LOS ANGELES COUNTY BAR ASSOCIATION

CONSTRUCTION LAW SUBSECTION

THE YEAR 2006 IN REVIEW:

DEVELOPMENTS IN DESIGN AND CONSTRUCTION LAW

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I. Alternative Dispute Resolution

A. Arbitration

Bosworth v. Whitmore
135 Cal.App.4th 536 (2d Dist., Jan. 6, 2006)

Superior Court's removal of arbitrator under Code of Civil Procedure § 1281.6, because arbitrator would not commit himself to concluding arbitration by the court-ordered deadline, was an abuse of discretion. Plaintiffs in construction defect lawsuit, who had submitted their dispute to arbitration pursuant to a contract with defendant builder, moved the court in January 2002 for the appointment of a new arbitrator. The dispute had been submitted to arbitration almost two years prior, and the arbitrator was unable to guarantee he could complete the arbitration before the court-ordered March 2002 deadline. The court granted the request, holding the arbitrator's inability to commit to finishing before the deadline constituted a "failure to act" under Section 1281.6, justifying the appointment of a new arbitrator. The arbitration hearing went forward with a new arbitrator, and without defendant's attendance. Plaintiffs were awarded more than $2 million in damages, and the Superior Court confirmed the award.

The Court of Appeal reversed, finding that in the two years preceding the court's removal of the arbitrator, the arbitrator had been diligently conducting hearings and issuing orders, and that none of the numerous delays in the case were the fault of the arbitrator. Thus, the lower court's removal of the arbitrator and appointment of a successor was improper, and the award was void.

Buckeye Check Cashing, Inc. v. Cardegna
546 U.S. 440 (Feb. 21, 2006)

Although this is not a construction case, it has important ramifications for contracts with Federal Arbitration Act provisions. The U.S. Supreme Court held that when a party to a contract with an arbitration clause challenges the *entire contract* as being illegal, the question of the contract's legality should be decided by an arbitrator, not a court. Plaintiffs sued Buckeye Check Cashing in Florida state court, alleging the finance charges they paid Buckeye for cash were usurious, and thus that the contracts they executed with Buckeye were void *ab initio*. Buckeye sought to compel arbitration pursuant to arbitration clauses in its contracts with plaintiffs, but the trial court rule that the court and not an arbitrator must decide whether the contracts were illegal. On appeal, the Florida Supreme Court affirmed the trial court.

The U.S. Supreme Court reversed, holding that under the Federal Arbitration Act and prior Court decisions, a challenge to the validity of the contract *as a whole*, rather than to the arbitration clause, must be decided by an arbitrator. The Court also reaffirmed that an arbitration provision is severable from the remainder of the contract, and that these substantive rules of arbitration law apply in state courts, as well as federal.

*One observer has commented that this ruling appears to conflict with prior California cases holding that a challenge to an entire contract on the grounds of illegality could be ruled on by the court.

Fininen v. Barlow
142 Cal.App.4th 185 (2d Dist., Aug. 22, 2006)

Relying on the principle that laws must be construed to avoid "'an unjust and absurd result,'" the Court of Appeal rejected an argument from the losing party in an arbitration that the arbitrator had failed to disclose a ground for disqualification. Plaintiffs sued Barlow for construction defects. Both sides stipulated to arbitration, naming as their arbitrator Craig McCollum, who had served as a mediator in a different lawsuit involving Barlow the previous year. Upon arriving at the arbitration, Barlow and McCollum recognized each other. Barlow told McCollum that he believed McCollum had presided in a mediation in which Barlow was a plaintiff, a year or two earlier. McCollum then advised all parties that he had mediated a matter in which Barlow was a party. All parties (including Barlow) agreed to waive any conflicts arising from the disclosure concerning the Barlow mediation.

Four and a half months later, McCollum issued his arbitration award in favor of plaintiffs. Barlow filed a petition to vacate the award, claiming McCollum failed to make disclosure of the Barlow mediation as required by Code of Civil Procedure Section 1286.2(a)(6). The law states a court shall vacate an arbitration award if the arbitrator failed to timely disclose a ground for disqualification of which he was aware. The trial court rejected Barlow's petition and confirmed the award. The Court of Appeal affirmed, noting that when read literally, the statute could support Barlow's contention. However, construing Section 1286.2(a)(6) to require vacating the arbitration award under these circumstances would lead to an "absurd" result.

Gueyffier v. Summers
144 Cal.App. 4th 166 (2005)
See "sage advice" at p. 14227 and discussion on p. 14226.

This also is an interesting case for construction lawyers although it arose in a non-construction context. The agreement at issue in the case (a franchise agreement) provided, as an expressly material term, that the defendant could not be found in breach of the contract absent prompt detailed written notice of the alleged breach and opportunity to cure; and the agreement's arbitration clause barred the arbitrator from modifying any of its material terms. The arbitrator did not find that the required notice was promptly given after plaintiff first learned of the breach, but instead ruled that under the circumstances the defendant's contract violations were not curable and giving notice of alleged breach and an opportunity to cure would have been an idle act. In other words, the arbitrator acknowledged plaintiff did not give the contractually required notice, but determined it was unnecessary to do so.

The Superior Court confirmed the arbitration award. The Court of Appeal reversed, holding that the arbitrator exceeded his powers within the meaning of Code of Civil Procedure Section 1286.2(a)(4) when he failed to enforce the contractual notice and cure provision.

Of course, many construction-related contracts provide for contractual notice and cure provisions for a variety of circumstances. A few of the most common include notices of potential delays or changed work, notices of failures to pay, and notices of defective work. If the arbitration agreement provides that the arbitrator may not modify any of the contract's material terms, then a decision by the arbitrator to waive or excuse an alleged failure to give required notice and opportunity to cure may provide a basis for overturning the arbitrator's decision.

Rodriguez v. American Technologies, Inc.
135 Cal.App.4th 1110 (4th Dist., Feb. 16, 2006)

When parties state in a contract that arbitration shall be pursuant to the Federal Arbitration Act ("FAA"), a court cannot rely on a California statute to refuse to compel arbitration. Perry and Kathy Rodriguez sued American Technologies, Inc., which repaired their home, for professional negligence. They also sued several insurance companies for breach of contract and breach of the covenant of good faith and fair dealing. The work order that Kathy Rodriguez had signed for American Technologies contained an arbitration clause that read, "ARBITRATION: Pursuant to the Federal Arbitration Act, any controversy or claim arising [out] of or related to this Agreement … shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association …." American Technologies moved to compel arbitration, but the court refused, relying on California Code of Civil Procedure § 1281.2(c). Section 1281.2(c) provides that when a party to arbitration is also party to litigation with a third party (here, the insurance companies), and there is the possibility of conflicting rulings on common issues of law or fact, the court may refuse to compel arbitration, may stay the arbitration pending the outcome of the litigation, or may stay the litigation pending the outcome of the arbitration. The Court of Appeal held the lower court erred in denying American Technologies' motion. Under the specific language of the contract, the FAA applied to arbitration of disputes, and under the FAA the court was required to stay the litigation and compel arbitration.

In reversing the lower court's ruling, the Court of Appeal distinguished a recent California case, Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal. 4th 376, in which the California Supreme Court upheld the denial of a motion to compel arbitration under § 1281.2(c). In that case, the contracts contained general choice of law provisions providing that they would be construed according to California law, and since § 1281.2(c) was not inconsistent with the FAA, the court could rely on § 1281.2(c) to refuse to compel arbitration. The Court of Appeal held that here, unlike in Cronus, the parties in their contract stated that the FAA would govern all aspects of any dispute, both procedural and substantive.

B. Mediation

Lindsay v. Piotr Lewandowski
139 Cal.App.4th 1618 (4th Dist., May 31, 2006)

A stipulated settlement agreement following a private mediation was ruled unenforceable due to the use of different terms in different versions of the agreement. The Court reversed the trial court's judgment entered against plaintiffs.

In the version of the Agreement signed by most parties, the Agreement states "in the event of a dispute as to the terms of the settlement the parties agree to return to the mediator for final resolution by binding arbitration." The words "binding arbitration" are a typed addition to the form. Another version stated that if no agreement could be reached, then the parties would submit to "'binding' mediation."

The trial court granted defendant's motion to compel arbitration of the payment terms dispute and ordered the parties to return to the mediator, who would resolve the terms of the Agreement acting as an arbitrator. The mediator/arbitrator issued a ruling which required that plaintiffs pay $190,000 to defendant. The trial court granted defendant's motion to confirm the arbitration award.

The Court agreed with plaintiffs that the settlement agreement was unenforceable because the parties never agreed on a procedure to resolve the payment dispute. Thus, the Court reversed the trial court's judgment.

Templeton Development Corp. v. Superior Court
144 Cal.App.4th 1073 (3d Dist., Oct. 25, 2006)

Provision in contract between general contractor and subcontractor which required parties to first submit any disputes to mediation in contractor's home state of Nevada was unenforceable because it violated California Code of Civil Procedure § 410.42. Section 410.42 voids any contractual provision between a contractor and subcontractor based in California, regarding construction work to be done in California, that requires disputes to be "litigated, arbitrated, or otherwise determined" outside California. Court of Appeal held that the phrase "litigated, arbitrated or otherwise determined" includes mediation.

C. Judicial Reference

Woodside Homes of California, Inc. v. Superior Court
142 Cal.App.4th 99 (3d Dist., Aug. 21, 2006)

Judicial reference provision in home sale contract was valid and enforceable under the California Supreme Court's holding in Grafton Partners v. Superior Court, 36 Cal.4th 944 (2005), which stated that predispute jury trial waivers are invalid except where authorized by statute. Unmistakable language in Grafton opinion affirmed the enforceability of pre-dispute judicial reference agreements, identifying them as being explicitly authorized by the California Civil Code.

II. Civil Procedure

Tutor-Saliba Corp. v. Herrera
136 Cal.App.4th 604 (1st Dist., Jan. 10, 2006)

San Francisco City Attorney Dennis Herrera, speaking before the San Francisco Chinese-American Democratic Club regarding city's litigation against contractor Tutor-Saliba

Corporation, accused Tutor-Saliba of fraud in connection with construction project at San Francisco International Airport. The text of the speech was later posted on the city attorney's web site. Tutor-Saliba filed a defamation suit against Herrera. Herrera filed special motion to strike under anti-SLAPP (strategic lawsuit against public participation) statute, Code of Civil Procedure § 425.16. Trial court granted the motion, and Court of Appeal affirmed.

Under Section 425.16, the court shall strike a complaint if the complained-of activity involves the exercise of free speech or petition rights in connection with a public issue, and if the plaintiff has not demonstrated a probability of prevailing on the claim. Tutor-Saliba conceded the first prong, and the court found Tutor-Saliba had not shown a probability of prevailing on the claim because Herrera's remarks were protected by the official duty privilege, contained in Civil Code § 47(a). The privilege extends to the remarks of any public official engaged in policy-making functions, where the remarks are within the scope of his official duties. Herrera made his remarks in response to a proposed mayoral veto of a $2.5 million appropriation to fund the litigation against Tutor-Saliba.

Elnekave v. Via Dolce Homeowners Association
142 Cal.App.4th 1193 (2d Dist., Sept. 12, 2006)

Settlement agreement stipulated to during mandatory settlement conference was unenforceable under Code of Civil Procedure § 664.6, because no officer or board member of defendant homeowners association was present to agree to the settlement. Plaintiff condominium owners sued their homeowners association and next-door neighbors, claiming that defendants were responsible for mold damage. During a mandatory settlement conference, an oral settlement was reached and put on the record before the court. The association's insurer, and an employee of a property management company the association hired to manage the condominium complex, settled the matter on its behalf. The employee told the court she had authority to settle for the association. The parties were later unable to reduce the oral agreement to writing, because they could not agree on the scope of a required release. Plaintiffs filed a motion to enforce the settlement agreement under Section 664.6, and the trial court granted the motion.

The Court of Appeal ruled the agreement was unenforceable under Section 664.6. The statute's requirement that "parties to the litigation" stipulate to the settlement is strictly construed and means only the parties themselves, not their agents or attorneys – even when a party has authorized an agent to settle on its behalf. The court reversed the trial court's judgment enforcing the settlement, and the order dismissing the plaintiffs' complaint. In a footnote, the court expressed sympathy for the trial court's "frustration" that the settlement was unenforceable, noting California Rules of Court require that persons with full authority to settle must personally attend the settlement conference. The Court of Appeal stated its remand did not preclude the trial judge from awarding sanctions against the association.

Marijanovic v. Gray, York & Duffy
137 Cal.App.4th 1262 (2d Dist., March 27, 2006)

Painting subcontractor's malicious prosecution action against general contractor, who named it as a cross-defendant in construction defects suit, was subject to dismissal under anti-SLAPP motions by various parties. General contractor was sued by condominium owners' association for latent construction defects; the complaint included the allegation that "water-exposed exterior surfaces . . . have failed, thereby allowing ponding and water entry into the walls and common areas, and causing damage . . ." General contractor cross-complained against subcontractors, including painter, for indemnity. The condominium's suit was settled without a contribution from painter, and general contractor dismissed its cross-complaint with prejudice. Painter then filed a malicious prosecution suit against the contractor and the two law firms that represented it. The Superior Court granted the anti-SLAPP motion of the law firm that initiated the action, but refused to grant anti-SLAPP motions of the second law firm and the contractor, holding that the continued *maintenance* of the suit was improper.

The Court of Appeal reversed, finding that all the anti-SLAPP motions should have been granted. In order to survive the anti-SLAPP motions, the painter was required to demonstrate a probability of prevailing on its malicious prosecution action. No such probability was shown as a matter of law. The only evidence painter presented in support of its malicious prosecution claim was that painter's counsel had told general contractor's counsel, after the cross-complaint was filed, that painter was not responsible for any of the alleged defects in the condominium.

III. Construction Defects and Claims

Atkinson v. Elk Corp. of Texas
142 Cal.App.4th 212 (6th Dist., Aug. 23, 2006)

Homeowner decided to use Prestique I shingles manufactured by Elk Corporation of Texas ("Elk") in the reroofing of his home, after reading a brochure saying the shingles carried a 30-year warranty. Several years later, homeowner discovered the shingles were cracking. Homeowner sued Elk and eventually filed an amended complaint for breach of express warranty under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss"), and for breach of implied warranty under Magnuson-Moss. Trial court dismissed express warranty claim, reasoning that because the homeowner's contract with the roofer was for a "lump sum" with no separate charge for materials, and because the shingles were incorporated into a dwelling, that the shingles were not "consumer goods" under Magnuson-Moss. Trial court dismissed implied warranty claim because the statute of limitations had expired.

The Court of Appeal reversed the trial court's dismissal of the express warranty claim. The court noted a "consumer" under Magnuson-Moss included both a buyer *and* any person to whom a product was transferred during the duration of an implied or written warranty. "Consumer goods" as defined by Magnuson-Moss and its regulations include roof shingles, where the consumer buys the goods over the counter at a hardware or building supply store, or when the consumer contracts for the purchase of shingles in connection with the improvement or

repair of a home. The court added that whether a product incorporated into realty is considered a "consumer good" is determined by the time of sale. If the products are bought to be added to an existing dwelling, they are consumer products. "If, on the other hand, the products are purchased as part of a larger real estate sales contract, or contract for a *substantial* addition to a home, they are not." The court affirmed the dismissal of the claim for breach of implied warranty under Magnuson-Moss, stating it was barred by a one-year California statute of limitations.

Crawford v. Weather Shield Manufacturing, Inc.
136 Cal.App.4th 304 (4th Dist., Jan. 31, 2006)
superseded by grant of review, opinion at Crawford v. Weather Shield Mfg., 136 P.3d 168, 44 Cal.Rptr.3d 632 (May 24, 2006)

The California Supreme Court has granted review of this case, which held that a subcontractor was obligated to pay the defense costs of a developer for a construction defects suit. In an agreement between the subcontractor, Weather Shield Manufacturing, which manufactured windows, and a housing developer, the subcontractor promised it would "defend" the developer against any action "founded upon" claims growing out of the execution of its work. Homeowners filed suit against the developer, the subcontractor, and the window framer, alleging their windows were defective. The developer asked the subcontractor and the window framer to defend it, and both refused. The developer eventually settled the case, and sought the costs of defending the suit from the subcontractor and window framer. The trial court ruled each was obligated to pay half the developer's defense costs that were attributable to window problems. However, the subcontractor had been found at trial to be not negligent. On appeal, the Fourth District court was asked to decide this question: "Did the absence of the window manufacturer's negligence retroactively excuse any duty that the window manufacturer had to provide a defense to the homeowners' suit . . .?" The court concluded that no cases existed that, properly read in context, stood for a per se rule that the absence of negligence retroactively excuses a defense obligation agreed to by a subcontractor.

Stonegate Homeowners Association v. Staben
144 Cal.App.4th 740 (2d Dist., Nov. 7, 2006)

Trial court committed error when it refused to allow experts in construction defects suit against subcontractor to testify on the industry standard of care. A contractor who had built retaining walls for a housing development hired the subcontractor, contracting orally with the subcontractor for the waterproofing of the walls and installation of back drains. Homeowners sued the subcontractor for negligence, alleging the waterproofing sealant was improperly applied and drains improperly installed. The trial court did not allow plaintiff's experts to testify on the industry standard of care for waterproofing and installing drains, ruling it was not relevant because the terms of the oral contract between the subcontractor and contractor established the subcontractor's standard of care. The court then granted the subcontractor's motion for nonsuit, finding that the plaintiff failed to prove that the subcontractor had breached its obligations under the oral contract.

The Court of Appeal reversed, holding the industry standard of care – and not just the terms of the agreement between the subcontractor and contractor – was relevant to the

standard of care owed by the subcontractor. The Court relied on the Supreme Court's 1961 decision in Stewart v. Cox, which held that a subcontractor may be liable in negligence "to the owner, with whom he was not in privity of contract, for damage occurring after his work had been accepted by the contractor and the owner." The Court stated that "[s]tandard of care and its breach in the construction defect context must usually be established through expert testimony, though lay testimony may suffice where construction defects 'are of such knowledge that men of ordinary education could easily recognize them.'"

IV. Insurance

Benavides v. State Farm General Ins. Co.,
136 Cal.App.4th 1241 (2d Dist., Feb. 23, 2006)
(partially published)

Absent coverage, there is no tort liability for improperly investigating a first-party insurance claim, regardless of whether the insurer's conduct is characterized as breach of contract, breach of the implied covenant of good faith and fair dealing, or negligence.

An insured prevailed on a negligent investigation claim against her insurer, but appealed and argued for a new trial on her claims for breach of contract and breach of the implied covenant of good faith and fair dealing. The insurer appealed as to the negligent investigation claim. The court reversed as to the insured's claim for negligent investigation and entered judgment in favor of the insurer. It affirmed as to the claims for breach of contract and breach of the implied covenant of good faith and fair dealing, and negligence.

Plaintiff could not recover for the negligent handling of her claim because there was no coverage under the terms of the policy. The insured's primary right is to receive compensation for covered losses. The insurer's duty is to not unreasonably withhold payment of benefits due. Where no benefits are due, a negligent investigation does not frustrate the insured's right to the benefits of the contract. Plaintiff also could not recover for breach of contract or breach of the implied covenant of good faith and fair dealing, because when an insurer withholds benefits for proper cause, there is simply no breach.

Century Surety Co. v. Polisso
139 Cal.App.4th 922 (3d Dist., May 22, 2006)

In this case, the Court of Appeal considered whether a "genuine dispute" existed over whether an insurer owed its insured a defense in a construction defects suit. Through various actions over a five-year period, Century Surety Co. refused to defend insureds. The insureds sued Century, alleging breach of the implied covenant of good faith and fair dealing among other claims, and a jury awarded the insureds more than $2.6 million. On appeal, Century claimed the "genuine dispute" doctrine barred the insureds' bad-faith claim. Century argued the insureds' policy and a floater endorsement contained exclusions for uncompleted work and faulty workmanship, and there was a genuine dispute over whether the insureds had finished the project when the damages occurred, and whether their workmanship was faulty.

The Court of Appeal first noted that the "genuine dispute" doctrine had been traditionally applied to bad-faith claims regarding the duty to *indemnify*, rather than the duty to *defend*; and that the court was unable to find any cases addressing the latter. However, assuming the genuine dispute doctrine could be applied to a duty-to-defend case, the facts showed the doctrine was inapplicable here. The court noted the duty to defend is broader than the duty to indemnify, and a carrier must defend an insured when there is even a *potential* for coverage, regardless of whether coverage ultimately develops. The court then held the complaint filed against the insureds, as well as extrinsic facts known to Century at the time the insureds tendered their claim, gave rise to the potential for coverage under the insureds' policy. In essence, Century could not have genuinely believed that there existed *no potential* for coverage.

The court also upheld the punitive damages award, rejecting Century's argument that the trial court gave improper instructions to the jury during the punitive damages phase of the trial. The lower court properly excluded an instruction to the jury that punitive damages must be comparable to civil penalties authorized for similar cases. The question of comparable civil penalties is not for consideration by a jury in deciding punitive damages, but only for consideration by courts in reviewing whether a punitive damages award is excessive.

The Gorham Co., Inc. v. First Financial Ins. Co.
139 Cal.App.4th 1532 (2d Dist., May 30, 2006)
(**partially published)**

When an insured who has financed the purchase of an insurance policy through a lender defaults on the loan, and the lender notifies the insurer under Insurance Code § 673(d) that it is exercising the insured's right to cancel the policy, neither § 673 nor § 677.2 requires the insurer to provide notice of cancellation to an additional named insured.

The Gorham Company entered into a contract with the City of Los Angeles Harbor Department to serve as the general contractor for the construction of a community center. Gorham employed PDC Associates as a subcontractor. PDC was insured by First Financial under a policy which made Gorham an additional insured for any liability arising out of PDC's work. PDC financed the policy premium through a lender, Arizona Premium Finance Co., Inc. ("APFC"), and through this agreement assigned its right to cancel the policy to APFC in the event PDC did not pay its premium. On instructions from APFC, First Financial did cancel the policy for nonpayment of the premium. Gorham did not receive notice of the cancellation. PDC worked on the project until it was later terminated by Gorham. PDC had not completed its work, and Gorham thereafter terminated its contract with the City and left the project.

Litigation ensued among Gorham, PDC, the City, and other parties. Gorham sued the City, which brought a cross-complaint against Gorham alleging, among other things, that Gorham breached its contract, and that its negligent work caused many defects in construction. Gorham, in turn, cross-complained against its subcontractors, including PDC. Ultimately this underlying litigation settled, except for Gorham's cross-complaint against PDC. First Financial, which was funding PDC's defense to Gorham's cross-complaint in the underlying litigation, commenced the instant case by filing a complaint for declaratory relief against PDC and Gorham. Gorham cross-complained against First Financial, seeking damages for First

Financial's failure to participate in funding Gorham's defense to the City's cross-complaint in the underlying litigation and alleging that Gorham was an additional insured under PDC's policy that First Financial had a duty to defend against the City's claims. The trial court granted First Financial's motion for summary judgment on the grounds that under the language of the PDC policy, First Financial had no duty to defend Gorham against the City's cross-complaint. Gorham appealed from this grant of summary judgment.

All of Gorham's causes of action depend on the existence of a duty by First Financial to defend Gorham against the City's cross-complaint in the underlying litigation. Because Gorham is an additional named insured under the PDC policy, First Financial's duty to defend under that policy extends to Gorham if any of the City's claims sought damages possibly covered by the PDC policy. Gorham argued that the policy period did not end before it tendered its claim to First Financial for defense, since the policy termination was ineffective in the absence of required notice to Gorham. The court concluded the policy was effectively terminated and there was no possibility of coverage of Gorham, so the trial court properly granted summary judgment.

Gorham was not entitled to notice under Ins. Code § 673 in light of the section's legislative history, which does not show an intent to provide notice of cancellation to persons named in additional insured endorsements absent some other requirement for such notice. Gorham argued that Ins. Code § 677.2, which requires written notice of cancellation to be provided to the named insured and has been interpreted to include "additional named insureds," did apply to the cancellation of the PDC policy, but the court ruled it inapplicable, as this section relates only to termination of a policy other than at the insured's request.

Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.
136 Cal.App.4th 212 (3d Dist., Jan. 31, 2006)

When an insurance company seeks to provide a defense for an insured corporation that has been suspended due to nonpayment of taxes, the insurer must intervene in the action to protect its interests and the interests of its insured pursuant to Cal. Civ. Proc. Code § 387. The insurance company may not answer and litigate the case in the name of the insured. Thus, trial court's denial of fees and costs to insurer was proper, despite the fact the insurer persuaded plaintiff to dismiss its lawsuit.

Lincoln Fountain Villas Homeowners Association
136 Cal.App.4th 999 (2d Dist., Feb. 15, 2006)

Northridge earthquake claims revival statute, Code of Civil Procedure § 340.9, does not impose upon insurers any duty to investigate newly-discovered earthquake damage. Section 340.9 allows homeowners to revive certain otherwise time-barred claims against their insurers for unpaid benefits allegedly due from the 1994 Northridge earthquake. However, the statute did nothing more than temporarily reopen the filing window for otherwise viable claims that would have been barred by the statute of limitations. It does not impose renewed or additional duties on insurers. While subsequently-discovered earthquake damage may support a

homeowner's claim that the insurer's initial investigation and adjustment of a claim were deficient, the insurer has no duty under § 340.9 to investigate the newly-discovered damage.

Oak Park Calabasas Condominium Association v. State Farm Fire & Casualty Co.
137 Cal.App.4th 557 (2d Dist., Feb. 21, 2006)

Insurance policies issued to a condominium homeowners' association did not provide coverage for directors' deliberate refusal to pay a contractor money owed for earthquake repairs.

Oak Park Calabasas Condominium Association was sued by a repair contractor for sums unpaid. The association tendered its defense to its insurer, State Farm. Oak Park's insurance policies contained a "Directors and Officers Liability" provision, which covered Oak Park for damages arising from "wrongful acts" by directors. The provision defined wrongful acts as "any negligent acts, errors, omissions or breach of duty directly related to the operation of the Condominium/Association." State Farm denied coverage, and the association sued State Farm. The trial court ruled the policies did not provide coverage, because the D & O provision covered only negligent breaches of duty, not breaches of contractual duties. On appeal, the association contended the trial court erred because the word "negligent" in the policy language did not apply to the term "breach of duty."

The Court of Appeal affirmed. It held no "exotic rules of grammar" were needed to construe the D & O provision, because if the provision were interpreted in the manner contended by the association, any condominium association similarly insured could enter into contracts for repair, decide not to pay the bills, and shift the obligation to its insurer. "No rational insurer would wish to undertake such an insuring obligation." Further, public policy would be offended if the association were able to shift the obligation to pay repair bills to its insurer, which had already paid the association more than $4.9 million for losses under earthquake coverage: "It appears that Oak Park in essence wanted to enrich itself by forcing State Farm to pay twice for the same property loss. This court refuses to countenance such a result."

Ortega Rock Quarry v. Golden Eagle Ins. Co.
141 Cal.App.4th 969 (4th Dist., July 27, 2006)

Dirt and rock fill qualified as "pollution" under pollution exclusion in rock quarry's insurance policies; thus insurers could deny coverage when quarry was subject of EPA administrative proceeding and civil suit for alleged contamination of waterway.

Ortega Rock Quarry sued its insurers after the insurers denied coverage on the basis of total pollution exclusions. The policies defined pollution as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." The quarry argued the pollution exclusions were ambiguous because they did not adopt the definition of "pollution" set forth in the Clean Water Act (which includes dredged dirt as a pollutant). However, the Court of Appeal held that "state and federal environmental laws may provide

insight into the scope of the policies' definition of pollutants without being specifically incorporated in those definitions."

The quarry also argued that under the doctrine of "ejusdem generis," under which specific expressions in a text qualify those which are general, the only pollutants excluded from coverage were the types specifically enumerated in the policy definition, i.e., "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The Court of Appeal rejected this argument, holding the term "including," which preceded the list of pollutants, is ordinarily a term of enlargement rather than a term of limitation. The Court also ruled that EPA administrative procedures are not "suits" under the policies.

Parkwoods Community Association v. California Ins. Guarantee Association
141 Cal.App.4th 1362 (1st Dist., Aug. 7, 2006)

A homeowners' association was shortchanged as a result of its own settlement agreement in this case, in which the First District court examined the duties of the California Insurance Guarantee Association (CIGA) to pay damages on behalf of an insolvent insurer.

Parkwoods Community Association sued the developer, general contractor and subcontractors of a condominium development for construction defects. The subcontractors' insurer became insolvent, causing CIGA to assume their defense. Parkwoods settled with the developer and general contractor, who agreed they were jointly and severally liable for construction defects resulting from the subcontractors' work. The developer and general contractor agreed to make payments that exhausted their commercial general liability insurance, and also agreed to pay a portion of the balance of the remaining damages out of their excess insurance coverage. However, there still remained $925,000 left in the developer and general contractor's excess insurance coverage, which Parkwoods would not recoup under the settlement agreement. Parkwoods and CIGA agreed the homeowners' association would file a declaratory relief action to determine CIGA's obligation to pay the $925,000; and that CIGA would pay if the court found for Parkwoods. However, CIGA advised Parkwoods of its position that it was not obligated to contribute to any settlement, because Insurance Code Section 1063.1(c)(9)(i) prohibits CIGA from paying "any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured . . ." Notwithstanding this advice, Parkwoods proceeded to enter the settlement agreement with the developer and the general contractor.

Applying the holding of California Insurance Guarantee Association v. Workers' Compensation Appeals Board, 128 Cal.App.4th 307 (2005), the First District held that CIGA was not obligated to pay Parkwoods the remaining damages. The court noted that the parties stipulated the developer and general contractor were jointly and severally liable for defects caused by the subcontractors. Furthermore, the developer and general contractor had not exhausted their excess insurance coverage. Thus, "other insurance" was available to pay the claim that CIGA was being asked to pay. The court noted, "Parkwoods brought this predicament upon itself by settling with the developer and contractor, who were jointly and severally liable for all damages caused by the [subcontractors], with full knowledge of CIGA's position."

Safeco Ins. Co. of America v. Superior Court
140 Cal.App.4th 874 (2d Dist., June 22, 2006)

In an action for equitable contribution by a settling insurer against a nonparticipating insurer, the settling insurer has met its burden of proof when it makes a prima facie showing of coverage under the nonparticipating insurer's policy — the same showing of potential coverage necessary to trigger the nonparticipating insurer's duty to defend — and the burden of proof then shifts to the recalcitrant insurer to prove the absence of actual coverage.

Several construction companies purchased commercial general liability insurance from Safeco Insurance Company of America, American States Insurance Company and/or Century Surety Company. All of the policies were primary and all provided coverage for certain property damage. The insureds were sued in various separate lawsuits for property damage. In each case, the insured tendered its defense to two insurers: either to Safeco or American States, and also to Century. Safeco and American States accepted all tenders and provided a defense under a reservation of rights, but Century rejected all tenders and refused to participate, taking the position that its policy provided only excess coverage to the insureds' other insurance. Safeco and American States then sued Century for equitable contribution, seeking reimbursement for Century's share of the costs of defense and settlements of the underlying actions.

Century argued that its liability for a share of the settlements depended on the settling insurers' ability to prove actual coverage of the settled claims under Century's policies. While the court acknowledged that an insurer's duty to indemnify typically arises after liability is established, it also reasoned that by settling, the parties forego their right to have liability "established" by a trier of fact, and thus settlement becomes presumptive evidence of the fact and amount of the insured's liability, which presumption is subject to being overcome by proof. By not participating in the defense, Century had waived its right to challenge the reasonableness or amount of settlement, but retained its right to raise coverage defenses in a contribution action, bearing the burden of proof on these affirmative defenses. Under the circumstances of this case, where Century's duty to defend was undisputed, and where by law the settlements are presumptively reasonable, the burden of proof was on Century to establish that there was no coverage.

The Standard Fire Ins. Co. v. The Spectrum Community Association
141 Cal.App.4th 1117 (4th Dist., July 31, 2006)

Standard Fire Ins. Co. brought a declaratory relief action seeking a determination that it had no duty to defend developers who were sued in a massive construction defect lawsuit. It prevailed at the trial level, but the Court of Appeal reversed. It agreed with the homeowners' association's argument that since at least part of the damage occurred during the policy period, the fact that the Association did not yet exist during the policy period, or own any of the damaged property during the policy period, did not mean that the property damage was not covered under the insurance policy. The Court reaffirmed the principle that coverage of policies covering an accident or occurrence which results in injury during the policy period is triggered when the complaining party was actually damaged, not when the wrongful act was committed.

Standard Fire had issued a general liability insurance policy to the project's developers with respect to the project. The policy period had ended prior to the Association being formed and the filing of this lawsuit. Extensive damage had occurred to the project during the policy period, but before the units were purchased and the Association was formed.

The insurance company sought a declaration that it had no duty to defend or indemnify the developers in connection with the construction defect litigation. It argued that there could be no potential for coverage under the policy for any of the construction defects because plaintiff homeowner association did not exist during the policy period and therefore did not suffer any damage during the policy period. Plaintiffs filed a cross-motion for summary judgment in the declaratory relief action, claiming that as a matter of law the policy provided coverage for defense and indemnity with respect to the underlying construction defect litigation, since significant damage had occurred to the Project within the policy period.

The Court ruled that Orange Grove Terrace Owners v. Bryant Properties, 176 Cal. App. 3d 1217 (1986) resolved the matter clearly, notwithstanding that Orange Grove's reasoning rests upon a statutory provision couched in terms of standing, which the court noted goes to the existence of a cause of action against the defendant. Logic also supports that associations which have the obligation to repair common areas on behalf of others similarly possess the right to sue to recover for damage to those areas.

Tilbury Constructors, Inc. v. State Compensation Ins. Fund
137 Cal.App.4th 466 (3d Dist., March 7, 2006)

A workers' compensation insurer does not breach the implied covenant of good faith and fair dealing when it fails to adequately investigate and pursue a subrogation claim against a third party, even where the insurer's actions result in increased premiums to the employer. Subcontractor Tilbury Constructors' employee was injured when he fell from a ladder that had been placed, but not secured by the general contractor. Insurer State Farm paid and held in reserve $500,000 in benefits to the injured employee, and filed a subrogation action against the general contractor. Days before trial, State Farm settled the subrogation action for $10,000; meanwhile, the injured employee who sued the general contractor settled his lawsuit for $1.2 million. Tilbury alleged State Farm inadequately investigated the subrogation claim and settled for too little. As a result, Tilbury's experience modification factor increased, causing Tilbury's premiums to increase by more than $40,000 in 2002, with an unknown increase expected for the following year.

Tilbury sued State Farm alleging breach of the implied covenant of good faith and fair dealing, breach of contract, and other claims. The trial court sustained State Farm's demurrer without leave to amend. The Court of Appeal affirmed, holding State Farm had no duty to pursue subrogation rights under its insurance contract or the state Labor Code – it merely had the *right* to do so. Moreover, an insurer cannot be liable for the breach of good faith and fair dealing where the insurer's actions do not deprive the insured of the benefits of the policy, and "State Fund has not denied Tilbury any benefits due to Tilbury under the insurance policy." If Tilbury was dissatisfied with State Farm's handling of the subrogation claim, "they can go out into the market and purchase workers' compensation insurance from a separate carrier in future years."

TRB Investments, Inc. v. Fireman's Fund Ins. Co.
40 Cal.4th 19 (Nov. 13, 2006)

Interpreting a property insurance policy which stated that an exclusion for vacant premises did not apply to buildings "under construction," the Supreme Court held in a case of first impression that the term "under construction" is not limited to the construction of new buildings, but encompasses significant alterations or additions to existing buildings – as long as there are "substantial continuing activities" associated with the project. Thus, the Court ruled that buildings undergoing renovation should not be considered vacant for coverage purposes. In so ruling, the Supreme Court reversed last year's decision of the Fifth District Court of Appeal, which held that the term "under construction" in the plaintiffs' insurance policy contemplated only new construction. The Supreme Court ordered the case remanded to the trial court to determine whether the renovation project at issue in the case constituted "substantial continuing activities" such that plaintiffs would be covered for water damage to their property.

V. Licensing

Law imposes misdemeanor penalties on revoked licensees doing business under other licenses
Assembly Bill 2897 (adding Business and Professions Code §§ 7121.6, 7121.65, 7121.7, and 7121.8)
(Signed into law Aug. 28, 2006)

Existing law prohibits a contractor whose license has been revoked from working under the license of another contractor, except as a supervised employee. However, according to supporters of Assembly Bill 2897, existing administrative remedies have not been sufficient to deter violations of this prohibition. AB 2897 would make revoked licensees who do work for which a license is required for licensed contractors subject to misdemeanor charges. AB 2897 would also make licensed contractors who knowingly employ revoked licensees to do work for which a license is required, subject to misdemeanor charges. Any revoked licensee, prior to being employed in any capacity by a licensed contractor, must give his would-be employer written notice of the revocation.

Law requires roofers to obtain workers' compensation insurance
Assembly Bill 881 (amending Business and Professions Code § 7125, and adding Insurance Code § 11665)
(Signed into law May 26, 2006)

While existing law requires all contractors to prove they have workers' compensation insurance as a condition of licensure, contractors who certify they do not have any employees are exempt from this requirement. According to supporters of Assembly Bill 881, more than half the licensed C-39 roofing contractors claim to have no employees, thus exempting themselves from having to pay workers' compensation premiums. Supporters of AB 881 contend that roofers who obey the law are being underbid by roofers who fraudulently claim to have no employees. The law provides that as of January 1, 2007, the registrar of contractors will remove the C-39 roofing classification from the license of any contractor without workers' compensation insurance – regardless of whether the contractor claims to have no employees.

The law also requires insurers issuing workers' compensation policies to roofing contractors with C-39 licenses to perform annual payroll audits. These provisions will expire on January 1, 2011.

Law clarifies obligations of revoked licensee who has declared bankruptcy
Assembly Bill 2658 (amending Business and Professions Code §§ 7102 and 7113.5)
(Signed into law July 24, 2006)

Previously existing law provided that whenever a contractor's license is revoked due to an act or omission, he must satisfy any monetary debt owed as a result of any loss caused by the act or omission as a precondition of reinstatement. However, the law provided that he need not satisfy such a monetary debt if it was "adjudicated in a bankruptcy proceeding." Assembly Bill 2658 clarifies existing law to replace the term "adjudicated" with the term "discharged." According to the bill's author, who was quoted in a legislative report for the state Senate, the term "adjudicated in bankruptcy" is not used as a term of art in bankruptcy law. Moreover, not all debts are wiped out in bankruptcy. Some debts may be determined to be non-dischargeable, or the entire bankruptcy may be dismissed. AB 2658 makes it clear that filing for bankruptcy alone will not shield a contractor from repaying his debts, while attempting to regain his license.

Law prohibits work under another license by licensee suspended for nonpayment of taxes
Assembly Bill 2456 (amending Business and Professions Code § 7145.5)
(Signed into law July 24, 2006)

Previously existing law provided that the California State License Board could suspend or refuse to issue a license upon notification that certain individuals on a license had an outstanding debt to the state, including for unpaid taxes, and DIR and EDD penalties. The law did not authorize the board to suspend other licenses for which the culpable parties served as members. This law prohibits all of the personnel of record named on such a suspended license from serving in any capacity subject to licensure until the debt is satisfied (except as a nonsupervising employee). In addition, the license of any other licensee with any of the same personnel of record who have been assessed an outstanding liability to the state shall be suspended until the debt has been satisfied or the personnel of record dissociate themselves from the license.

VI. Contracts

Barton Properties, Inc. v. Superior Gunite
2006 WL 541025 (2d Dist., March 7, 2006)
(unpublished)

In this unpublished decision, the Second District ruled that where a general contractor *materially* breaches a contract so as to delay or prevent the performance of the subcontractor, the subcontractor is not foreclosed from refusing to perform and rescinding the contract by reason of a contractual provision which requires the subcontractor not to stop work but instead to "continue the work diligently to completion" and then "submit [any] controversy [regarding] performance of the work, the interpretation of this contract, extra work, delay,

disruption, or payment or nonpayment for work performed" "to determination by a court of competent jurisdiction after the project has been completed." The court held that a contrary result would impermissibly conflict with Civil Code Section 1511 (excusing performance or delay under certain circumstances), citing Peter Kiewit Sons' Co. v. Pasadena Junior College Dist., 59 Cal.2d 241 (1963).

CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.
142 Cal.App.4th 453 (2d Dist., Aug. 29, 2006)

TEG Oil & Gas U.S.A. hired CAZA Drilling to drill an oil well in Castaic. Shortly after work began, a blowout killed a CAZA employee, injured others, and completely destroyed the well. The drilling company continued to work for TEG to repair the damage, and later filed suit against TEG for unpaid work. The oil company, in turn, filed a cross-complaint against CAZA for breach of contract, negligence, and negligence per se, contending the drilling company's negligence caused the blowout. CAZA moved for summary judgment on TEG's cross-complaint, arguing that exculpatory clauses in the form contract between the parties allocated liability for all TEG's damages to the oil company. The trial court granted summary judgment against TEG on the cross-complaint.

On appeal, TEG argued that the exculpatory clauses were invalid under Tunkl v. Regents of University of California, 60 Cal.2d 92 (1963), which applies Civil Code 1668[2] to bar enforcement of exculpatory clauses when a contract implicates the public interest. The Court of Appeal considered the factors listed in Tunkl to determine whether the public interest was implicated, and ruled it was not. In particular, CAZA and TEG were "relatively equal business entities" and neither possessed a decisive advantage in bargaining strength. Nor was the parties' contract one of adhesion; TEG had specifically negotiated two changes to it.

TEG also argued the exculpatory clauses purported to absolve CAZA from liability for violations of law, and thus ran afoul of Civ. Code § 1668. However, the Court of Appeal held that TEG failed to identify any applicable laws violated by CAZA.

Shoals v. Home Depot, Inc.
422 F. Supp.2d 1182 (E.D. Cal. 2006)

Homeowner brought action against home improvement store to recover for breach of home improvement contract. Defendant moved for judgment on the ground that the alleged contract between plaintiff and defendant was not reduced to writing and was therefore unenforceable, arguing that Business & Professions Code Section 7159 (Home Improvement Act) requires covered home improvement contracts to be in writing. The Court denied the motion, finding that under California law the alleged oral home improvement contract was enforceable by the homeowner. The Court held that although the Home Improvement Act

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[2] Civil Code Section 1668 states that "[a]ll contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

requires that such contracts be in writing, they are not governed by the statute of frauds. The Court stated that California's statutory scheme for home improvement contracts is not designed to enable home improvers who are or act as contractors to avoid responsibility.

VII. Stop Notices and Mechanic's Liens

A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.
137 Cal. App. 4th 1118 (4th Dist., Feb. 21, 2006)

A stop notice can be subject to the litigation privilege, but only when it is issued in anticipation of litigation which is contemplated in good faith and under serious consideration. An electrical contractor sued his materials supplier for libel, slander and unfair business practices, after the supplier issued two stop notices to the school district for which the contractor was working. Defendant supplier had also used a collection agency to pursue a claim against contractor's surety bond, and had allegedly filed a derogatory credit report against contractor with Dun & Bradstreet. Defendant filed an anti-SLAPP motion to strike contractor's lawsuit, and the trial court denied. The Court of Appeal affirmed.

Defendant argued on appeal that its activities were protected under the anti-SLAPP statute because they were covered by the litigation privilege. In response, contractor argued the litigation privilege does not apply to stop notices. While the court found that stop notices can be protected by the privilege, defendant's stop notices, as well as communications to the collection agency and Dun & Bradstreet, did not qualify for the privilege. Defendant made no showing that it was seriously considering a lawsuit at the time it made these communications and issued the stop notices. The only evidence presented was that defendant allegedly told contractor that if contractor did not remit payment, defendant would issue stop notices "and pursue all available legal remedies." Because the litigation privilege did not apply, and defendant made no showing that its communications related to a public issue, contractor's lawsuit was not subject to an anti-SLAPP motion.

The importance of the Brown decision rests primarily in the finding of the court that the filing of the stop notice is a privileged action. In most cases, a party who files a stop notice or mechanic's lien should be in a position to easily articulate and document that they actually intended to file a lawsuit to foreclose the lien or enforce the stop notice, if necessary. Indeed, in most cases it could be expect that a company who goes through the trouble of filing a stop notice is similarly committed to filing a lawsuit. Rhino failed to present any such evidence to the court, possibly because the amount in controversy was not sufficient to justify the filing of a lawsuit. However, in most cases the obstacle which Rhino failed to overcome, is not one that should present much difficulty to most stop notice claimants. For most such claimants, Brown stands for the helpful proposition that as long as litigation is seriously contemplated, the filing of a stop notice as a first step in that process will be protected and not subject to collateral attack.

Howard S. Wright Construction Co. v. BBIC Investors, LLC
136 Cal. App. 4th 228 (1st Dist. Jan. 31, 2006)
(partially published)

A mechanic's lien was recorded timely and not prematurely when the contractor recorded the lien the day after the project owner anticipatorily breached its contract. The Court of Appeal reversed the trial court's holding that Civil Code section 3115, which governs the timely recording of mechanic's liens, requires the lien be recorded after completion of the *work of improvement*. The Court of Appeal noted the plain language of the statute says only that the lien must be recorded after completion of the *contract.* The contract was complete when the owner of the improvements informed the contractor they would not pay the contractor any more money, as this was an anticipatory breach of the contract.

North Bay Construction, Inc. v. City of Petaluma
143 Cal. App. 4th 552, (1st Dist., September 28, 2006)

Plaintiff North Bay Construction, Inc., could not recover from the City of Petaluma for grading work it performed on City land where the plaintiff had contracted with the developer to whom the City had leased the property, via either foreclosure on a mechanic's lien against the property or on a theory of quantum meruit.

North Bay alleged it was not paid for work completed. It sued the City as owner of the property, although the City was not a party to the contract. The Court of Appeal affirmed the trial court's grant of the City's demurrer on the ground that a mechanic's lien cannot be enforced against property owned by a municipality, even if the work was not performed as part of a "public work" project, and that common counts may not be asserted against public entities. The court cited the principle of sovereign immunity and reaffirmed precedent (Mayrhofer v. Board of Education (1891) 89 Cal. 110, 112; Wells v. One2One Learning Foundation (2006) 39 Cal.4th 1164, 1192) that any right to impress a mechanic's lien on public property must be expressly provided for by statute. No statute imposes liability on a public entity for debts incurred by a lessee for improving property leased from the public entity.

The court rejected North Bay's argument that a distinction should be made between property owned by a municipality that is used for governmental as opposed to proprietary purposes, with the proprietary property being subject to a lien just as other privately held property would be. The Court disposed of North Bay's pursuit of its claim under the mechanic's lien law by explaining that in the absence of legislation authorizing imposition of a mechanic's lien on publicly owned property, North Bay can pursue no such claim. The Court responded to North Bay's cause of action for recovery based on quantum meruit with the observation that it has long been true that a quasi-contract theory cannot be asserted against a municipality in a public works context. This principle rests on an understanding that the municipality lacked the ability to ratify the contract at issue, and that public policy favors closing off recovery against such public entities. Since it is true that "a contractor cannot recover in quantum meruit against a city that has itself contracted for the performance of work without complying with competitive bidding requirements, there is hardly a basis for recovery in quantum meruit for work performed under a contract to which the city was not even a party."

VIII. Public Works of Improvement

A. Design-Build

Law extends design-build authority to city of Victorville
Senate Bill 535 (amending Public Contract Code § 20175.2)
(Signed into law Sept. 14, 2006)

Senate Bill 535 extends to the city of Victorville the authority, until January 1, 2011, to enter into specified design-build contracts, with the approval of the city council.

B. Competitive bidding

Law allows state agency to award public works contract by "best value" process rather than competitive bidding.
Senate Bill 667

This bill allows the University of California at San Francisco to use a "best value" alternative contract award process rather than the competitive-bidding procedures specified in the Public Contract Code. While the bill applies only to UCSF, it may set a precedent for the contracting processes for other state universities, and some interested parties expect the introduction of further bills to give local public agencies greater latitude in their contract award processes. Contractor organizations such as the AGCC have expressed concern about the potential undermining of the low-bid, competitive bidding process.

Opinion of Bill Lockyer, Attorney General, No. 05-405
(Jan. 24, 2006)

The Attorney General opined that a public school district may not contract with another public agency to acquire factory-built modular classrooms and other buildings for installation on a permanent foundation without advertising for bids. The Attorney General's office, in issuing its opinion, was required to interpret Cal. Pub. Cont. Code § 20118. Section 20118 creates a limited exception to the requirement that all public agencies must follow a competitive bidding process for projects of $15,000 or more. Section 20118 provides that a public school board may authorize another public agency to lease "data-processing equipment, purchase materials, supplies, equipment, automotive vehicles, tractors, and other personal property for the district . . .," without advertising for bids. The Attorney General, using the rule of statutory construction of *ejusdem generis* ("of the same kind, class, or nature"), opined that the "personal property" referred to in § 20118 did not include building structures to be permanently affixed to land.

New law prohibits California State University from using auxiliary organization to circumvent public bidding process
Assembly Bill 1986 (adding Education Code § 89911; amending Public Contract Code §§ 10701 and 10704; and adding Public Contract Code § 10706.5)
(Signed into law Sept. 20, 2006)

The existing California State University Contract Law sets forth a process through which construction projects are competitively bid and executed. The law provides that the project be under the sole and direct control of the trustees of the university. The law provides that any subcontractor or agent, or any employee of any contractor or subcontractor, who knows of work done in violation of the CSU contract law and does not immediately notify the trustees or certain project officials is guilty of a felony. Assembly Bill 1986 provides that any construction work located on CSU property that is performed by an auxiliary organization of CSU and is funded in whole or in part by public money, is subject to the CSU contract law.

Law penalizes public agencies that repeatedly violate California Uniform Public Construction Cost Accounting Act
Assembly Bill 2372 (adding Public Contract Code § 22044.5)
(Signed into law Aug. 28, 2006)

Public agencies are generally required under existing law to competitively bid and award contracts for construction projects costing more than $15,000. Public agencies may avoid this low threshold for competitive bidding by agreeing to follow the cost accounting procedures in the California Uniform Public Construction Cost Accounting Act (the "Act"). If they agree to follow the Act, agencies may use their own employees on construction projects up to $30,000, and use informal competitive bidding procedures for projects costing up to $125,000. Public projects over $125,000 must be let to contract by formal bidding procedures. Assembly Bill 2372 provides that any public agency which has been found by the California Uniform Construction Cost Accounting Commission to have violated the Act three times within ten years will lose the use of the higher thresholds for five years.

C. Transit/Transportation Projects

Law continues design-build authority for transit districts
Assembly Bill 372 (amending Gov. Code § 20209.5)
(Signed into law Sept. 14, 2006)

Continues authority for transit districts to use design-build contracting to January 1, 2011. Previously existing law was set to repeal this authority on January 1, 2007.

Law authorizes Caltrans to build additional toll projects and toll lanes
Assembly Bill 1467 (amending Streets and Highways Code § 143 and adding § 149.7)/Assembly Bill 521 (amending Streets and Highways Code § 143)
(Signed into law May 19, 2006 and Sept. 28, 2006)

Assembly Bill 1467 authorizes the State Department of Transportation (Caltrans) to enter comprehensive development lease agreements with public and private entities for the construction of four transportation projects that may charge tolls or user fees. Two of these projects are allotted for northern California and two for southern California, as selected by the California Transportation Commission. AB 1467 also authorizes Caltrans and regional transportation agencies to apply to the commission to build four high-occupancy toll lane projects, two in northern California and two in southern California. Assembly Bill 521 provides that lease agreements for the four public-private transportation projects referenced above are deemed approved by the State Legislature if the Legislature fails to reject the lease agreements within 60 legislative days of submittal.

Law exempts certain levee repairs and highway/bridge retrofit projects from CEQA
Assembly Bill 1039 (adding Public Resources Code § § 21080.12, 21080.14, and 21080.16)
(Signed into law May 19, 2006)

The California Environmental Quality Act (CEQA) requires an agency to prepare and certify the completion of an environmental impact report on a project that may have a significant effect on the environment, unless the project is exempt from the act. Assembly Bill 1039 exempts certain levee repairs and highway and bridge seismic retrofits from CEQA.

D. Public Records Act

Michaelis, Montanari & Johnson v. Superior Court
38 Cal.4th 1065 (June 22, 2006)

The California Supreme Court considered California's Public Records Act ("the Act") (Gov. Code § 6250 et seq.), which calls for disclosure of a public agency's records, and the statutory exception applicable where the public interest in nondisclosure "clearly outweighs" the public interest in disclosure. Here, the Supreme Court determined that the benefits of public disclosure of competitive proposals submitted to a public agency were outweighed by the public interest in the nondisclosure of the proposals until after the conclusion of the agency's negotiation process, but before the agency's recommendation is finally approved by the awarding authority.

The City of Los Angeles Department of Airports issued a Request for Proposals for the lease of a parcel of land. After the deadline for submitting proposals had passed, petitioner submitted a request under the Act for copies of all proposals submitted in response to the RFP. After the City informed petitioner that it would provide copies of the proposals after the City had concluded the negotiations with the successful proposer, the petitioner filed a mandate petition in superior court, which was denied. The Court of Appeal reversed, finding that the City failed to demonstrate a clear balance in favor of denying disclosure. The majority

concluded that reasons for nondisclosure were vague and speculative, whereas the public had a significant interest in knowing, prior to completion of the negotiating process, whether the City had acted properly and followed its own guidelines.

The Supreme Court disagreed and reversed again, finding a significant public interest in nondisclosure until negotiation with the successful proposer was complete. Disclosure would hinder the City's, and hence the city taxpayers', interest in negotiating the most favorable lease possible. Knowledge of others' proposals would put negotiating proposers at an advantage, and public knowledge of proposal details would permit political and other pressures to interfere in the process. Petitioner offered no compelling reason that public review for the purpose of ensuring the City's compliance with guidelines could not take place as effectively after negotiations had been completed but before the lease was to be approved.

E. Performance Bonds

Golden State Boring & Pipe Jacking, Inc., v. Orange County Water District
143 Cal.App.4th 718, (4th Dist., Sept. 28, 2006)

In a matter of first impression, the Court interpreted California Public Contract Code section 4108's mandate pertaining to subcontractor performance and payment bonds. A subcontractor whose response to an informal invitation to submit subbids included the language "[i]f bond is required, a fee of 2.5% of the contract price will be added", and twice reiterated its offer to provide a bond if required, was subject to substitution out of the project pursuant to Public Contract Code section 4107 when it refused to sign the subcontract requiring it to obtain a performance bond.

Subcontractor Golden State Boring & Pipe Jacking, Inc. ("GSB"), argued that the prime contractor, Colich Construction, L.P., had no right to insist on a performance bond because Colich failed to make a statutorily required request for a bond under section 4108 of the California Public Contract Code. Section 4108 provides that a prime contractor cannot impose bond requirements where such requirements are not specified in the written or published requests for subbids. The Court agreed with the Orange County Water District that this section does not apply to the situation at hand, because Colich never advertised for subbids nor issued any written invitations for bids. GSB stated in its submitted bid, without prompting by Colich, its ability and readiness to provide bonds at a rate it specified. GSB subsequently communicated to Colich that it had made efforts to provide the bonds. These communications made it clear to the court that the bond was not being required by Colich, but instead was part of the consideration offered by GSB and accepted by Colich. The court agreed with Colich's argument that because GSB had offered in its subbid to provide bonds, its refusal to do so after the bid was accepted constituted grounds for substituting GSB out of the project.

F. Development Fees

New law prohibits imposition of development fees to cure existing deficiencies in public facilities
Assembly Bill 2751 (Gov. Code § 66001(g))
(Signed into law Aug. 28, 2006)

Assembly Bill 2751 amended Government Code § 66001 to codify case law that cities and counties may not charge fees against new developments to cure existing deficiencies in public facilities. The new portion of the statute reads, "A fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan."

G. Differing Site Conditions

Bill clarifies law regarding notification of differing site conditions
Senate Bill 1605 (amending Public Contract Code § 7104)
(Signed into law Aug. 28, 2006)

Existing law requires public works contracts of a local public entity, involving excavations deeper than four feet, to contain a clause requiring the contractor to notify the public entity in writing of any subsurface or latent physical conditions that differ from the conditions indicated. Senate Bill 1605 clarifies existing law and provides that the notification requirement shall be triggered by conditions that differ from information made available to bidders prior to the deadline for submitting bids.

IX. Labor and Employment

Mendoza v. Brodeur
142 Cal.App.4th 72 (1st Dist., Aug. 18, 2006)

The Court of Appeal held that an unlicensed roofer could pursue a tort claim against defendant, a homeowner who hired him to do roofing work, because plaintiff was legally defendant's "employee" as defined by Labor Code Section 2750.5. Plaintiff had been working for defendant for only four hours when he fell from defendant's roof, breaking his leg and ankle and hitting his head. Plaintiff sued defendant in tort. Defendant contended that plaintiff's action was barred under Labor Code Section 3352(h), which defines exclusions to the term "employee" for purposes of workers' compensation. Section 3352(h) states that one who has worked for an employer less than 52 hours in the 90 calendar days prior to his injury is not an employee. The court held, however, that Section 3352(h) applied only to bar plaintiff from making a *workers' compensation* claim, and did not bar a tort action. Moreover, Labor Code Section 2750.5 establishes a rebuttable presumption that an unlicensed worker performing services for which a license is required is an employee (as opposed to an independent contractor). Since defendant

conceded that plaintiff was unlicensed, plaintiff was defendant's "employee" and could pursue his tort claim.

California State Auto. Association Inter-Insurance Bureau v. Workers Comp. Appeals Board
137 Cal.App.4th 1040 (1st Dist., March 22, 2006)

Worker hired to paint couple's home, who was injured in fall from a ladder his first day on the job, was not the couple's "employee" such that he was entitled to workers' compensation. While Labor Code § 3351's definition of "employee" includes employees who are hired by owners or occupants of residential dwellings to maintain the dwelling or provide personal services, Labor Code § 3352 excludes from that definition any person who has earned less than $100 and worked less than 52 hours during the 90 days preceding the accident.

The court rejected the finding of the Workers Compensation Appeals Board that Labor Code § 3715 provided for the worker's coverage. Section 3715(b) provides that, notwithstanding the exclusions in § 3352, a "casual" worker whose work is expected to take 10 days or longer, and is expected to earn $100 or more, may file an application for workers' compensation with the appeals board, and any amount awarded will be paid by his employer – in addition to that worker's being able to sue his employer in court. However, § 3715 applies only to *uninsured* employers, and the employers here had insurance.

Mora v. Construction Laborers Pension Trust for Southern California
435 F.3d 1121 (9th Cir., Jan. 25, 2006)

Contributions made by construction employers into the Construction Laborers' Trust for Southern California (the Vacation Trust) did not represent paid vacation hours which construction workers could count for the purpose of accruing pension benefits. The Vacation Trust was established by unions and employer associations as a fund for the payment of vacations for construction workers (some of whom did not receive paid vacations from their employers). A retired worker who received a pension requested that the payments made to the Vacation Trust for the hours he worked be counted as "hours of service" for the purpose of determining pension benefits. The worker argued that ERISA regulations count paid vacation hours as "hours of service" for the purpose of calculating pension benefits. Thus, he contended, the payments his employer contributed to the Vacation Trust should be counted toward his hours of service. However, the Court of Appeals noted that the ERISA regulations defined an "hour of service" as "each hour for which an employee is paid . . . during which no duties are performed." The court stated, "the payments to the Vacation Trust were not made 'on account of time during which no duties [were] performed.' The payments were made precisely for time during which [the plaintiff] worked. These hours have already been counted once. To count them again would be to count them twice." The court held that the worker's arguments "have a superficial attraction because of the name of the entity into which the . . . contributions were made. His argument ends with the name. The payments were in fact into a trust that held savings on his account." Thus, the worker could not count his vacation benefits as "hours of service" for the purposes of calculating his pension.

Violante v. Communities Southwest Development & Construction Co.
138 Cal.App.4th 972 (4th Dist., March 16, 2006)

A subcontractor's employee on a public works project cannot sue the general contractor for the subcontractor's failure to pay prevailing wages. Three construction workers on a housing development sued various contractors and developers of the project for violation of Labor Code section 1774, breach of contract, and unfair business practices. Defendants had entered into a reimbursement agreement and a community facilities district agreement with the City of Yucaipa and a local community facilities district. Plaintiffs alleged they and other workers were paid less than the prevailing wages for public works projects as required by Labor Code section 1770 et seq. The trial court sustained defendants' demurrer without leave to amend.

The Court of Appeal affirmed, holding the Labor Code does not require a contractor to pay prevailing wages to a subcontractor's employees. Although a contractor and subcontractor may be held jointly and severally liable when the Labor Commissioner issues assessments for prevailing wage violations, this does not create a private right of action by a subcontractor's employee against a contractor. The court also affirmed the dismissal of plaintiffs' claims based on third-party breach of contract and unfair competition.

X. Safety/Personal Injury

Healy Tibbitts Builders, Inc. v. Director, Office of Workers' Comp. Programs
444 F.3d 1095 (9th Cir., April 14, 2006)

Longshore and Harbor Workers' Compensation Act benefits were properly awarded to survivors of a construction worker who died while excavating a utility line trench near the water's edge, as part of a project to renovate submarine berths at Pearl Harbor. Healy Tibbitts Builders, Inc. contracted with the U.S. Navy to renovate three submarine berths, and Healy Tibbitts then subcontracted utility line work to John Mannering. Mannering worker Finefeuiaki Maumau was killed when a steel shield supporting the sidewalls of the trench fell on him. An administrative law judge awarded benefits to Maumau's survivors, holding Maumau was covered by the Act, and the Benefits Review Board affirmed. The Ninth Circuit Court of Appeals denied Healy Tibbitts' and Mannering's petitions for review.

In determining the scope of the Act's coverage, the Court of Appeals noted that it "does not cover 'all those who breathe salt air,'" but added "neither is it limited to Popeye." The Act defines a covered employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in long-shoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." The court held that "harbor-worker[s]" as identified in the Act include workers directly involved in the construction of a maritime facility which is used for accommodating ships or submarines, even if their specific job duties are not maritime in nature.

City and County of San Francisco v. Ballard
136 Cal.App.4th 381 (1st Dist., Jan. 10, 2006)

Defense of laches was not allowed where city sought to enforce fire safety standards for building. The city and county of San Francisco sued the owner of an 84-unit brick and wood-frame residential building, seeking to have the building declared a public nuisance because its partial sprinkler system was not in compliance with fire prevention statutes for high-rise structures. The trial court ruled the city's and county's suit was barred by laches. The Court of Appeal held the ruling was error, because the equitable doctrine of laches cannot be invoked against a governmental body where it would defeat the operation of a policy adopted to protect the public.

However, the Court of Appeal affirmed the lower court's ruling that the building did not qualify as a "high-rise" structure under state fire safety laws. Health and Safety Code § 13210, subdivision (b), defines a high-rise structure as "every building of any type of construction or occupancy having floors used for human occupancy located more than 75 feet above the lowest floor level having building access…." The building subject to the lawsuit was built on a hillside and had multiple entrances at different levels. The city and county argued that since the lowest floor, the basement, had a streetside entrance/exit, the height of the building should be measured from the basement because that was the "lowest floor level having building access." However, the Court of Appeal held the statute was ambiguous and could be interpreted as the lowest floor "where it is reasonable to enter," or the lowest floor "where the fire department is likely to enter." Thus, as measured from a different entrance/exit on a different street, the relevant distance from the "lowest floor level having building access" to the penthouse floor was less than 75 feet.

Geffcken v. D'Andrea
137 Cal.App.4th 1298 (2d Dist., Feb. 27, 2006)

Trial court's exclusion of test results indicating exposure to mold mycotoxins was not an abuse of discretion, where there was no evidence that any of the tests performed met the criteria for admissibility under Evidence Code § 352 or the *Kelly/Frye* factors. Plaintiffs sued defendants for negligence, constructive eviction, nuisance, and breach of warranty of habitability after allegedly becoming ill from exposure to mold mycotoxins, which are carried on mold spores. Defendants made motions in limine to exclude the following evidence:
1) environmental air sampling data from plaintiffs' home and workplace; 2) a blood serology test, 3) a mycotoxin antibody test; and 4) testimony from a doctor stating that plaintiffs suffered from exposure to mycotoxins. The trial court granted the motions in limine, and the Court of Appeal affirmed. There was substantial testimony discrediting the environmental sampling, the blood serology test, and the mycotoxin antibody test. The environmental sampling was reportedly done in a sloppy manner and tested only for the presence of mold spores, not the presence of mycotoxins. Furthermore, the blood serology and mycotoxin antibody tests did not meet the admissibility test for new scientific methodologies established in People v. Kelly (1976) 17 Cal. 3d 24 and Frye v. United States (D.C. Cir. 1923) 293 F. 1013. Because these test results were properly excluded, the trial court was also justified in excluding the doctor's testimony and dismissing the plaintiffs' causes of action.

Jonkey v. Carignan Construction Co.
139 Cal.App.4th 20 (2d Dist., May 6, 2006)

The most-catchy-first-paragraph-of-an-opinion award goes to Justice Kenneth R. Yegan of the Second District Court of Appeal for his "strolling on a battlefield wearing horse blinders and ear plugs" analogy in this construction-accident case:

> A construction site can be a dangerous place. There are some people who are keenly aware of this danger – construction workers. Seasoned and mature construction workers who have risen to the top of this industry and who are supervisors, managers, and owners are not only keenly aware of the dangers; they also teach and are responsible for construction safety. They may also suffer financially for injuries occurring at a construction site. This, of course, provides an extra incentive to be safety-conscious. Here, it is ironic that Eric Jonkey (appellant), a seasoned and mature construction worker who had risen in the industry to a position of management and ownership, could be injured in the way we shall describe. Of all people at a construction site, appellant was and is chargeable with caring for his own safety. That he was walking near scaffolding which was being disassembled at a construction site looking down absorbed in a cell-phone conversation is tantamount to strolling on a battlefield wearing "horse blinders" and ear plugs. While we regret that he was injured, he should be grateful that he wasn't killed.

The court affirmed the jury's decision that the appellant's injuries were not caused by negligence of the company responsible for the scaffolding.

Michael v. Denbeste Transportation, Inc.
137 Cal.App.4th 1082 (2d Dist., March 23, 2006)
(partially published)

The Privette doctrine, which establishes that hirers of contractors are not liable for injuries to the hired contractor's employees, also applies when the injured worker is an *independent contractor* of the hired contractor. Truck driver David Michael sued his hirer Denbeste Transportation, Inc., a hazardous waste hauler, and Chemical Waste Management, Inc., a hazardous waste handler who hired Denbeste, after he was paralyzed in fall from a loaded trailer while attempting, without fall protection, to install a tarp. Michael also sued Aman Environmental Construction, Inc., the general contractor for demolition work on the job site and CWM's hirer; and he sued Secor International, Inc., a consultant hired by the landowner.

The trial court dismissed Michael's claims against all defendants on summary judgment. The court ruled that regardless of whether Michael was Denbeste's independent contractor or employee, Denbeste could not be liable to Michael for negligence because Michael contractually released Denbeste from liability in their hiring agreement. As to CWM and Aman,

regardless of whether Michael was Denbeste's employee or independent contractor, CWM and Aman were not liable under the doctrine established by Privette v. Superior Court (1993) 5 Cal. 4th 689, and its progeny. The court ruled there was no basis for fixing liability on Secor because Secor had not hired anyone.

The Court of Appeal affirmed the trial court's ruling as it applied to CWM and Aman. The court agreed the Privette line of cases applies regardless of whether the injured worker is an employee of a hired contractor, or an independent contractor of the hired contractor. Furthermore, neither of the two exceptions to hirer non-liability established in the Privette cases applied here. First, the lack of fall protection on the trailer was not a concealed hazardous condition of which CWM and Aman were aware, but Denbeste and Michael were not. Second, neither CWM nor Aman affirmatively exercised any control over safety conditions at the job site in a way that contributed to Michael's injury. The Court of Appeal also affirmed the grant of summary judgment as to Secor, the landowner's agent.

In the unpublished portion of the opinion, the Court of Appeal held there were triable issues of fact as to whether Michael was Denbeste's employee or independent contractor. Because this issue was unresolved, summary judgment based on the liability release in Michael's contract with Denbeste was improper, because such a provision appeared to be void as against public policy in the event Michael was an employee.

Sully-Miller Contracting Co. v. California Occupational Safety and Health Appeals Board
138 Cal.App.4th 684 (3d Dist., April 13, 2006)

An asphalt paving contractor that temporarily "leased" one of its employees to work for another company could properly be cited by Cal OSHA after the employee died in a construction accident at the secondary employer's job site.

Sully-Miller Contracting Co. leased one of its long-time employees, Jeff Moreno, to Manhole Adjusting, Inc., to work three days as a roller operator. On his first day on the job, Moreno was killed after being thrown from a roller which had an unusable seatbelt. Cal OSHA cited Sully-Miller for failing to have an injury prevention program where employees were instructed to refuse to work at secondary work sites if confronted with unsafe conditions. Sully-Miller was also cited for failing to periodically monitor the secondary work site for compliance with safety rules. The Cal-OSHA Board upheld the citation, as did the Superior Court when Sully-Miller filed a petition for writ of administrative mandate.

Sully-Miller appealed, arguing a) there was no basis for a dual-employer theory of responsibility; b) Moreno was not its employee at the time of his fatal accident because he was not working under Sully-Miller's direct supervision at the time; c) under Labor Code § 6401.7(h), a primary employer has no responsibility to provide safety training to an employee who is directly supervised by another employer; and d) there was insufficient evidence to support the finding that Sully-Miller's injury prevention program was inadequate. The Court of Appeal affirmed the trial court's ruling.

First, the Court of Appeal held the California Occupational Health and Safety Act did provide for dual-employer responsibility in situations like Moreno's. Second, there was substantial evidence that Sully-Miller was Moreno's primary employer at the time of the accident. Moreno had been employed by Sully-Miller for approximately 22 years, and remained on Sully-Miller's payroll even though he was temporarily not working for Sully-Miller due to lack of available projects. Furthermore, Sully-Miller expected Moreno to resume working for it as soon as projects were available, and Sully-Miller issued a payroll check to Moreno's family for the work Moreno performed for Manhole prior to the accident. Third, the statute requiring employers to have injury prevention programs, California Labor Code § 6401.7(h), requires *both* primary employers and secondary employers to maintain injury prevention programs to protect employees like Moreno, who are leased by primary employers to secondary employers. Finally, there was substantial evidence supporting the Board's finding that Sully-Miller's injury prevention program was inadequate to protect Moreno. According to the Board, Sully-Miller failed to instruct him that he was to refuse to perform any assignment involving a dangerous condition. Sully-Miller was also obligated to periodically inspect the Manhole work site to make sure Moreno was not exposed to unsafe conditions, or coordinate with Manhole to see that such an inspection program was in place. Sully-Miller failed to do either.

Thomas v. Duggins Construction Co.
139 Cal.App.4th 1105 (4th Dist., May 25, 2006)

Apportionment of noneconomic damages according to percentage of fault, required by Proposition 51, is not available to a defendant who has committed an intentional tort. The defendant in this case, Duggins Construction Co., sold a used scissor lift to electrical contractor Greg Bentley Electric. Days later, two Bentley employees were seriously injured when the lift tipped over and the platform on which the employees were standing collapsed. The two employees sued Duggins and certain of Duggins' employees for their injuries, and Duggins was found liable for fraudulent misrepresentation. A jury found that Duggins was 40 percent at fault for the accident; Bentley was 40 percent at fault; and two Duggins employees were each found 10 percent at fault. The trial court entered a judgment against Duggins for the entirety of plaintiffs' damages, despite Duggins' argument that it was entitled to have its liability for damages apportioned under Proposition 51. Proposition 51 holds that a defendant shall not be liable for noneconomic damages in personal injury, property damage and wrongful death suits, in excess of the defendant's percentage of fault for the accident. The Court of Appeal affirmed the trial court, holding that an intentional tortfeasor is not entitled to have his damages apportioned according to percentage of fault under Proposition 51.

Williams v. Occupational Safety & Health Review Commission
464 F.3d 1060 (9th Cir., Oct. 3, 2006)

The Ninth Circuit denied a petition for review of a final order of the Federal Occupational Safety and Health Review Commission, affirming four violations of the Occupational Safety and Health Act ("OSHA") after a trench collapse and death of an employee at a construction site. In reviewing the ALJ findings, the court found that the reasonable inferences drawn from the findings easily satisfied the substantial-evidence standard.

The first citation charged the Williams Construction Company with failing to instruct its employees in the recognition and avoidance of unsafe conditions and in the regulations applicable to their work environment, as required by 29 C.F.R. § 1926.21(b)(2). Williams provided no training in trenching hazards to at least the two employees working in the trench, and no Williams supervisor was familiar with OSHA regulations. The court ruled that the Secretary of Labor did not need to prove the *absence* of training; evidence of broad neglect of safety was sufficient to support the ALJ decision.

The second citation charged Williams with failing to ensure that no worker would have to travel more than 25 feet to reach a safe point of egress from a trench, as required by 29 C.F.R. §1926.651(k)(1). The court concluded that this regulation applies regardless of whether the employees were exposed to actual danger at the time of the collapse; a violation is established so long as employees have *access* to a dangerous area more than 25 feet from a means of egress. This regulation was also violated because of Williams' failure to designate a "competent person" with sufficient training and knowledge to identify and correct hazards.

The third citation charged Williams with failing to ensure that "a competent person," i.e. one with specific training in soil analysis and protective systems and capable of identifying dangerous conditions, performed daily inspections of excavations for evidence of hazardous conditions, as required by 29 C.F.R. § 1926.651(k)(1). Williams could not discharge its OSHA duties merely by relying on the general work experience or "common sense" of its employees.

The fourth citation charged Williams with failing to ensure that the walls of the excavation were either sloped or supported, as required by 29 C.F.R. § 1926.652(a)(1). This regulation was violated because Williams failed to protect its employees from cave-ins, since Williams had reason to know its employees would enter the trench on the day of the cave-in and that they in fact did so. Williams' argument that employees must take care to avoid placing themselves in harm's way or that management can expect an employee not to intentionally place himself in danger misconstrues the purpose of the OSHA safety standards.

<u>New Heat Protection Standards Adopted</u>
California Code of Regulations, Title 8, Chapter 4, § 3395: Heat Illness Prevention

Following 15 heat-related deaths at workplaces statewide in 2005, Cal-OSHA last year adopted new heat protection standards for workers in hot indoor or outdoor environments. The standards, which became effective in July, require that water be provided at the beginning of the work shift in sufficient quantities to allow for one quart per worker for each hour of the shift. (Employers may begin the shift with smaller quantities if they have effective procedures for replenishment during the shift as needed to allow each employee to drink one quart or more per hour.)

Employees suffering from heat illness, or believing they need to recover from the heat to prevent heat illness, must be allowed to go to an area with shade that is either open to the air or provided with ventilation or cooling, for a period of no less than five minutes. Such access to shade must be provided at all times. In addition, each employee working in hot indoor or

outdoor environments must receive heat stress training, and all supervisors must receive additional training. For information, visit http://www.strategichr.com/shrsweb2/hrtoolbox/toolbox0706/HRToolbox-0706.pdf.

Bills delete requirement that written agreement is required to use power-driven tools near underground utilities
Assembly Bill 463/Senate Bill 1359 (amending Gov. Code § 4216.4)
(Signed into law Sept. 14, 2005)

These two bills delete a requirement, which had been passed into law in 2005, that there must be a written agreement between excavators and utility operators in order for excavators to use power-driven tools before ascertaining the exact location of underground utilities. AB 463 and SB 1359 provide that as long as the excavator provides the utility operator with documented notice of the intent to use such tools, and the use of such tools is "mutually agreeable" to the excavator and utility operator, the excavator may use such tools when digging near underground utilities, before the precise location of the utilities is ascertained. According to legislative analysts, the "mutually agreeable" standard governed such excavations prior to the 2005 change in the law.

Law requires on-site meetings to verify location of dangerous subsurface utilities
Senate Bill 1359 (amending Gov. Code §§ 4216, 4216.2, 4216.3, and 4216.7)
(Signed into law Sept. 29, 2006)

Senate Bill 1359 requires that whenever a proposed excavation is within 10 feet of a "high-priority subsurface installation" – defined as a high-pressure natural gas pipeline, petroleum pipeline, pressurized sewage pipeline, high-voltage electric supply line, cable or conductor, or hazardous materials pipeline – the excavator and utility operator must conduct an on-site meeting to determine how to verify the location of the installation prior to the start time. SB 1359 also requires that high-priority subsurface installation operators maintain plans for the installations. The bill requires that only qualified, trained persons perform underground utility locating activities. Finally, SB 1359 provides that any subsurface installation operator who fails to comply with certain provisions of the Government Code related to underground excavations shall be liable to an excavator who has complied with the code, for damages, costs, and expenses that were proximately caused by the operator's failure to comply.

XI. Architect-Engineer Issues

Weinstein v. California Department of Transportation
139 Cal. App. 4th 52 (6th Dist., April 3, 2006)

The Court of Appeal affirmed a grant of summary judgment against plaintiffs who alleged that cross-median accident was caused by a dangerous condition of state highway, including absence of a median barrier. Defendant Caltrans established a defense of design immunity under Government Code Section 830.6 by providing substantial evidence that supported the reasonableness of the roadway's design. Plaintiffs claimed defendant lost design immunity due to changed conditions, namely an increase in traffic at the accident location and a

corresponding increase in accidents. However, there was no significant history of cross-median accidents, and increased traffic alone does not cause a roadway to no longer be in conformity with state design standards.

Consulting Engineers and Land Surveyors of California, Inc. v. Professional Engineers in California Government
140 Cal.App.4th 466 (3d Dist., June 14, 2006)
unpublished and superseded by grant of review, opinion at Consulting Engr's & Land Surveyors v. Prof'l Eng'rs in Cal. Gov't, 143 P.3d 654, 49 Cal.Rptr.3d 653 (Sept. 13, 2006)

The Court of Appeal affirmed the trial court judgment which granted a writ of mandate petitioned for by Consulting Engineers and Land Surveyors of California, Inc., which enjoined the implementation of provision 24 of a Memorandum of Understanding between the state and Professional Engineers in California Government. The provision states, among other things, that, except in extremely unusual or urgent circumstances, the state must make every effort to use state employees to perform architectural and engineering services for public works projects before resorting to contracts with private companies.

The Court held that provision 24 was in direct conflict with Proposition 35, which added article XXII to the California Constitution. Proposition 35 specified that article VII of the California Constitution could not be construed to limit the state from contracting with private companies for architectural and engineering services for public works of improvement. In so holding, the Court reasoned that provision 24 attempted to restrict the ability of state authorities to freely contract out engineering services, which was precisely what Proposition 35 was designed to prevent.

Andrews v. USF Ins. Co.
2006 WL 289159 (2d Dist., February 8, 2006)
(unpublished)

A homeowner brought an arbitration claim against the architect he had hired, pursuant to an AIA form architectural services agreement, to review structural engineering work and to observe progress and quality of construction work and endeavor to protect the owner against defects. The house experienced cracking and sinking resulting from deteriorated wood pilings, and had to be rebuilt. The architect tendered the case to the insurer on his comprehensive general liability policy. The insurer, USF Insurance Co., denied coverage after initially providing a defense with a reservation of rights.

The homeowner prevailed in the arbitration against the architect, as well as against the general contractor and the structural engineer, on a joint and several liability basis. The architect then sued USF Insurance for breach of contract and bad faith. The trial court granted summary judgment in favor of USF on the ground that the policy exclusion for liability arising out of professional services precluded coverage of the claim against the architect. That exclusion provided: "It is agreed that this policy shall not apply to any liability arising out of professional services performed by or for any insured, including, but not limited to . . . supervisory, inspection or engineering services. It is further understood and agreed that this

exclusion shall be applicable as respects any liability arising out of the performance by or for any insured or professional services for others in the capacity as an architect, engineer, or surveyor."

The court of appeal affirmed the judgment. It held that the professional services exclusion applied because the homeowner's claim against the architect alleged failure to supervise and inspect the general contractor's work with respect to the pilings. The court rejected the argument by the architect that he himself was a general contractor, as well as architect, and that the failure to properly inspect the construction was done in his capacity as a contractor. The court stated that the evidence showed the architect's AIA form contract referred to him only as the "Architect" and that he was acting as an architect when he inspected the construction.

Law renders unenforceable many agreements by design professionals to indemnify a public agency
Assembly Bill 573 (Adding Section 2782.8 to the Civil Code)
(Signed into law Sept. 25, 2006)

Assembly Bill 573 renders unenforceable all agreements by design professional services that purport to indemnify a public agency, except for claims that arise out of or relate to the negligence, recklessness, or willful misconduct of the design professional. Thus, the new law eliminates so-called "Type I" indemnity agreements between public entities and design professionals.

LGS Architects, Inc. v. Concordia Homes of Nevada
434 F.3d 1150 (9th Cir., 2006)

In this case, the 9th Circuit reversed the district court's denial of a motion for preliminary injunction. LGS, an architecture firm, had provided four copyrighted plans for Concordia's construction of a development known as Arbor Glens I. LGS and Concordia entered into a Licensing Agreement, based on the standard American Institute of Architects' form, which provided that the plans could only be used on the specific project unless Concordia obtained written authorization from LGS and paid an appropriate re-use fee. Without first obtaining written consent, Concordia tendered at least a portion of the required re-use fee and proceeded to build Arbor Glens II using the four floor plans provided by LGS. After Arbor Glens II was completed and sold out, LGS filed suit seeking an injunction requiring Concordia to cease using the plans and to return them to LGS.

Initially, Concordia sought to moot the appeal by submitting a declaration that it had no intention of using the plans any further. However, the 9th Circuit noted that such a voluntary declaration does not moot an appeal unless it is absolutely clear that the alleged wrongdoing could not recur. The Court then reviewed the merits of the injunction. Initially, in a copyright case, a party seeking a preliminary injunction is only required to prove the probability of success on the merits. The other required element of an injunction, the threat of irreparable harm, is presumed in copyright infringement cases. Because Concordia did not dispute that LGS was the owner of valid copyrights in the four plans, the only question for the Court was whether Concordia exceeded the scope of the license.

The Court had little trouble concluding that the plain language of the licensing agreement only permitted Concordia to use the four plans on the first phase of its project. Without written consent, Concordia simply could not proceed with the second phase of the project using LGS' plans. The Court also rejected Concordia's claim that LGS had breached the covenant of good faith and fair dealing. Concordia claimed that LGS had breached the covenant by failing to provide written authorization for the additional use. The Court raised, without deciding, the preliminary question of whether such a covenant can even be implied in a licensing agreement. However, even assuming it was, the Court found that Concordia had not presented any evidence that it had fully tendered the re-use fee that was required by the Agreement. Because Concordia had not demonstrated satisfaction of this pre-requisite to further use of the plans, the Court concluded that LGS had not violated the covenant of good faith and fair dealing in failing to authorize the additional use.

While the Court's decision is straightforward and largely dictated by what appear to be fairly clear contract provisions, this case highlights the need for builders and design professionals to carefully consider future use of plans during the initial planning for a project. If a builder intends to construct a project in multiple phases, it should ensure that any licensing agreement it has with its design professionals permits the use of any plans for each phase, or at least a mechanism for obtaining such authorization. If the agreement does not give the builder those options, the builder could find themselves in a difficult position if it wants to maintain the continuity of the development from one phase to the next. In addition, for the design professional, they must ensure that the fees they are being paid are sufficient to compensate them if additional phases or use of their plans is anticipated. If the right to continued or future use of floor plans and design documents is not resolved by the parties, in advance, the seeds of the dispute have been sown. Being cognizant of these potential issues in advance gives both sides the opportunity to clearly address the issue before it becomes a dispute.

Law expedites OSHPD approvals of plans
Senate Bill 1838

This bill expedites the approval of hospital construction plans by the Office of Statewide Health, Planning and Development.

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