



## Alerts

### California Appellate Court Bars Equitable Indemnity Claim Against Design Professional Where Only Economic Damages Are Involved

**February 10, 2015**

*Lawyers for the Profession®*

*State Ready Mix, Inc. v. Moffatt & Nichol*, Case No. B253421, 2014 WL 4647358 (Cal.App. 2 Dist. Jan. 8, 2015)

#### **Brief Summary**

Concrete supplier was hired to supply concrete for a pier that civil engineering firm designed for the owner. At the request of the general contractor, civil engineer reviewed and approved supplier's design for the concrete mixture. The concrete mixture failed to meet the required specifications and supplier was sued for the cost of replacing the pier. Supplier cross-claimed against civil engineer for equitable indemnity. Held, cross-complaint was properly dismissed. Supplier was sued for breach of contract and breach of warranty, not tort. Without a tort claim there was no basis for an equitable indemnity cross-complaint, and the economic loss rule precluded any recovery against civil engineer because there were no allegations of injury to any person or other property. Public policy also did not support imposition of a legal duty of care.

#### **Complete Summary**

The project owner, through its project manager Bellingham Marine ("Bellingham"), hired Major Engineering Marine, Inc. ("Major") to construct a concrete travel lift pier at Channel Islands Harbor. Major, in turn, hired State Ready Mix ("State") to supply the pre-mixed concrete to the project site. Bellingham hired civil engineering firm Moffatt & Nichol ("Moffatt") to prepare the plans for the pier. At Major's request, Moffatt reviewed and approved State's concrete mix design at no charge. On the day of the pour, State's chemical dispensing equipment failed and State manually added the chemical mixture without telling anyone and without testing the mixture to ensure that it met design requirements. Not surprisingly, the concrete mixture failed to meet the required compression strength, and Major was forced to demolish and rebuild the affected portion of the pier. Major sued State for the cost to remove and replace the defective concrete, asserting causes of action for breach of contract and breach of warranty. State filed a cross-complaint against Moffatt for implied equitable indemnity and contribution, alleging that Moffatt bore liability because Moffatt drafted the pier plans and reviewed and approved State's concrete mix design.

#### Service Areas

Professional Liability



The trial court sustained Moffatt's demurrer without leave to amend and dismissed State's second amended cross-complaint, finding that Moffatt was not in privity of contract with Major or State and that the cross-complaint was barred by the economic loss rule.

The appellate court affirmed the trial court. The law in California is that without a tort claim, there can be no basis to assert equitable indemnity. A breach of contract becomes tortious only when the conduct also violates a duty independent of the contract sounding in tort, otherwise, it is merely an attempt to recast a breach of contract cause of action as a tort claim. The court found that Major's claim for damages was solely economic in nature; there were no allegations of injury to any person or other property. Additionally, State had no contractual relationship with Moffatt by which State could pursue an independent tort claim arising from a breach of a contract. In the court's view, State was improperly attempting to recast a breach of contract claim as a tort claim. The court held that with no contractual relationship between State and Moffatt and no facts alleging personal or property damage, State's equitable indemnity claim against Moffatt was barred under the economic loss rule.

Importantly, the court also found that even if there were allegations of damage to other property, Moffatt did not owe a legal duty to State on public policy grounds. Design professionals may owe a duty of care to a third party based on a "special relationship" to the third party. Lack of privity of contract does not bar equitable indemnity if public policy favors imposition of a legal duty of care. This duty is based on multiple factors discussed in *Biakanja v. Irving*, 49 Cal.2d 647 (1958), and include the extent to which the transaction was intended to affect the third party, the closeness of the connection between the defendant's conduct and the injury suffered, and the foreseeability of harm to the third party.

The Court found that Moffatt's review of the State's concrete mix design was gratuitous and for the sole benefit of Bellingham, the project manager who retained Moffatt. Additionally, the court found that the State's own conduct was the primary cause of the damage, and Moffatt could not have predicted the structural soundness of the concrete given that State manually added the chemical mixture to the concrete and kept that information to itself. The court found no duty of care was owed to State on public policy grounds.

### **What the Court's Decision Means for Practitioners**

The case limits the liability of design professionals in breach of contract claims where the damages are purely economic. A party in a suit alleging deficient work or services must now consider whether the underlying claims support naming a third party defendant, such as a design professional, where the harm suffered does not involve property damage or personal injury. California courts will likely subject claims against third parties to greater scrutiny where only economic damages are sought.

For more information, please contact your Hinshaw attorney.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*