 63 Cal. App. 3d 836 (1976), and *Mackey v. Campbell Constr. Co.*, 101 Cal. App. 3d 774 (1980). The trial court denied Uvegas' motion and entered judgment for Elsner after a jury awarded Elsner over \$ 630,000 in damages. Uvegas appealed.

The Court of Appeal reversed, holding that section 6304.5 prohibits use of evidence of Cal-OSHA standards and violations for any purpose in third party employee actions. That section was amended in 1999. Before it was amended, the section unambiguously stated that the Cal-OSHA standards could only be used as evidence in actions

by employees against their employers. While the 1999 amendments rendered the section somewhat ambiguous on this issue (because of its definition of employers at multiemployer worksites), the court held the amendment did not change the rule under the prior version excluding evidence of Cal-OSHA standards and violations in third party employee actions. The court based its conclusion on both the statutory language (harmonizing sections 6304.5 and 6400) and the amendment's legislative history.

**EPA regulation requiring small construction sites to obtain NPDES permits is constitutional and within the EPA's authority**

*Environmental Defense Center, Inc. v. United States Environmental Protection Agency*, 03 CDOS 369 (9<sup>th</sup> Cir. 1/14/03)

In a consolidated appeal, the Ninth Circuit affirmed three different district court judgments denying various groups' challenges of an EPA regulation requiring small municipalities with separate sewer systems and small construction sites to obtain National Pollutant Discharge Elimination System (NPDES) permits before making any stormwater discharges.

In 1999, the EPA promulgated a final administrative rule under § 402 of the Clean Water Act (33 U.S.C. § 1342(p)) mandating that discharges from small municipalities' separate sewer systems and small construction sites are subject to NPDES permitting requirements. Various groups, including the National Association of Home Builders, challenged this rule. The groups argued, *inter alia*, that the rule exceeded the EPA's statutory authority under section 402(p)(6), it violated the First and Tenth Amendments of the federal Constitution, and its promulgation violated the Administrative Procedures Act (APA). With regard to small construction sites, which are defined as sites of one to five acres, the groups argued that the rule's application to those sites is arbitrary and capricious. The Ninth Circuit held that the trial courts correctly rejected all of these arguments, finding for example that ample evidence supported the EPA's conclusion that small construction sites were sufficiently different from non-regulated sites to justify their inclusion in the permitting requirements.

**Authority administering risk-pooling arrangement had no duty to indemnify or defend insured park district against subcontractor payment claims based on arrangement's contract language**

*Southgate Recreation and Park Dist. v. Cal. Ass'n for Park and Recreation Insurance*, 03 CDOS 1121 (2/5/03)

Court of Appeal affirmed summary judgment for risk-pooling arrangement administrator, holding that arrangement's contract language precluded duty to defend or indemnify plaintiff park district for subcontractor payment claims.

Southgate Recreation and Park District contracted with Flint Construction to

build a golf course. During construction, Flint went bankrupt, and its sureties defaulted. Flint's subcontractors sued Southgate for payment. Southgate, in turn, tendered the claims to the California Association for Park and Recreation Insurance ("CAPRI"), a joint powers authority that administers a risk-pooling arrangement entered into by various park districts in the state, including Southgate, as an alternative to commercial insurance. After CAPRI denied that it had a duty to defend or indemnify Southgate, Southgate sued CAPRI.

Southgate contended that CAPRI had a duty to defend the subcontractors' payment claims based on the "personal injury" offense of "violation of property rights" in the risk-pooling arrangement contract and that the contract's exclusion for liability "arising out of or related to" construction contracts did not apply. The trial court rejected both arguments, and the Court of Appeal agreed. The contract excluded from personal injury coverage failures to perform contractual obligations, which the court found to be the basis of the subcontractor's claims (*i.e.*, that Southgate failed in its obligation to properly administer its contract with Flint). The subcontractor's claims also did not fit within the contract's definition of "personal injury," which listed various offenses (such as false arrest, slander, etc.), which did not resemble the subcontractors' claims. Finally, while the subcontractors framed some of their legal theories in tort, the facts on which the claims were based clearly arose from construction contracts and, thus, fit squarely within the contract's exclusion.