Murchison & Cumming

TRENDS

First Quarter, 2005

By: Bryan M. Weiss and Richard D. Newman

IN THIS ISSUE…

Casualty & Coverage

American Casualty Co. of Reading, PA. v. General Star Indem. Co. (2005) 125 Cal.App.4th 1510

Garamendi v. Golden Eagle Ins. Co. (2005) --- Cal.Rptr.3d ----

General Torts

Baldwin Builders Vs. Coast Plastering Corp. (2005) 125 CA4th 1339

Hudis v. Crawford (2005) 125 Cal.App.4th 1586

Products Liability

Cadlo v. Owens-Illinois, Inc. (2004) 125 Cal.App.4th 513

Professional Liability

Laguna Beach County Water District vs. Superior Court (2005) 124 Cal.App4th 1453

Goldberg v. Warner/Chappell Music, Inc. (2005) 125 Cal.App.4th 752

Murchison & Cumming

TRENDS

First Quarter, 2005

CASUALTY & COVERAGE

COURT OF APPEAL HOLDS THAT INSURER'S OBLIGATIONS TO AN ADDITIONAL INSURED ARE INDEPENDENT OF CIVIL CODE SECTION 2782'S BAR OF INDEMNITY FOR SOLE NEGLIGENCE

FACTS: Crowvision and Carolco entered into a written License Agreement in which Carolco granted to Crowvision the right to use certain stages, backlot, offices and other facilities at Carolco's studio, to produce and film a motion picture. The agreement required that Crowvision indemnify and hold Carolco harmless from all liability by reason of any injury or loss to persons (including employees of Crowvision) or property, resulting from "... any cause whatsoever, or arising out of the condition of the licensed premises or any portion thereof,.... " This hold harmless obligation, however, did not extend to any injury or loss resulting from the negligent acts or intentional misconduct of Carolco or its officers, agents or employees. The agreement also required that Carolco be added as an additional insured to Crowvision's policies of insurance. Crowvision procured liability insurance from American. Carolco also carried its own liability insurance with TIG Insurance Company and an excess policy with General Star. While the policies were in effect, an employee of Crowvision was seriously injured while operating a lift used in the construction of a set. American filed this action seeking to compel General Star to contribute to or pay the amount of the judgment. American claimed that its liability was barred because of the "sole negligence" limitation of section 2782, which provides that an indemnitee in a construction contract is not entitled to indemnity for its sole negligence.

PROCEDURAL HISTORY: American filed a motion for summary judgment and General Star filed a cross-motion. The trial court denied American's motion and granted General Star's. American appealed.

ISSUE: Does the prohibition against indemnity for an indemnitee's "sole negligence" contained in Civil Code section 2782 apply to an insurer's obligations to an additional insured claimed to have solely negligent?

HOLDING: No.

ANALYSIS: American, claiming that its liability is barred because of the "sole negligence" limitation of section 2782, argued that the trial court improperly made a factual determination that the injuries were not necessarily the result of Carolco's "sole negligence." In American's view, the trial court rejected its "sole negligence" argument on the "mere possibility" that there also had been negligence on the part of Crowvision or others, but without any admissible evidence supporting that conclusion. It was American's position that since the record reflected negligence only by Carolco, Crowvision had no liability to indemnify Carolco under the terms of the Agreement. Since Crowvision had no indemnity liability under its contract with Carolco, American contended that it likewise should have no liability under the additional insured endorsement to its policy.

It was General Star's position that the trial court correctly analyzed the respective obligations of it and American and that General Star's motion for summary judgment was properly granted. The appellate court agreed with

General Star. To begin with, General Star was an excess carrier and its liability was not triggered until exhaustion of the primary insurance, which had not occurred. Nevertheless, American sought to avoid its obligation to share its burden under the principles of equitable contribution and to shift the entire liability for the judgment to Carolco's insurers. Essentially, American was asserting a claim for equitable subrogation based on the proposition that the scope and extent of Crowvision's contractual liability to indemnify Carolco defines and controls American's liability under the additional insured endorsement provided to Carolco. The court held that American's argument ignore that this is not a dispute about the enforcement of an indemnity provision in a construction contract. The dispute presented in this case involves the enforcement of the additional insured endorsement to a liability policy issued by American. That insurance policy is an entirely separate contract and its enforcement is expressly not limited by section 2782. Thus, the issues of Carolco's "sole negligence" and section 2782 are simply not relevant to the enforcement of American's separate and independent promise of coverage to Carolco. Section 2782 expressly states that its "sole negligence" limitation "shall not affect the validity of any insurance contract." As the court read the clear import of that language, a provision in a liability policy providing coverage to an additional insured will not be deemed contrary to public policy or unenforceable merely because that additional insured party may have incurred claim liability due to its "sole negligence."

American Cas. Co. of Reading, PA. v. General Star Indem. Co. (2005) 125 Cal.App.4th 1510

Murchison & Cumming
TRENDS
First Quarter, 2005

COURT OF APPEAL UPHOLDS POLLUTION EXCLUSION TO BODILY INJURY CLAIMS BASED ON EXPOSURE TO SILICA

FACTS: Plaintiffs filed complaints alleging that during the course of their employment with the insured, they were exposed to silica-containing dust and that they sustained serious and permanent bodily injuries as a result. The plaintiffs were employed as sandblasters and alleged that they were forced to inhale silica-containing dust. The defendants included 49 companies associated with silica and sandblasting materials, including Pauli Systems. Pauli was insured under a Golden Eagle liability policy which contained a "total pollution exclusion". "Pollutants" was defined as any "solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. . . . " Golden Eagle denied coverage on the basis of the total pollution exclusion.

PROCEDURAL HISTORY: Pauli challenged the denials with the Insurance Commissioner, pursuant to Code provisions relating to insurance companies in liquidation. The Commissioner ruled that the claims administrator had not abused its discretion in denying coverage.

ISSUE: Does a policy's "total pollution exclusion" apply to silica contamination?

HOLDING: Yes

ANALYSIS: Pauli argued that silica is not a pollutant within the terms of the policy, since it is not "smoke, vapor, soot, fumes, acid, alkalis, chemicals [or] waste," and it is found in many commonplace materials such as sand, glass, concrete and computer chips. The court rejected that argument, noting that even if silica is not one of the enumerated items listed in the policy definition of pollutants, that listing is not exclusive and silica dust nonetheless comes within the broad definition of "any solid, liquid, gaseous, or thermal irritant or contaminant." Indeed, federal regulations identify silica dust as an air contaminant. The widespread dissemination of silica dust as an incidental by-product of industrial sandblasting operations most assuredly is what is "commonly thought of as pollution" and "environmental pollution." Contrary to Pauli's suggestion, there need not be "wholesale environmental degradation" in order for the exclusion to apply.

Garamendi v. Golden Eagle Ins. Co. (2005) --- Cal.Rptr.3d ----

Murchison & Cumming
TRENDS
First Quarter, 2005

GENERAL TORTS

COURT OF APPEAL HOLDS THAT SUBCONTRACTOR CAN ENFORCE ATTORNEYS FEES CLAUSE IN SUCCESSFUL DEFENSE AGAINST INDEMNITY CLAIM BY DEVELOPER

FACTS: A developer and subcontractors were sued in a construction defect case. The developer cross-complained for express indemnity against the subcontractors pursuant to an indemnity clause in the subcontract, which required the subcontractors to defend and indemnify the developer against all claims arising out of the subcontractor's acts or omissions unless due to the developer's sole negligence. The clause further stated that the subcontractor will be responsible for all costs and attorneys fees incurred by developer in enforcing the indemnity agreement. At trial, the developer was found solely liable to plaintiffs. The trial court further concluded that the subcontractors owed no duty to defend or indemnify under the subcontract. The subcontractors moved for attorneys fees pursuant to the aforesaid fee agreement. The developer claimed that the fee provision was part of the indemnity agreement which only imposed a duty to defend or indemnify upon the subcontractorts.

PROCEDURAL HISTORY: The trial court awarded costs and attorneys fees to the subcontractor under the subcontract.

ISSUE: Does an attorney fee provision in a subcontract, which provides that "subcontractor shall pay all costs, including attorney's fees, incurred [by developer] in enforcing this indemnity agreement" permit recovery of attorneys fees incurred by a subcontractor who successfully defended against developer's indemnity claim? If so, can they recover fees incurred in the defense of the plaintiff's action, or are they limited only to those fees specifically attributable to the defense of the developer's indemnity claim?

HOLDING: Yes, and the subcontractor can also recover fees and costs attributable to its defense of plaintiff's claim.

ANALYSIS: The court of appeal affirmed. It held that the attorney fee clause was severable from the indemnity agreement. Under California's reciprocal rule governing contractual attorney fees, all such clauses are reciprocal by operation of law, thereby affording the prevailing party the right to attorneys fees. By prevailing against the developer's indemnity claim, the subcontractors were entitled to their costs and fees in defending against that claim. And since their defense to the indemnity agreement required them to establish their freedom from fault, they were entitled to those fees and costs that were attributable to defending against plaintiff's claims as well.

Baldwin Builders Vs. Coast Plastering Corp. (2005) 125 CA4th 1339

Murchison & Cumming
TRENDS
First Quarter, 2005

COURT OF APPEAL HOLDS THAT A DISMISSAL OF AN ACTION FOR LACK OF STANDING DOES NOT CONSTITUTE A "FAVORABLE TERMINATION" TO SUPPORT A MALICIOUS PROSECUTION CLAIM

FACTS: An attorney, Crawford, filed an elder abuse case against Hudis. The case was dismissed because the named plaintiffs did not have standing to bring the suit. Hudis then filed the instant action for malicious prosecution against Crawford and the named plaintiffs in the underlying action. Crawford demurred to the complaint on the ground that dismissal of the elder abuse action was not a favorable termination on the merits for malicious prosecution purposes.

PROCEDURAL HISTORY: The trial court sustained the demurrer without leave to amend and dismissed the action as to Crawford. Hudis appealed, arguing that the "lack of standing" dismissal of the elder abuse action was a favorable termination on the merits for malicious prosecution purposes.

ISSUE: Is a dismissal of an action for lack of standing a favorable termination on the merits for malicious prosecution purposes?

HOLDING: No

ANALYSIS: In order for the termination of a lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit. However, a favorable termination does not occur merely because a party complained against has prevailed in an underlying action. If the termination does not relate to the merits--reflecting on neither innocence of nor responsibility for the alleged misconduct--the termination is not favorable in the sense it would support a subsequent action for malicious prosecution. Thus, a technical or procedural termination as distinguished from a substantive termination is not favorable for purposes of a malicious prosecution claim. Here, the underlying action was dismissed due to the fact that the nieces and the nephew lacked either "standing" or "capacity" to sue for the alleged wrongs to their aunt. The court held that a "lack of standing" is a jurisdictional defect, and that a dismissal for lack of jurisdiction does not involve the merits and cannot constitute a favorable termination. The merits of the allegations against Hudis were never considered by the court and were unrelated to the basis for the dismissal of the action. Therefore, it cannot be said that the dismissal reflected on the innocence of Hudis.

Hudis v. Crawford (2005) 125 Cal.App.4th 1586

Murchison & Cumming
TRENDS
First Quarter, 2005

PRODUCTS LIABILITY

COURT OF APPEAL HOLDS THAT MANUFACTURER, WHICH CEASED ALL AFFILIATION WITH A PRODUCT, MAY NOT BE HELD LIABLE WHERE PLAINTIFF'S FIRST EXPOSURE TO PRODUCT OCCURRED AFTER THAT DATE

FACTS: Owens-Illinois began developing Kaylo (an asbestos-containing insulation product) in the 1930s and placed it on the market in 1943. In 1958 Owens-Illinois sold its Kaylo division to Owens-Corning Fiberglas Corporation (OCF). With the sale Owens-Illinois ceased all manufacture, sale, and distribution of Kaylo. Plaintiff was exposed to Kaylo after the sale to OCF. It was undisputed that any Kaylo to which he was exposed was manufactured only by OCF, not by Owens-Illinois. Plaintiff married in May 1999, and was diagnosed with mesothelioma in July 2002, and stopped working in August 2002 because of his disease. Plaintiffs filed a complaint against Owens-Illinois, which included causes of action for fraud, deceit and concert of action. These causes of action essentially alleged that Owens-Illinois knew of and intentionally concealed the hazardous nature of Kaylo throughout the period it manufactured Kaylo, and approved and assisted Kaylo's purchaser, OCF, in continuing to conceal Kaylo's hazards. Plaintiffs alleged that the concealment and misrepresentation of Kaylo's hazards and the failure to warn about its hazards resulted in the sale of Kaylo products, and the perpetuation of unsafe installation, handling and use of Kaylo, all of which caused plaintiff to be exposed to and injured from his exposure to Kaylo dust. Owens-Illinois demurred to these causes of action.

PROCEDURAL HISTORY: The trial court sustained Owens-Illinois's demurrer to plaintiffs' causes of action for fraud, deceit, and concert of action. Plaintiffs appealed.

ISSUE: Can a manufacturer of a product be held liable for injuries sustained to a person who was not exposed to the product during the time that the manufacturer was producing the product?

HOLDING: No

ANALYSIS: The court of appeal held that for pleading purposes, plaintiffs satisfactorily alleged that Owens-Illinois knowingly misrepresented that Kaylo was a safe product both by promoting it as "non-irritating to the skin and non-toxic" and concealing its hazardous nature. However, they did not allege that plaintiff permitted himself to be exposed to Kaylo because he was actually aware of and relied on this misrepresentation that implied Kaylo was not hazardous. Owens-Illinois ceased its involvement with Kaylo in 1958, when plaintiff was only 13 years old, and then never advertised it again. Plaintiff did not rely on any representations made prior to 1958, nor did he allege that Owens-Illinois made a representation about Kaylo's safety to a third party who then communicated the misrepresentation to plaintiff. With respect to the concert of action theory, although the complaint adequately alleged that between 1953 and 1958, Owens-Illinois and OCF marketed Kaylo by falsely representing its safe use and concealing its hazards, plaintiff was not injured by Kaylo manufactured by Owens-Illinois during those years. Plaintiff acknowledged that Kaylo manufactured by Owens-Illinois did not cause plaintiff's injuries. The court sustained the summary judgment on the product liability causes of action, holding that plaintiff could not have come into contact with Owens-Illinois's product

because his first exposure to Kaylo was not until seven years after Owens-Illinois had ceased all affiliation with Kaylo.

Cadlo v. Owens-Illinois, Inc. (2004) 125 Cal.App.4th 513

Murchison & Cumming
TRENDS
First Quarter, 2005

PROFESSIONAL LIABILITY

ATTORNEY WORK PRODUCT PROTECTION NOT WAIVED WHERE ATTORNEY SENDS DOCUMENTS TO OUTSIDE AUDITORS FOR CLIENT

FACTS: Plaintiff brought this inverse condemnation action against defendant, a public entity. The defense was funded by a public entity risk pool. In the course of discovery, plaintiff sought production of documents from the risk pool encompassing investigation reports to the risk pool manager related to defendant's potential liability. Plaintiff also sought documents from the defendant's independent accounting firm seeking documents that encompassed defendant's audit reports to the accounting firm in regards to this case. Defendant objected on the basis of attorney client and work product privileges. The documents were reviewed by the court in camera. The trial court ruled that, although privileged, the privilege was waived in light of the affirmative defenses alleged by defendant in its answer, which supposedly placed the subject matter of the documents in issue. The trial court theorized that certain of these defenses in which defendant had touted its investigation or lack of prior knowledge of the defects waived the privilege by implication.

PROCEDURAL HISTORY: Defendant filed a Writ with the court of appeal following the trial court's ruling.

ISSUE: Does an attorney waive the right to assert the attorney work-product privilege by sending letters containing work product to auditors for its client?

HOLDING: No.

ANALYSIS: The court of appeal granted the Writ. The documents to the risk manager consisted of letters from defendant's attorney which detailed the status of pending claims resulting from the construction and investigative facts surrounding those claims (in other words, post-construction investigation). The court held that this has nothing to do with defendant's alleged knowledge about the property and project prior to and at the time of construction. (The court did not decide the hypothetical question of whether pre-construction investigation reports by the attorney, if any existed, would have been admissible). The letters to the auditor were again signed by defendant's attorney. Such auditing reports, in which he was asked to provide the auditor with information about pending or threatened litigation against defendant that might affect its financial condition, included the attorney's analysis of the merits of the case, which is privileged. The fact that these documents were sent to a third party (i.e., the auditor) does not waive the privilege. Disclosure operates as a waiver only when privileged information is divulged to a third party who has no interest in maintaining the confidentiality of the work product.

Laguna Beach County Water District vs. Superior Court (2005) 124 Cal.App4th 1453

Murchison & Cumming
TRENDS
First Quarter, 2005

COURT OF APPEAL HOLDS THAT FIRM NEED NOT BE VICARIOUSLY DISQUALIFIED BY VIRTUE OF FORMER ATTORNEY'S RELATIONSHIP WITH PLAINTIFF

FACTS: An employee sued her former employer for wrongful termination. She moved to disqualify defendant's counsel, MS&K. The grounds for the motion were that six years earlier, plaintiff had consulted with a former partner with MS & K who had left the firm three years prior to the underlying lawsuit. The consultation involved her written contract with her former employer. MS & K established in opposition to the disqualification motion that the consultation had been brief and informal, and that no one else at MS & K had any knowledge concerning either the consultation or any confidential information imparted to the former partner (Salomon).

PROCEDURAL HISTORY: The trial court denied the motion to disqualify. At the hearing, the court stated that the only potential basis for disqualification was plaintiff's contact with Salomon, not her personal and professional relationships with other MS & K attorneys. The court concluded that there was an attorney-client relationship between Goldberg and Salomon even though Salomon appeared to be helping her "as a friend." The court agreed that if Salomon were still with MS & K, the firm would be disqualified. However, because Salomon had left the firm, there was no need for vicarious disqualification.

ISSUE: Does a law firm become vicariously disqualified from representing a party where a former lawyer in the firm once counseled the plaintiff?

HOLDING: No

ANALYSIS: Plaintiff argued that it is or should be the law in California, that an attorney's presumed knowledge of a former client's confidences should cause vicarious disqualification not just of the attorney's present firm, but also any firm the attorney passed through after he gained possession of confidential information. There is no question that an attorney can and should be disqualified for representing a party adverse to a former client where the attorney possesses confidential information that could be helpful to the new client and hurtful to the old. In addition, "[i]t is now firmly established that where the attorney is disqualified from representation due to an ethical conflict, the disqualification extends to the entire firm." There is, however, a recognized "limited exception to this conclusive presumption in the rare instance where the lawyer can show that there was no opportunity for confidential information to be divulged." In this case, Salomon is no longer with MS & K. The court was not concerned that he will inadvertently pass on confidential information to his colleagues in the future because he is no longer there "in the lunch room" as the trial court said. It was appropriate under the circumstances for the trial court to make an assessment of whether Salomon actually passed on confidential information. Since the court found he had not, there was no basis for disqualification.

Goldberg v. Warner/Chappell Music, Inc. (2005) 125 Cal.App.4th 752