# The Year 2010 In Review: Developments In California Design And Construction Law


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A developer recorded covenants, conditions and restrictions ("CC&Rs") which included a clause (in capital letters) providing that any construction dispute in which the developer was a party would be resolved through arbitration in accordance with the Federal Arbitration Act. The purchase and sale agreement ("PSA") for each unit recited that by accepting a grant deed to the property, the purchaser agreed to abide by the CC&Rs. The dispute resolution provision in the PSA referenced the arbitration provision in the CC&Rs by paragraph number, and also stated: "Buyer and Seller acknowledge that by agreeing to resolve all disputes as provided in [the CC & R's], they are giving up their respective rights to have such disputes tried before a jury." When the condominium association sued the developer (on its own behalf and on behalf of its member owners) for construction defects, the developer sought to compel arbitration. The trial court denied the motion on the ground that the arbitration provision was unconscionable and also on the ground that the association was not a party to the PSA. The appellate court affirmed, but on different grounds, finding that no agreement to arbitrate existed since the CC&R's were signed and filed solely by the developer, the association not having existed until thereafter. As the association was not a party to the CC&R's, it could not have agreed to waive its right to a jury trial. [See contra Villa Milano Homeowners Ass'n v. Il Davorge, 84 Cal. App. 4th 819 (2000).] The appellate court also ruled that the jury waiver in the PSA was unconscionable.

# II. CONSTRUCTION CONTRACT CLAIMS

1. Ted Jacob Engineering Group, Inc. v. Ratcliff Architects, 187 Cal. App. 4th 945 (1st Dist. Aug. 2010)

Ratcliff Architects was the principal architect in connection with the expansion and renovation of a hospital for the County of San Mateo. Ratcliff subcontracted with Ted Jacob Engineering Group ("Jacob") for mechanical and electrical engineering services. Although Ratcliff and Jacob had a written agreement covering Jacob's basic services, the scope of Jacob's work grew over time, and there was disagreement over both the scope of the original basic services, as well as over appropriate compensation for the additional services. The negotiations over compensation were protracted (as was the tedious discussion of them in the reported decision) and ultimately unsuccessful, in no small part because Ratcliff was unwilling to commit to provide additional compensation to its subcontractor without having a corresponding commitment in hand from the project owner for additional compensation. Despite no finalized agreement with respect to the price of additional services, Jacob continued to perform the additional engineering services for the project.

At trial, Jacobs succeeded in recovering more than $1 million for its additional services. Ratcliff argued unsuccessfully at trial and on appeal that in the face of disagreement over the price of additional services, Jacobs was not entitled to continue to perform the services and seek reasonable compensation for them afterwards. Relying on Coleman Engineering Co. v. North American Aviation, Inc., 65 Cal. 2d 396 (1966), Ratcliff argued that Jacobs' only remedies were either to stop performing the changed work or to perform it for the original fee. Both the trial and appellate court rejected this interpretation of Coleman. The Supreme Court in Coleman held that if changes to a contract were of great magnitude in relation to the entire contract and the parties were unable to reach agreement about the price of the changes, then a contractor was not obligated to continue to perform in the absence of agreement as to price. But both the trial and appellate court concluded that nothing in the Coleman decision – and nothing in the subcontract between Ratcliff and Jacob – precluded the subcontractor from continuing to perform and then seeking reasonable compensation for the changed work.

## III. DESIGN AND CONSTRUCTION DEFECTS LITIGATION

### 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.

## IV. CONTRACTOR LICENSING

1. Loranger v. Jones, 184 Cal. App. 4th 847 (3d Dist. May 2010)

Jones, a licensed contractor, had a workers' compensation policy covering his employees. Jones unknowingly used an unlicensed subcontractor and knowingly permitted two minors without work permits, and another person without a contractor's license, to help perform work for Loranger. Loranger refused to pay the final invoice and Jones filed suit for breach of contract. Loranger cross-complained alleging defects and sought disgorgement of monies paid. However, the Court of Appeal, affirming the trial court, held that Jones' license had not been automatically suspended under Business and Professions Code Section 7125.2 and accordingly, Jones was not subject to the sanctions of Section 7031 subdivisions (a) and (b). Loranger largely relied upon Wright v. Issak, 149 Cal. App. 4th 1116 (6th Dist. 2007) in arguing that Jones could not bring suit and was subject to disgorgement. However, the Court found Wright distinguishable because in that case the contractor intentionally reported zero payroll to avoid obtaining workers' compensation insurance. In the instant case, however, Jones had workers' compensation coverage when he began the project. At worst there may have been a lapse of coverage; however, without notice of a lapse of coverage from the registrar, there was no effective suspension of the contractor's license. The Court also expressly rejected a reading of

Wright to find "any" underreporting of payroll tantamount to a failure to obtain workers' compensation coverage and thus an automatic suspension of a contractor's license.

2. In re Yehuda Sabban, 600 F.3d 1219 (9th Cir. BAP, April 2010)

A homeowner won a judgment against an unlicensed contractor under Business and Professions Code Sections 7031(b) (disgorgement for non-licensure) and 7160 (contract induced by falsity or fraud) in state court. After the trial, the contractor filed for bankruptcy under Chapter 7 of the Bankruptcy Code (liquidation of all non-exempt personal property to pay off creditors). The individual filed an adversary action to determine the dischargeability of the debt. He argued that both awards imposed a remedy for violations of statutes punishing the contractor for debts obtained by fraud and therefore, pursuant to 11 U.S.C. § 523(a)(2)(A), those debts were not dischargeable. The bankruptcy court partially rejected that argument, holding that the 7031(b) award was dischargeable and finding the smaller award under 7160 was non-dischargeable. The Ninth Circuit, in affirming the bankruptcy court ruling, held that the 7031(b) award was not traceable to fraud, and was not premised on fraud, and so it was dischargeable. Thus, an award against an unlicensed contractor under Business and Professions Code Section 7031(b) is dischargeable in bankruptcy.

3. Alatriste v. Cesar's Exterior Designs, Inc., 183 Cal. App. 4th 656 (4th Dist. April 2010)

A homeowner employed a landscaping contractor which it knew did not have a contractor's license at commencement of work. The contractor stopped work when the homeowner refused to make payments. The homeowner brought suit to recover the money he had already paid to the contractor. The contractor contended that the homeowner's claim was barred because he knew about the contractor's unlicensed status.

The Court of Appeal rejected the contractor's argument, stating that Business and Professions Code Section 7031(a) provides a complete defense to a claim for payment from an unlicensed contractor, even when the customer knew the contractor was unlicensed. The Court applied that rationale to the "sword provision" of 7031(b), holding that knowledge of unlicensed status does not provide a defense to a claim for disgorgement of payments made for unlicensed work. Furthermore, the Court rejected the contractor's argument that it was entitled to retain payment for work performed after it obtained a license, noting that 7031(b) provides for disgorgement if a contractor was unlicensed at *any time* during the performance of work. The homeowner was entitled to recover the total amount paid, including payment for materials.

4. UDC-Universal Development, L.P. v. CH2M Hill, 181 Cal. App. 4th 10 (6th Dist. Jan. 2010), *rev. denied*, 2010 Cal. LEXIS 4141

UDC-Universal Development, L.P. entered into two contracts with CH2M Hill, pursuant to which CH2M agreed to provide engineering and environmental planning services for UDC's condominium development. The contracts included an indemnity provision that covered all of UDC's losses to the extent that they arose from, or were connected to, any negligence or omission by CH2M. A duty to defend clause obligated CH2M to defend any suit, action or

demand brought against UDC on any claim "covered herein" upon written request from UDC. After completion of the development, the homeowners association brought suit against UDC for "defective conditions" due in part to negligence attributable to CH2M. CH2M rejected UDC's tender of defense, and UDC cross-complained against CH2M for indemnity.

CH2M argued that UDC's indemnity claim was barred because UDC lacked a contractor's license when it entered into the contracts. However, the Court of Appeal held that the term "compensation" as used within Business and Professions Code Section 7031(a) means sums claimed as an agreed price or fee earned by performance, and not indemnification for claims related to a subcontractor's work. Accordingly, the Section 7031(a) bar on actions to recover compensation for work performed by an unlicensed contractor does not apply where the contractor is seeking indemnity for damages paid as a result of a subcontractor's defective work. Regardless of whether a developer is properly licensed, where a contract imposes on a subcontractor a duty to defend against any claim implicating the subcontractor's work, the duty arises as soon as a defense is tendered.

5. Licensing Now Available to LLCs (SB 392)

Effective January 1, 2011, section 7025 of the Business & Professions Code is amended to allow limited liability companies to obtain contractor licenses in California. The License Board is required to begin processing applications therefor not later than January 1, 2012. In order for an LLC to hold a license, it must file and maintain a surety bond in the amount of $100,000 for the benefit of employees to ensure payment of wages and fringe benefits (in addition to the contractor's license bond required of all licensees.) Further, if the LLC is a signatory to a collective bargaining agreement, the new bond must cover fringe benefit trust fund contributions. Finally, a licensed LLC must maintain and furnish proof of specified insurance coverage in an amount between $1-5M, depending on the number of personnel of record.

## V. MECHANIC'S LIENS, LIS PENDENS AND BONDS

### A. Mechanic's Liens

1. New Requirement for Mechanic's Liens (AB 457)

Effective January 1, 2011, Civil Code Section 3084 is amended to require that mechanic's lien claimants must give notice of certain information included in the lien claim to the property owner and accompany the notice with a proof of service affidavit.

### B. Lis Pendens

1. Forsgren Associates, Inc. v. Pacific Golf Community Development LLC, 182 Cal. App. 4th 135 (4th Dist. Feb. 2010)

A general contractor on a project involving the construction of a golf course sued the owners of adjacent property to foreclose on a mechanic's lien recorded against both the golf

course property and adjacent properties. Although the parcels were owned by different legal entities, the principal owner of the golf course development was also a member of the other owner entities. Part of the golf course contained a flood control channel which benefitted not only the golf course, but the surrounding land designated for the construction of homes. The trial court ruled that the general contractor was entitled to foreclose on the liens attached to the whole of the adjacent properties.

The Court of Appeal reversed the ruling as overbroad. The golf course was owned by a business entity separate and independent from the owners of the surrounding residential and commercial property. The Court held that the scope of the lien was limited to only those portions of adjacent properties that were beneficial to the convenient use and occupancy of the golf course. Only those limited portions of adjacent properties where sprinklers for the golf course had been installed and areas in which topsoil had been removed and vegetation planted could be subject to the lien.

2. Recording of Lis Pendens Now Mandatory (AB 457)

Effective January 1, 2011, Civil Code Section 3146 is amended to require that a lis pendens must be recorded within 20 days of filing a lien foreclosure action. Until and unless the lis pendens is recorded, an encumbrancer or purchaser will not be deemed to have constructive notice of the foreclosure suit as a matter of law.

## C. Stop Notices

1. Force Framing, Inc. v. Chinatrust Bank (U.S.A.), 187 Cal. App. 4th 1368 (4th Dist. Aug. 2010)

The subcontractor served its preliminary notice on the bank erroneously listed in a preliminary information sheet furnished by the owner (East West Bank) and there was no evidence it had reason to know of the error. The subcontractor served the correct bank (Chinatrust) with a bonded stop notice and filed suit to enforce the stop notice. The bank sought summary judgment on the ground that the subcontractor had not served it with the preliminary notice required by Civil Code Section 3097 and that the subcontractor was charged with constructive knowledge of the bank as construction lender because the deed of trust it recorded was a matter of public record. The trial court agreed and granted summary judgment in the bank's favor. The appellate court reversed on the ground that the subcontractor could have had a good faith belief in the identity of the construction lender, and that created a triable issue of fact which could not be resolved on summary judgment.

### D. Performance and Payment Bonds

1. Mepco Services, Inc. v. Saddleback Valley Unified School District, 189 Cal. App. 4th 1027 (4th Dist. Nov. 2010) , *modified*, 2010 Cal. App. LEXIS 1978

A general contractor sued a school district to recover compensation for extra work and delay damages, in addition to its final progress payment and retention. The district countersued the general contractor for breach of contract, seeking liquidated damages for delay and also sued both the contractor and the surety on the performance bond, the procurement of which by the contractor was required under the prime contract. Following a jury trial, the trial court issued judgment in favor of the contractor on its action, and against the district on its countersuit, and the court awarded the contractor its attorneys' fees, although the contract contained no attorneys' fee provision. The appellate court held that the fees were properly awarded pursuant to the terms of the performance bond and Civil Code Section 1717. The bond provided that the district was entitled to recover its fees from the contractor and the surety, jointly and severally, if it was required to engage the services of an attorney to enforce the bond. The Court of Appeal observed that under Section 1717, the contractor and the surety were each, reciprocally, entitled to recover their fees in defending against the enforcement action. Also, under the circumstances of this case, the claims prosecuted and defended by the contractor involved an issue common to, and intertwined with, the district's performance bond claim, i.e., which party had breached the contract. Therefore, the trial court did not err in awarding the contractor all its attorneys' fees.

## VI. PROMPT PAYMENT

1. Yassin v. Solis, 184 Cal. App. 4th 524 (2d Dist. May 2010)

Homeowners entered into an agreement with a contractor for home improvement work. The agreement called for the contractor to be paid fixed amounts upon reaching specific milestones on the project, with the final payment of $7,500 due once the work was complete and a certificate of occupancy issued. The homeowners became dissatisfied with the contractor's work, terminated him from the project, and hired another to complete the work.

The contractor filed suit to recover amounts he claimed were owed, including the $7,500 due upon completion. The homeowners cross-complained to recover amounts they spent to correct the contractor's deficient work. The trial court awarded the contractor nothing and awarded the homeowners $50,000, plus $36,000 in attorneys' fees under Civil Code Section 3260(g), which governs payment of retention proceeds. The trial court reasoned that the homeowners were entitled to recover attorneys' fees because they were the prevailing party on the contractor's claim for the last payment of $7,500, which the court determined to be retention.

The Court of Appeal overturned the award of attorneys' fees. The Court distinguished the type of installment payments agreed upon by the homeowners and contractor in this case with retention. Unlike installment payments, retention consists of amounts withheld

from progress payments until after the project is complete and the lien period has expired as security for the contractor's performance and full payment of subcontractors and suppliers. Because the $7,500 payment the contractor sued to recover was not withheld from any prior progress payment, it was not retention. Instead it was simply an installment payment and, therefore, could not trigger the recovery of attorneys' fees under Civil Code Section 3260(g), which only covers the timely payment of retention. Without much discussion or analysis, the Court of Appeal endorsed the trial court's conclusion that attorney's fees are not recoverable under Civil Code Section 3260.1, which addresses the timely payment of progress payments.

2. Hinerfeld-Ward Inc. v. Lipian, 188 Cal. App. 4th 86 (2d Dist. Sept. 2010)

A contractor on a substantial, multi-year home remodeling project sued the homeowners for unpaid amounts claiming breach of an oral contract. The homeowners cross-complained for, among other things, negligence and fraud, and defended against the contractor's affirmative claims by citing Business and Professions Code Section 7159, which requires home improvement contracts to be in writing. At trial, the contractor obtained a judgment for $200,000 for earned but unpaid progress payments and was awarded 2% per month on the unpaid amount, plus another $200,000 in attorney's fees, under the prompt pay provisions of Civil Code Section 3260.1. Meanwhile, the homeowners were awarded $1,000 on their negligence claim against the contractor.

The appellate court affirmed the trial court. Citing Asdourian v. Araj, 38 Cal. 3d 276 (1985), the appellate court held that while oral home improvement contracts violate Business and Professions Code Section 7159 and are illegal, they are not automatically void. In deciding whether an oral home improvement contract should be enforced, courts must examine whether enforcing the contract will undermine the consumer protection purposes of the statute or whether declaring the contract unenforceable will result in an unjust windfall to the homeowners. Because the homeowners in Hinerfeld-Ward were well-educated and were assisted by an experienced architect throughout the project, the Court of Appeal found they were not in danger of being manipulated or abused by a contractor. Moreover, declaring the contract unenforceable would have resulted in a substantial windfall to the homeowners. Thus the Court ruled the oral contract was enforceable.

The appellate court – a different division of the Second District than the one that decided Yassin v. Solis – reached a decision at odds with the outcome of Yassin v. Solis regarding the recoverability of attorneys' fees in actions brought under Civil Code Section 3260.1. The homeowners challenged the imposition of both a 2% percent per month charge on unpaid amounts and attorney's fees. Section 3260.1 states that if progress payments are wrongfully withheld, the contractor is entitled to recover "the penalty" specified in Section 3260(g). Section 3260(g) provides for both the charge of 2% per month on the wrongly withheld amount plus an award of attorney's fees and costs to the prevailing party. Relying on legislative history that reflected an intention to allow the recovery of both the 2% charge and attorney's fees, the Court of Appeal rejected the homeowners' argument that an attorney's fees award was not part of "the penalty" that could be recovered under Section 3260.1.

# VII. PUBLIC WORKS OF IMPROVEMENT

## A. Bidding

### 1. Great West Contractors Inc. v. Irvine School District, 187 Cal. App. 4th 1425 (4th Dist. Aug. 2010)

In Great West Contractors, the Fourth District held that a public agency's rejection of a bid for a public works project on the basis that a corporate bidder did not list its officers' licenses is a question of bidder responsibility, not bid responsiveness, and therefore a due process hearing was required. The Court of Appeal said that the case is important for two reasons. First, it presents a challenging problem in public contracting law: how to distinguish a "non-responsive" bid from a *de facto* determination that the bidder is not a "responsible" bidder. Second, the case presents what the court called "an object lesson in how evidence that, at least on its face, tends to show favoritism – indeed, on this record, favoritism most foul – never got squarely presented to, or considered by, the trial court." The Court invited readers of the opinion to judge for themselves whether "stonewalling" might not be a better word than "delay" for describing the public agency's actions.

The School District sought bids for the renovation of two elementary schools. All bidders were pre-qualified. Plaintiff, Great West Contractors, submitted the lowest bid on each project. Nonetheless, its bid was rejected as non-responsive. In response to the question in the bid package, "Have you ever been licensed under a different name or license number?" Great West responded "No." The School District subsequently determined that Great West had in fact operated under different license numbers and its president was listed as an RME under a different license number, and on that basis the School District determined that Great West's bid was non-responsive and it was therefore rejected in its entirety. The way by which this came about is what provoked the court's "favoritism most foul" comment. The Court related that a competing bidder, for a reason never adequately explained by the public agency, had access to Great West's bid information within 24 hours of the opening of all bids. Thus, the competitor was able to present a bid challenge almost immediately to the School District based on the allegation that Great West had omitted to disclose some licenses with which it or its principals had been associated. And that competing bidder went on to be awarded one of the contracts. But when Great West tried to get a copy of that very same competitor's bid, the School District did not turn over that information until several weeks later – indeed, the information was deliberately not made available until after the critical first court hearing in the case. And then, when Great West finally did get the information on its competitors' bids, it discovered that its successful competitors had been guilty of the very same omission with regard to the disclosure of all associated licenses that was the ostensible reason that Great West's bid was summarily rejected in the first place.

Great West filed a petition for writ of mandate generally arguing that it should have received the contract award. After two hearings, the trial court held that Great West's bid was non-responsive, and even if Great West had a due process right to a hearing due to its non-responsiveness, any relief would be moot inasmuch as the work had already begun and Great

West could no longer be awarded the contracts at issue. Additionally, the trial court entered judgment against Great West.

The Court of Appeal ruled first that, although the projects were already completed, the question presented on appeal – whether plaintiff's failure to list its officers' licenses constituted an issue of bid responsiveness or bidder responsibility – was not moot. The work was already complete, and the School District argued that therefore a court should not decide the propriety of its rejection of Great West's low bid. The Court of Appeal reasoned, however, that the non-responsive vs. non-responsible issue presented is "a classic example of an issue capable of repetition yet likely to evade review. Consider: in public contracts of a short lead-time nature, like the one here, an initial determination by the public agency that the lowest bid is 'non-responsive' allows for a summary rejection of that bid that may readily preclude effective judicial redress."

The Court of Appeal added that the issue is of great public concern. A school district is legally required to award contracts to the lowest responsible bidder. This statutory mandate may be bald-facedly circumvented if the school district need simply declare the bid non-responsive, then award the contract to the next (and perhaps favored) bidder.

The court then went on to address the merits of the case, discussing the difference between non-responsibility and non-responsiveness. The Court cited, *inter alia*, the Taylor Bus Service case which stated that responsibility is a "complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of settled judgment, whereas responsiveness is "less complex" and "can be determined from the face of the bid." The Court ultimately held that the allegation of falsity with respect to Great West's response to the bid question made it clear that the School District's rejection of its bid was an issue of non-responsibility, not non-responsiveness. The Court of Appeal reversed the judgment below, finding that the School District had erred in rejecting Great West's bid without allowing it a hearing on the issue of responsibility, and further finding that the trial court had incorrectly denied Great West the opportunity to amend its claim to seek damages (bid preparation costs) consistent with Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority, 23 Cal. 4th 305 (2000).

2. Schram Construction Inc. v. Regents of University of California, 187 Cal. App. 4th 1040 (1st Dist. Sept. 2010)

The Regents of the University of California awarded a general contract to DPR Construction for the design and construction of a medical center. On the University's behalf, DPR solicited bids for the mechanical, plumbing and electrical work on the project. Subcontractors were invited to bid on six individual packages and three alternative combination packages. After learning which subcontractors had bid on each package, DPR and the University decided to award a contract on a certain combination package instead of two individual packages. Southland Industries was determined to be the lowest responsible bidder on the combination package. Plaintiff, Schram Construction, which had submitted bids on the two individual packages but not on the combination package, filed a petition for writ of mandate challenging the award of the contract to Southland. The trial court denied Schram's petition.

The Court of Appeal reversed, concluding that the University's bid package selection procedure violated Public Contract Code Section 10506.4(c) – which requires it to "adopt and publish procedures and required criteria that ensure that all selections are conducted in a fair and impartial manner" and to disclose to prospective bidders how the best value bid will be selected, including the bid selection procedure and the determinative factors in that decision -- where it selected the bid packages based on undisclosed criteria and in a manner that allowed it to predetermine the outcome of the bid selection. The Court held that section 10506.4 required publication of the bid package selection criteria and that publication was necessary to a fair and impartial bid selection. The Court was particularly concerned that the bid selection had turned on a criterion that had not even been disclosed to the bidders. In concluding that the contract with Southland must be set aside, the Court stated that the University's violations of the competitive bidding statutes were not merely "technical or non-substantive," and that they compromised the integrity of the selection process by failing to ensure procedural and substantive fairness.

3. Graffiti Protective Coatings, Inc., et al. v. City of Pico Rivera, 181 Cal.App. 4th 1207 (2d Dist. Feb. 2010)

Through competitive bidding, plaintiff had been awarded a public works contract to maintain a city's bus stops. Four years later, the City terminated the contract as allowed by its terms. Without inviting competitive bids in accordance with Public Contract Code sections 20161 - 20162, the City entered into a new contract with one of plaintiff's competitors. Plaintiff filed suit for a writ of mandate and declaratory relief to invalidate the new contract and to compel the City to award the contract through competitive bidding.

In response, the City filed a special motion to strike, contending that the action was a "strategic lawsuit against public participation" (SLAPP) (Code Civ. Proc., § 425.16(b)(1)). The trial court granted the motion, reasoning that the maintenance of the City's bus stops was an issue of public interest and plaintiff was not likely to prevail on the merits of its claims. Under the anti-SLAPP statute, the City was entitled to an award of attorneys' fees, which the trial court fixed at over $24,000.

In reversing the trial court's decision, the Court of Appeal held that, even if plaintiff's claims involve a public issue, they are not based on any statement, writing, or conduct by the City in furtherance of its right of free speech or its right to petition the government for the redress of grievances. Rather, plaintiff's claims are based on state and municipal laws requiring the City to award certain contracts through competitive bidding. Thus, the claims are not subject to the anti-SLAPP statute. It follows that plaintiff does not have to demonstrate a probability of success on the merits at the pleading stage, risking the dismissal of its claims and the payment of the City's attorneys' fees. If the court were to conclude otherwise, the anti-SLAPP statute would discourage attempts to compel public entities to comply with the law.

## B. Methods of Proving Damages – Total Cost and Modified Total Cost Theories

### 1. Dillingham-Ray Wilson v. City of Los Angeles, 182 Cal. App. 4th 1396 (2d Dist. Mar. 2010)

In this case, the Court of Appeal reversed a decision of the trial court, which had precluded the contractor from proving damages by the method it proposed and had ruled that neither a total cost theory nor a modified total cost theory was permissible. The first sentence of the Court of Appeal's opinion stated: "The City of Los Angeles obtained millions of dollars worth of construction work that it does not want to pay for." It only went further downhill for the City after that.

Dillingham-Ray Wilson (DRW) had been awarded a contract by the City to expand the digester capacity at the Hyperion Wastewater Treatment Plant. During the course of construction, the City issued over 300 change orders which contained more than 1,000 changes to the plans and specifications. On rare occasions, the City directed DRW to perform changes on a time and materials basis. But in most instances, the City requested an estimate of the cost of the work, told DRW to start the work, and agreed the parties would negotiate a lump-sum payment at a later date. The parties agreed on the compensation payable for some of the time and materials change orders and lump-sum change orders, but not all of the change orders were ultimately agreed. When DRW completed the job, it requested an equitable adjustment to compensate it for the work performed without a price, and for expenses and losses allegedly resulting from the City's interference and delays. The City refused, and it assessed liquidated damages against DRW for delays and did not release the retention funds from escrow.

DRW sued the City for breach of contract, and the City cross-complained against the DRW on various theories including under the False Claims Act. Based on Amelco Electric v. City of Thousand Oaks, 27 Cal. 4th 228 (2002) and Public Contract Code Section 7105(d)(2), the City filed motions in limine to preclude DRW from presenting a total cost claim and from proving its damages with engineering estimates rather than actual costs. It also barred DRW from proving its damages on a modified total cost theory.

The case proceeded to trial on DRW's claims for delay damages, wrongfully withheld retention and prompt pay penalties, and on the City's cross-complaint. After post-trial motions, judgment was entered in favor of DRW in a net amount exceeding $30 million. Both parties appealed.

The Court of Appeal reversed the rulings which had limited DRW's damages proof, finding that the contract was ambiguous regarding restrictions on the proof and measure of damages. It remanded the case for a further trial on the interpretation of the contract. The Court also held that PCC Section 7105 and applicable case law restrict only the measure of damages and not the method of proving damages. It ruled that if, following remand, the trial court or jury interprets the contract and concludes that it does not require DRW to document actual costs on the change orders, and if engineering estimates are the best evidence of damages available, then DRW can offer those estimates to prove its claims. The Court also found that there is no legal prohibition on using a modified total cost theory (total cost of performance, less the contract

amount, less any unreasonable cost) to prove damages on a public works contract. Therefore, DRW would be allowed to use this method to prove its damages on remand if the contract does not require it to document its actual costs.

### C. Change Orders

#### 1. P & D Consultants, Inc. v. City of Carlsbad
190 Cal. App. 4th 1332 (4th Dist. Dec. 2010)

The Fourth District Court of Appeal held that a contract with a public agency cannot be modified orally or through conduct of the parties when the contract provides that no amendments, modification, or waivers of contract terms were allowed without a written agreement signed by both parties.

This breach of contract action arose from a written agreement between P & D Consultants and the City of Carlsbad for services pertaining to a redesign of the City's municipal golf course. The contract provided that no amendments, modification, or waivers of contract terms were allowed without a written agreement signed by both parties. The parties executed several written amendments, which increased the contract price for extra work. Because the City typically took several weeks to execute each amendment, the City's project manager often authorized P & D to begin work prior to receiving the signed amendment. The parties disagreed on the scope of work and price for Amendment No. 5, but ultimately executed it for slightly less than half the value P & D believed it was due. P & D later sought more money from the City, apparently for work P & D thought should have been included in Amendment No. 5. The City refused to pay and P & D sued. The City cross-complained for deficient and incomplete work. The jury found the City liable for breach of contract and awarded P & D the full damages it requested, $109,093.81.

The City appealed, contending that as a matter of law, the jury's award for extra work could not stand because there was no written change order. The Court of Appeal held that the judgment for P & D must be reversed "because as a matter of law, it cannot recover for extra work without a written change order, as the parties' contract requires." The Court held that the trial court erred in finding that the contract could be modified orally or through conduct, and that it should not have allowed the case to go to the jury on the modification theory. The Court cited to Katsura v. City of San Buenaventura, (2007) 155 Cal. App. 4th 104, which held that contracts with public entities cannot be modified orally and that people dealing with public agencies are "presumed to know the law with respect to any agency's authority to contract." The Court stated that any oral authorization by the City's project manager was insufficient to bind the City, and that the plain language of the contract limited the City's power to contract to that set forth in the contract.

## D. Public Agency's Failure to Disclose

### 1. Los Angeles Unified School District v. Great American Insurance Co., 49 Cal. 4th 739 (July 2010)

The Supreme Court held in this case that a contractor need not prove an affirmative fraudulent intent to conceal as part of a cause of action for non-disclosure of material facts or breach of the warranty of correctness of the plans. The Court framed the issue as "whether a contractor may also recover when the plans and specifications are correct, but the public authority failed to disclose information in its possession that materially affected the cost of performance." The Court expressly disapproved of the language used in the 1979 decision in Jasper Construction, Inv. v. Foothill Junior College District, 91 Cal. App. 3d 1, which had held that to recover for non-disclosure the contractor must show the public entity affirmatively misrepresented or intentionally concealed material facts that rendered the furnished information misleading.

The School District had ejected a contractor from a school construction project claiming material breach of contract. The School District solicited proposals from other contractors to correct defects and complete the project. Bidders were provided with copies of the original plans and also with a 118-page list of work that the District's representatives found to be defective or incomplete. The list contained language that was intended to hold the contractor responsible for all listed defects. Hayward Construction submitted a bid to perform the work on a time and materials basis with a guaranteed maximum price of $4.5 million. Shortly after starting work, Hayward notified the District that many defects had not been included on the correction list and could not have been discovered by simple observation, and that it therefore had significantly under-estimated the cost of the remedial work. Hayward alleged that the District had failed to disclose the full nature and extent of the defects in the existing construction, and had failed to disclose information that would have put Hayward on notice that some of its assumptions about the scope of the work required were faulty. For example, Hayward asserted that the District had failed to disclose a consultant's report that would have alerted Hayward to the defects in the stucco work and further asserted that the District was aware Hayward's intended method for curing stucco discoloration would not be effective. The trial court granted the School District judgment on the pleadings, rejecting Hayward's claims of breach of contract and breach of warranty, reasoning that under Jasper, Hayward could not recover because it had not alleged facts that would allow a conclusion that the District either actively concealed or intentionally omitted material information. The court entered judgment in favor of the School District in an amount exceeding $1.1 million.

The Court of Appeal reversed, holding that Hayward may maintain an action for breach of contract based on non-disclosure of material information if it could establish that the District knew material facts concerning the project that would affect Hayward's bid and failed to disclose those facts. The Supreme Court affirmed the decision of the Court of Appeal, though it concluded that the Court of Appeal's ruling was overbroad in suggesting that recovery may be had for any failure to disclose material information . The Supreme Court held that the contractor on a public works contract may be entitled to relief for a public entity's non-disclosure in the following limited circumstances: (1) the contractor submitted its bid or undertook to perform

without material information that affected performance costs; (2) the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) any contract specifications or other information furnished by the public entity to the contractor misled the contractor or did not put it on notice to inquire; and (4) the public entity failed to provide the relevant information. The Court elaborated that the circumstances affecting recovery may include, but are not limited to, positive warranties or disclaimers made by either party, the information provided by the plans and specifications and related documents, the difficulty of detecting the condition in question, any time constraints the public entity imposed on proposed bidders, and any unwarranted assumptions made by the contractor. The public entity may not be held liable for failing to disclose information a reasonable contractor in like circumstances would or should have discovered on its own, but may be found liable when the totality of the circumstances is such that the public entity knows, or has reason to know, a responsible contractor acting diligently would be unlikely to discover the condition that materially increased the cost of performance.

## E. MBE, WBE, and DVBE Preferences

### 1. Coral Construction, Inc. v. City and County of San Francisco, 50 Cal. 4th 315 (Aug. 2010)

In the latest decision arising out of the City and County of San Francisco's series of ordinances granting preferences in the award of public contracts, the California Supreme Court upheld the constitutionality of Article I, Section 31 of the California Constitution, which forbids a city awarding public contracts to discriminate or grant preferential treatment based on race or gender. The City, whose public contracting laws expressly violate Section 31, challenged its validity under the so-called political structure doctrine, a judicial interpretation of the federal equal protection clause. The Court concluded that Section 31 does not violate the political structure doctrine.

For the last 26 years, the City has preferentially awarded public contracts to minority-owned business enterprises (MBE's) and women-owned business enterprises (WBE's). The City's Board of Supervisors has mandated these preferences in a series of ordinances adopted over time, justifying each with legislative findings purporting to show continuing discrimination by the City against MBE's and WBE's. The details of the program have evolved, partly in response to changes in the law governing the validity of such preferences. The plaintiffs in this case, Coral Construction Inc. and Schram Construction Inc., challenged the 2003 version of the ordinance as unconstitutional under Section 31.

Section 31, which the voters approved as Proposition 209 in the November 1996 General Election, declared that the State, including its political subdivisions, "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

In rejecting the City's argument that Section 31 violates the political structure doctrine – an aspect of federal equal protection articulated in Washington v. Seattle School

District No. 1, 458 U.S. 457 (1982), the Court emphasized that Section 31 prohibits race- and gender-conscious programs which the federal equal protection clause *permits* but does not *require.* The Court also rejected the City's contention that the ordinance was unaffected by Section 31 because it falls within an exception which applies in instances where action must be taken to establish or maintain eligibility for federal funding. The City, which receives federal funds for a variety of projects, argued that it was compelled to enforce its ordinance by specific federal regulations imposing affirmative action obligations on cities that receive funds. The Supreme Court held, as the Court of Appeal had held, that the City's argument lacks merit.

Finally, the City contended that the federal equal protection clause requires its ordinance as a remedy for the City's own discrimination. The Court of Appeal had reversed the Superior Court's decision relating to this argument and remanded the case for the limited purpose of adjudicating that issue. The Supreme Court held that the Court of Appeal ruled correctly in remanding the federal compulsion argument for further proceedings. The Court did offer guidance to the Superior Court in resolving the federal compulsion issue on demand. The Court said that to defeat plaintiff's motion for summary judgment, the City must show that triable issues of fact exist on each of the factual predicates for its federal compulsion claim, namely (1) that the City has purposefully or intentionally discriminated against MBE's and WBE's; (2) that the purpose of the City's 2003 ordinance is to provide a remedy for such discrimination; (3) that the ordinance is narrowly tailored to achieve that purpose; and that a race- and gender-conscious remedy is necessary as the only, or at least the most likely means of rectifying the resulting injury.

## VIII. PREVAILING WAGE/EMPLOYMENT LAW

1. Alameda County Joint Apprenticeship and Training Committee v. Roadway Electrical Works Inc., 186 Cal. App. 4th 185 (1st Dist. June 2010)

A general contractor and its electrical subcontractor working on the project to rebuild the Bay Bridge were sued by various electrical unions, electrical contractors, and electrical contractors' associations. The plaintiffs asserted claims for unfair and unlawful competition under Business and Professions Code Section 17200 claiming that that defendants were using unauthorized workers to perform work that called for certified electricians under Labor Code Section 3099. The defendants succeeded in obtaining the dismissal of the lawsuit by arguing that the plaintiffs' claims raised issues with respect to the proper classification of workers, that it was up to the Department of Industrial Relations ("DIR") in the first instance to determine the scope of work that must be performed by certified electricians, and that plaintiffs had failed to exhaust their administrative remedies with the DIR before filing suit.

The Court of Appeal reversed. Labor Code Section 3099 was enacted in 1999 to establish and validate minimum standards for training and competency for electricians. It requires all persons who perform work for electrical contractors with class C-10 licenses to be certified. Section 3099 was not enacted as part of prevailing wage legislation, but rather as public safety legislation to ensure that electrical work be performed safely by properly trained

electricians. When the general contractor bid for and secured electrical work requiring a C-10 license, it was on notice that it was obligated to use certified electricians to perform the work. Because the requirement for C-10 licensees to employ certified electricians was not the result of any DIR determination, but rather was a statutory requirement, the plaintiffs' claims that alleged violation of the statute did not require that any type of administrative proceeding be exhausted before the claims could be presented in court.

2. Azusa Land Partners v. Department of Industrial Relations, 191 Cal. App. 4th 1 (2d Dist. Dec. 2010)

The private developer of a planned residential community reached an agreement with the City of Azusa regarding the public infrastructure that would be required as a condition of approval of the proposed planned community. The infrastructure included a school, park, streets, storm drains, sewers, utilities, and other improvements, all of which were estimated to cost $147 million to construct. Roughly one-half of the cost would be financed through Mello-Roos bonds; the other half was to be paid from private funds.

The developer unsuccessfully sought a determination from the DIR that the portion of the public improvements paid for through private funds need not be subject to the prevailing wage requirements of Labor Code Section 1720, et seq. The DIR's determination was upheld by the trial court, which in turn was affirmed by the Court of Appeal. The Court held that Mello-Roos bond proceeds are public funds under Section 1720 and that the obligation to pay prevailing wages applied to all of the public improvements required for approval of the development, even though some of the specific improvements might be entirely financed with private funds. The Court of Appeal rejected the developer's argument that each piece of infrastructure should be analyzed individually to determine if its construction was paid for with public funds. Instead, the Court held the public infrastructure works that were a condition of the development's approval must be analyzed as a whole; if public funds are used to pay a portion of the overall infrastructure costs, then prevailing wages must be paid in connection with the infrastructure costs, regardless of whether individual aspects of the infrastructure were privately funded.

## IX. INSURANCE

1. Forecast Homes, Inc. v. Steadfast Insurance Co., 181 Cal. App. 4th 1466 (4th Dist. Jan. 2010), *rev. denied*, 2010 Cal. LEXIS 4356

A home developer, acting as a general contractor, hired subcontractors to build homes. The subcontracts all required the subcontractors to defend and hold the developer harmless against any liability arising out of their work and to add the developer to their commercial general liability policies as an additional insured. A construction defect litigation was brought against the developer, but not against the subcontractors. The developer tendered its defense to Steadfast Insurance Company, which insured many of the subcontractors and on whose policies the developer was an additional insured. The insurer refused the tender, maintaining that only the named insured subcontractors could satisfy the per occurrence self-

insured retention ("SIR") amounts and none of the subcontractors had done so because they did not incur defense or indemnity costs in the litigation.

In a bench trial, the court concluded that the policies unambiguously allowed only the named insured, and not the developer, to satisfy the SIR obligation. The Court of Appeal affirmed, agreeing that the policy language of "you" and "your" means the named insured when read together with the provision that "you shall be responsible for payment of all damages and defense costs for each occurrence or offense until you have paid self-insured retention amounts and defense costs equal to the per occurrence amount shown in the endorsement." The words "or any insured" in the definition of the SIR, did not create ambiguity as to who may pay the SIR; rather it was intended to define what amounts and expenses qualify for the named insured's SIR payment. As to the public policy argument raised by the developer, the Court stressed that the subcontractors, not the developer, formed the insurance contracts and that the subcontractors may have wanted to control the exhaustion of the SIR. Further, the policy's restriction on who may pay the SIR did not render the developer's coverage illusory. In conclusion, it is not against public policy for a commercial general liability policy to provide that the additional insured may not pay the SIR in order to trigger coverage.

2. Interstate Fire and Casualty Insurance Co. v. Cleveland Wrecking Co., 182 Cal. App. 4th 23 (1st Dist. Feb. 2010)

A general contactor entered into subcontracts with Delta and Cleveland, pursuant to which each subcontractor agreed (i) to indemnify the general contractor for liability arising out of its work and to (ii) procure general liability insurance to which the general contractor would be an additional insured. Only Delta complied with the latter obligation, obtaining a commercial general liability policy from Interstate Fire and Casualty Insurance Company. During the performance of work, one of Delta's employees was injured by falling debris dislodged by Cleveland's operations. The employee filed suit against Delta, Cleveland and the general contractor. The general contractor tendered defense of the lawsuit to both subcontractors and to Interstate. Cleveland rejected the tender, but Interstate, pursuant to the Interstate-Delta policy, accepted it. The general contractor settled with the Delta employee and Interstate paid the settlement and attorney's fees. Cleveland also entered into a settlement with the Delta employee and obtained a good faith settlement determination.

Interstate filed a suit for subrogation against Cleveland for breach of contract in failing to defend and indemnify the general contractor. Cleveland demurred, contending that the good faith settlement cut off the general contractor's ability to sue for indemnity or contribution. The trial court sustained the demurrer, observing that the general contractor sustained no damages as a result of the breach and so had no claim.

The Court of Appeal reversed. The Court held that Interstate, standing in the shoes of an insured, could pursue a cause of action against Cleveland for breach of express contractual indemnification clause notwithstanding a good faith settlement determination. Another issue raised in the demurrer was the comparative equitable position of Cleveland and Interstate. The Court noted, that as an element of subrogation, Interstate must be in an equitable position superior to Cleveland in order to obtain subrogation. Addressing that issue, the Court

found that Interstate and Delta had fulfilled their contractual obligations, whereas Cleveland had not. Accordingly, Interstate was in a superior equitable position as compared to Cleveland. Because the insurer was in a superior equitable position it stated a cause of action against Cleveland.

3. PMA Capital Insurance Co. v. American Safety Indemnity Co., 695 F. Supp. 2d 1124 (E.D. Cal. March 2010)

PMA Capital Insurance Company sued coinsurer American Safety Indemnity Company ("ASIC") for equitable contribution on the grounds that the coinsurer had a concurrent duty to defend a mutual insured in an underlying construction defect case. The parties cross-moved for summary judgment. The primary issue in the case was the definition of the term "occurrence" in the liability policy issued by the coinsurer. The District Court held that the term "occurrence" included only negligent work done by the insured that caused property damage. PMA could not establish that the occurrence, i.e., the insured's negligent work, occurred during the ASIC policy periods. Without negligent work by the insured during the policy period, PMA did not meet the burden of demonstrating potential for coverage under the ASIC policy. Accordingly, the District Court granted ASIC's motion for summary judgment.

4. Scottsdale Insurance Co. v. Century Surety Co., 182 Cal. App. 4th 1023 (2d Dist. March 2010)

Two insurers shared multiple construction subcontractors as mutual insureds. Frequently, Century Surety Co. would decline to participate in the defense and indemnity of the mutual insureds. Scottsdale Insurance Co. filed suit seeking equitable contribution with respect to over 300 underlying actions involving the mutual insureds. In allocating responsibility between the insurers, the trial court applied the following standard: "where someone's wrong has made it difficult to provide exact numbers as to loss or damage, plaintiff does not bear the burden of exactitude." The trial court concluded that Scottsdale could recover one-half of the amounts it paid on approximately 80 underlying claims.

On appeal, the Court held that when multiple insurance companies have a duty to defend a mutual insured in a legal action and one declines to participate in the defense, an insurer seeking equitable contribution from the non-participating insurer must prove that it paid more than its "fair share" of the defense and indemnity costs for the common insured. The insurer seeking equitable contribution also bears the burden of producing the evidence necessary to calculate a "fair share." One insurer cannot recover equitable contribution from another insurer for any amount that would result in the first insurer paying less than its "fair share" even if that means that the otherwise liable second insurer will have paid nothing. Because the trial court applied an incorrect standard, the Court of Appeal reversed and remanded the case for an allocation determination.

5. Pennsylvania General Insurance Co. v. American Safety Indemnity Co., 185 Cal. App. 4th 1515 (4th Dist. June 2010), *rev. denied,* 2010 Cal. App. LEXIS 11011

A framing subcontractor was insured by Pennsylvania General Insurance Company under a commercial general liability policy while performing work on an apartment construction project ("Project"). At the conclusion of the policy period, and after the subcontractor's work was completed, the subcontractor was issued a new commercial general liability policy by American Safety Indemnity Company ("ASIC"). The subcontractor was then sued in a construction defect suit involving the Project. The subcontractor tendered its defense to both Pennsylvania General and ASIC. Pennsylvania General accepted the tender of the defense and paid the subcontractor's defense and settlement costs. ASIC denied the subcontractor's tender and did not participate in defending or indemnifying the subcontractor, claiming that the allegedly defective work did not occur during the ASIC policy period. Pennsylvania General sued ASIC for equitable contribution for a portion of the defense and indemnity costs. The key issue was whether the trigger for coverage occurred within the ASIC policy period. The trial court concluded it did not and entered summary judgment for ASIC.

The Court of Appeal reversed. The Court noted that when construing insurance policies, ambiguities in coverage clauses must be resolved broadly in favor of coverage. The Court held that ASIC's policy, read as a whole, was reasonably susceptible to the interpretation that resulting damage, and not causal conduct, was a defining characteristic of the "occurrence" that must take place during the policy period to trigger coverage. Accordingly, it was error to grant summary judgment in ASIC's favor.

6. Clarendon America Insurance Co. v. North American Capacity Insurance Co., 186 Cal. App. 4th 556 (4th Dist. June 2010), *reh'g denied,* 2010 Cal. LEXIS 9459

A homebuilder was insured by two insurance companies, Clarendon America Insurance Company and North American Capacity Insurance Company ("NAC"). Clarendon sued NAC seeking proportionate or equitable share of sums Clarendon expended to defend the homebuilder in a construction defect class action. NAC moved for summary judgment on the ground that its duty to defend the homebuilder never materialized as the homebuilder never paid a $25,000 "per claim" self-insured retention for *each* of the homes involved in the class action completed *after* the effective date of the NAC policy. The trial court granted NAC's motion. The Court of Appeal reversed because, in light of other terms of the NAC policy and the circumstances surrounding the issuance of the policy, the homebuilder may have had an objectively reasonable expectation that the self-insured retention would apply to the class action as a whole rather than to each of the homes constructed after the policy was issued. NAC failed to show the homebuilder had no reasonable expectation of coverage or defense as a matter of law.

7. Clarendon America Insurance Co. v. StarNet Ins. Co., 186 Cal. App. 4th 1397 (4th Dist. Oct. 2010), *rev. granted,* 2010 LEXIS 11395

The developer of a residential housing development was served by the homeowners association with a Calderon Notice commencing an alternative dispute process which was a prerequisite to filing a complaint for construction defects. The developer sued Clarendon seeking payment of defense costs incurred in defending against the Calderon Notice. Clarendon, in turn, sued StarNet (the developer was an additional insured on both insurer's policies). StarNet argued that the Calderon ADR proceedings did not consitute a "suit" within the meaning of its policy. The trial court disagreed and the appellate court affirmed. The latter applied the "literal meaning" approach (as opposed to the "functional equivalent" approach) to determine what constitutes a proceeding which triggers the defense obligation, as mandated by the California supreme court in Foster-Gardner, Inc. v. National Union Fire Ins. Co., 18 Cal. 4th 857 (1998). The court found that the Calderon Notice and ADR process is mandatory and "one part - the first step – in a continuous litigation process." Therefore, it met the definition of "suit" in the StarNet policy. [This case was granted review, but further action was deferred pending consideration of the Ameron case discussed below.]

8. Arrowood Indemnity Company v. Travelers Indemnity Company of Connecticut, 188 Cal. App. 4th 1452 (2d Dist. Oct. 2010)

A general contractor held two CGL policies for different periods. The contractor was sued for negligence allegedly committed during the second policy period and the second insurer provided both defense and indemnity. The jury found the contractor was negligent, but it was not clear from the verdict whether it found the negligence to have occurred during the first policy period, the second policy period or both. The second insurer sued the first insurer for equitable contribution. The appellate court characterized this as a case of first impression: where one insurance has participated in the defense and/or indemnity of an insured and the other has not, which bears the burden of proving the existence or nonexistence of coverage? The court held that under such circumstances, the participating insurer meets its burden of proof when it makes a showing of coverage under the other insurer's policy. The burden then shifts to the nonparticipating insurer to prove that, in fact, there is no coverage.

9. Ameron International Corp. v. Insurance Co. of the State of Penn., 50 Cal. 4th 1370 (Nov. 2010)

The insured was a subcontractor who manufactured and installed concrete siphons for an aqueduct project being performed for the US Dept. of the Interior Bureau of Reclamation. Long after the siphons were installed, they were discovered to be defective, and the Bureau's contracting officer ("CO") sought to recover $40M from the subcontractor for the continuous and progressive deterioration of the materials. Under the Contract Disputes Act of 1978, the insured subcontractor had the option to challenge the CO's decision either by appealing the decision to the US Department of Interior Board of Contract Appeals ("IBCA") or by bringing an action in the US Court of Federal Claims. The insured chose the former forum, and following 22 days of "trial," settled the CO's claim for $10M. The insured sought to recover the settlement

and its defense costs from its liability insurers. The trial court ruled as a matter of law that none of the policies provided coverage, and the appellate court affirmed since the policies only obligated defense of "any suit . . . seeking damages" and indemnity for "all sums which the insured is legally obligated to pay as damages," but did not define either "suit" or "damages." The courts applied the bright-line holding of Foster-Gardner, Inc. v. National Union Fire Ins. Co., 18 Cal. 4th 857 (1998) in which the court applied the "literal meaning" of the word "suit" to mean an action filed in a court of law. The California Supreme Court reversed, stating that its holding in Foster-Gardner, which concerned an administrative action designed to obtain a negotiated settlement of the insured's liability for environmental pollution, was based on its concern that the order did not provide insurance companies with sufficient notice of the parameters of the action against the insured. In this instance, however, the Supreme Court found that the adjudicative IBCA proceeding did not raise the same concern in that a complaint filed in the IBCA gave "as much, if not more, notice to insurers" as would a complaint filed in court, and noting the similarities between a court and an IBCA proceeding (the latter being authorized to conduct trials, determine liability and award damages). This opinion is thus an expansion of an insurer's obligation deriving from similar policy language to defend and indemnify its insured who participates in an adjudicative administrative proceeding.

## X. SAFETY/PERSONAL INJURY

### 1. Tverberg v. Fillner Construction, Inc., 49 Cal. 4th 518 (June 2010)

The peculiar risk doctrine is a judicially created exception to the common law rule that a person hiring an independent contractor to perform inherently dangerous work is generally not liable to third parties for injuries resulting from the work. Courts initially used the peculiar risk doctrine to impose upon landowners vicarious liability for the acts of their independent contractors when certain third parties – innocent bystanders or neighboring property owners – were injured by the contractors' work. It was not until courts expanded the doctrine to include another category of third parties, the employees of the independent contractors, that the Supreme Court stepped in to curtail the exception. In Privette v. Superior Court, 5 Cal. 4th 689 (1993), the Supreme Court held that a hirer of an independent contractor is not vicariously liable to the employees of the independent contractor for injuries caused by risks inherent in the work the contractor was hired to perform.

In Tverberg, the Supreme Court seized the opportunity to resolve a conflict within the Courts of Appeal regarding whether the hirer of an independent contract is vicariously liable to the contractor for the contractor's own injuries resulting from a risk inherent in the work. The Court of Appeal in Michael v. Denbeste Transportation, Inc., 137 Cal. App. 4th 1082 (2005) held that the hirer was not liable to the independent contractor for the contractor's own injuries, while the Court of Appeal in Tverberg reached the opposite conclusion. The Tverberg court reasoned that the justification for the Privette decision was the availability of workers compensation for the injured employee. Because workers compensation would not always be available to the independent contractor, the Court of Appeal in Tverberg concluded that the independent contractor could seek recovery for injuries from the hirer.

The California Supreme Court reversed the Court of Appeal and barred the independent contractor's claim against the hirer for injuries caused by the inherently dangerous jobsite conditions. The Supreme Court explained that the outcome in Privette and other decisions disallowing claims was not determined by the availability of workers compensation to the injured person. Instead, the analysis depended on the delegated responsibility for maintaining jobsite safety. A hired independent contractor who is injured by risks inherent in the hired work, after having assumed responsibility for all safety precautions reasonably necessary to perform the work safely, is not an innocent third party deserving of compensation under the peculiar risk doctrine. The doctrine of peculiar risk does not apply when the injured independent contractor seeks to hold a hirer vicariously liable for injuries caused by risks inherent in the work over which the independent contractor has been granted control.

2. Miranda v. Bomel Construction Co., 187 Cal. App. 4th 1326 (4th Dist. July 2010)

The plaintiff worked in an office next to a vacant lot, which for several months was used as the location of an uncovered stockpile for dirt excavated from a nearby construction project. Plaintiff contracted Valley Fever and filed a complaint for negligence against the general contractor that created the stockpile. The plaintiff alleged the contractor failed to cover the stockpile or otherwise contain dust from it, and that fungal spores carrying the pathogens that caused Valley Fever were released from the excavated soil that the contractor had negligently stored. The contractor successfully moved for summary judgment on the ground the plaintiff could not establish that the contractor had proximately caused the plaintiff's injury.

The Court of Appeal affirmed. While plaintiff produced ample evidence that the fungal spores that cause Valley Fever are contained in dirt throughout Southern California, can become airborne, and can be inhaled after dirt is excavated, plaintiff had no evidence that dirt from the stockpile contained the fungal spores or was the source of plaintiff's exposure to the disease. While plaintiff could speculate that the dirt stockpile was the source of the fungal spores that caused him to contract Valley Fever, he could not produce evidence that the stockpile (rather than all the other sources of airborne dust in Southern California) was a substantial factor in causing the disease.