

AGCC/LAC NEW CASES OF INTEREST

(May 14 through June 4, 2004)

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CALIFORNIA

California Supreme Court

California Supreme Court to review decision holding that conspicuous written disclaimer in sales and express warranty documents provided to homeowners precluded homeowners' claims against home builder for breach of implied warranty of quality

Hicks v. Superior Court (Kaufman and Broad Home Corp.), 2004 Cal. LEXIS 4022, 2004 D.J.D.A.R. 5706 (5/12/04)

The Court granted review of the Court of Appeal's decision in *Hicks v. Superior Court*, 115 Cal. App. 4th 77, 2004 D.J.D.A.R. 749 (1/22/04), *modified*, 2004 D.J.D.A.R. 782 (1/22/04) (2/10/04 AGCC/LAC Cases of Interest) denying plaintiff homeowners' petition for writ of mandate on the issue of whether California law precluded the builder of newly constructed homes from excluding from its sales contracts the common law implied warranty of quality.

California Supreme Court to review decision holding that subcontractor that was properly licensed for part of the work is entitled to compensation for the work performed while licensed

MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc., 2004 Cal. LEXIS 4026, 2004 D.J.D.A.R. 5719 (5/12/04)

The Court granted review of the Court of Appeal's decision in *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.*, 115 Cal. App. 4th 512, 04 C.D.O.S. 983 (1/30/04) (2/10/04 AGCC/LAC Cases of Interest) reversing the trial court's order granting defendant contractor and sureties motion for summary judgment against plaintiff subcontractor.

California Supreme Court to review decision holding that Cal-OSHA standards are admissible to show negligence *per se* in an action against a third party

Gradle v. Doppelmayr, 2004 Cal. LEXIS 4029, 2004 D.J.D.A.R. 5720 (5/12/04)

The Court granted review of the Court of Appeal's decision in *Gradle v. Doppelmayr*, 116 Cal. App. 4th 276, 2004 D.J.D.A.R. 2589 (3/2/04) (3/9/04 AGCC/LAC Cases of Interest) reversing the trial court's order ruling that the plaintiff could not offer evidence of Cal-OSHA safety standards in his action against a third party.

California Courts of Appeal

Supplier of housing concrete that sustained submicroscopic damage is liable for negligence (modification of prior decision)

Mesa Vista South Townhome Ass'n v. California Portland Cement Co., 2004 D.J.D.A.R. 6523 (6/2/04)

The Court of Appeal modified its prior decision, at 2004 D.J.D.A.R. 5370 (5/4/04) (*see* 5/18/04 AGCC/LAC Cases of Interest). The court added a footnote rejecting the defendant's assertion that there was no basis for concluding the trial court was concerned about the long term integrity of the homes.

Punitive damages awards in two cases modified because they exceeded single digit ratio of compensatory damages award

Bardis v. Oates, 2004 D.J.D.A.R. 6431 (5/28/04)

Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 2004 D.J.D.A.R. 6045 (5/20/04)

The Courts of Appeal reduced superior courts' punitive damages awards from \$7 million to \$1.5 million in *Bardis* and from \$1.7 million to \$360,000 in *Textron* and affirmed the judgments as modified.

In *Bardis*, plaintiffs sued defendant for fraud and breach of fiduciary duty in connection with a real estate partnership between them. The jury awarded plaintiffs \$165,527.63 in compensatory damages and \$7 million in punitive damages.

In *Textron*, plaintiff sued defendant for breach of an insurance contract and fraud, and the jury awarded plaintiff \$165,414.40 in compensatory damages and \$10 million in punitive damages. The trial court remitted the latter award to \$1.7 million. In both cases, defendants appealed, contending among other things that the punitive damages awards were so grossly excessive that they must be vacated.

Both courts held that, under *State Farm Mutual Ins. v. Campbell*, 538 U.S. 408 (2003), the punitive damages awards violated due process and had to be reduced. The courts noted other Court of Appeal decisions reducing awards based on *Campbell – Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (2003), and *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal. App. 4th 1020 (2003), and stated that a ratio of four to one will be the “outer constitutional limit” in the usual case. Based on the facts before them, the *Bardis* court found that a larger ratio was merited, noting the reprehensibility of defendants’ acts and their high net worth, but the *Textron* court, on the other hand, found a four-to-one ratio was appropriate.

Comment: Neither decision mentions the unreported companion decision to *Romo – Johnson v. Ford Motor Co.*, 2003 WL 22794432 (11/25/03), *review granted*, ___ Cal. Rptr. 3d ___, 2004 WL 721668 (3/24/04) – or the contrary Court of Appeal decision in *Simon v. San Paolo U.S. Holding Co. Inc.*, 7 Cal. Rptr. 3d 367, 03 C.D.O.S. 10376 (12/2/03), *review granted*, ___ Cal. Rptr. 3d ___, 2004 WL 721668 (3/24/04), both of which are currently under review by the California Supreme Court. *See* 4/13/04 AGCC/LAC Cases of Interest. Given the California Supreme Court’s grant of review in *Johnson* and *Simon*, it is likely defendants in both of the cases will seek review of these decisions and that the Supreme Court will grant that review and hold the cases pending disposition of *Johnson* and *Simon*.

Where a contractor’s primary CGL insurance policies contained conflicting “other insurance” provisions, the insurers have a duty to contribute on a pro rata basis to the litigation and indemnification expenses in defending the contractor in a construction defect lawsuit

Travelers Casualty & Surety Co. v. Century Surety Co., 04 C.D.O.S. 4400 (5/21/04)

The Court of Appeal affirmed the trial court’s grant of the plaintiff insurer’s motion for summary judgment, finding that the defendant insurer had a duty to contribute on a pro rata basis to the litigation and indemnification expenses in defending a common insured in a construction defect lawsuit.

Travelers issued CGL policies to Standard Wood Structures, Inc., a framing contractor, between July 1988 and 1993. The policies stated that, “if any other insurance is also primary,” Travelers “will share with all that other insurance” either in equal shares (if all the other insurance permits) or pro rata.

Century issued a CGL policy to Standard between September 1996 and September 1997. The policy stated: “Other Insurance: [I]f other valid and collectible

insurance is available to any insured for a loss we cover. . . , then this insurance is excess of such insurance and we will have no duty to defend any claim or ‘suit’ that any other insurer has a duty to defend.”

Standard performed carpentry and framing on a residential development between 1987 and 1990. In 1998, the homeowners sued Standard and others, alleging continuing damage caused by defective work. Standard tendered the defense to Travelers, Century and CNA, which had also issued primary liability insurance to Standard.

The court noted that both Travelers’ and Century’s policies were primary, even though Century’s declared it would be excess to other valid collectible insurance, because, during the time each policy was in effect, Standard had no other liability insurance. Citing *Fireman’s Fund Ins. Co. v. Maryland Casualty Co.*, 65 Cal. App. 4th 1279, 1293 (1998), the court stated that, while courts will generally honor the coverage terms in an insurance policy, there are exceptions, including where two or more insurers provide a common insured with primary coverage for the same risk and the policies contain conflicting “other insurance” clauses. In such cases, courts will require each insurer to pay its share of loss and defense costs.

Successor homeowners have causes of action against home builder for latent defects unless original owners suffered actual economic injuries as a result of those defects

Siegel v. Anderson Homes, Inc., 04 C.D.O.S. 4350 (5/20/04)

The Court of Appeal reversed the superior court’s grant of defendant home builder’s motion *in limine* to exclude evidence of construction defects and dismissal of complaint.

Two homeowners, Siegel and Sanchez (collectively “Siegel”), sued the home builder, Anderson Homes, for strict liability and negligence, alleging latent construction defects in their homes (poor chimney, roof, window and stucco siding installation leading to leaks). Anderson moved *in limine* to exclude evidence of the defects on the ground that, absent an assignment of rights by the original owners to them, Siegel lacked standing to sue for such defects. The trial court agreed and dismissed the complaint. Siegel appealed.

The issue on appeal was “whether a cause of action for latent construction defects accrues when some significant structural damage occurs, or when the owner discovers (or should discover) the damage.” After analyzing cases all over the map, including *Krusi v. S.J. Amoroso Constr. Co.*, 81 Cal. App. 4th 995 (2000) – relied upon by Anderson and the trial court, the Court of Appeal reversed, concluding that, “absent proof the original owners suffered actual economic injuries as a result of the construction defects . . . , they possessed no causes of action against Anderson that

precluded Siegel and Sanchez from maintaining their present claims.” Put another way, the court held that “the cause of action belongs to the owner who first discovered, or ought to have discovered, the property damage.”

FEDERAL

Requiring contractor to add fire-rated electrical systems constitutes a material change

Turner Constr. Co., Inc. v. United States, 2004 U.S. App. LEXIS 9321, 2004 WL 1057624 (Fed. Cir. 5/12/04)

The Federal Circuit reversed the Court of Federal Claims decision denying Turner’s claim for additional costs due to a government directed change in Turner’s construction contract with the Department of Veteran Affairs (DVA).

Turner contracted with DVA for the construction of an addition to a DVA hospital in Massachusetts. The contract required Turner to install electrical systems for the addition and to comply with all applicable electrical codes. The specifications included detailed electrical drawings that did not indicate fire-rated electrical installations in the hospital operating rooms. Another part of the specifications, however, required fire-rated electrical installations for the addition’s emergency system. Both the Massachusetts State Electrical Code (MSEC) and the National Electrical Code (NEC) require that emergency equipment have fire-rated electrical systems, but neither define which systems are included in an emergency system.

During construction, the DVA directed Turner to install fire-rated electrical systems in the addition’s operating rooms. Turner did so, and then submitted a claim for its additional costs. The Contracting Officer (CO) denied the claim, contending that the operating room systems were part of the emergency system, and so the fire-rating requirements of the specifications and Code applied. After the Court of Federal Claims denied Turner’s appeal of the CO’s final decision, Turner appealed to the Federal Circuit.

The Federal Circuit reversed, holding that Turner’s interpretation was reasonable and that, if there were any errors in the specifications, they were latent and the government’s responsibility.

Government’s default termination based on contractor’s failure to meet schedule was improper where the Government had waived the completion date

B.V. Construction, Inc., ASBCA Nos. 47766, 49337, 50553, 2004 ASBCA LEXIS 34 (4/22/04)

The Armed Services Board granted in part the appeals of B.V. Construction, a small woman-owned contractor on a NASA construction contract, converting a termination for default to one for convenience, vacating an assessment of excess procurement costs, and allowing a claim for damages, including unabsorbed overhead.

Citing *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969), the Board found that NASA waived the contract's completion date and never established a new reasonable date before terminating for default. Thus, the Board converted the termination to one for convenience.

The Board also found that B.V. Construction had been damaged as a result differing site conditions and defective specifications and that B.V. Construction was entitled to unabsorbed overhead damages for 727 days under the *Eichleay* formula. The Board found that B.V. Construction proved (1) government-caused delay that was not concurrent with delay caused by the contractor or some other reason; (2) the contractor's original time of contract performance was extended; and (3) it was required to remain on stand-by during the delay. With regard to the stand-by element, the Board stated that B.V. Construction had "made all three showings necessary to establish 'standby' by 'indirect evidence,'" and "'made a prima facie case of entitlement.'" As a result, "the burden of production shift[ed] to [NASA] 'to show that it was not unpractical for [B.V. Construction] to take on replacement work and thereby mitigate its damages.'" The Board held that NASA did not meet this burden, having shown "only that [B. V. Construction] continued its normal operations, including the performance of 'additional' contracts."