Abdulaziz, Grossbart & Rudman
NEWS
Emphasizing All Phases of Construction Law

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THE INSURERS DUTY TO DEFEND

This case dealt with an insurance company's duty to defend a default judgment against its insured.

Reese Jones ("Jones") filed an arbitration proceeding against STARS Holding Company, Inc. ("STARS"). Jones sought to recover damages for faulty investment and financial planning advice. STARS was unable to put forward a defense because it had become insolvent prior to the proceeding. Jones obtained a $22 million judgment, which was confirmed by a judge.

Executive Risk Indemnity, Inc. ("Executive") was the insurer for STARS. Executive had issued a $10 million policy providing coverage for claims arising from STARS investment's advice and financial planning services. The policy covered losses "occasioned by a wrongful act where the insured becomes legally obligated to pay." Fortunately for Jones, Jones gave notice to Executive prior to the proceeding, but Executive refused to defend, stating that it was not obligated to do so under the terms of Executive's policy. The trial court agreed with Executive's argument that it was neither a party nor one in privity with any party to the proceeding. Thereby, it was not bound by the result obtained.

The Appellate Court reversed the decision. The Appellate Court stated that "an insurer, who has undertaken to indemnify another against loss arising out of a certain claim and has notice and opportunity to defend an action brought under such claim is bound by the judgment entered in that action and is not entitled to retry the material facts established by the judgment."

To be enforceable, the judgment may be based on a default hearing. In this case, Jones obtained a judicially confirmed judgment against STARS to which Executive had notice but refused to defend. Although Executive did not have a duty to defend in order to protect its interest, it could have intervened in the action.

When an insurer is notified of the underlying claim against its insured and given an opportunity to protect its interest, it is bound by any resulting judgment, whether or not its refusal to participate in the underlying proceeding is legally justified.

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PHCC -- THE FLOW EXPO -- MAY 1, 2010

Saturday, May 1, 2010, at the Long Beach Convention Center is the 35th Annual Southern California Plumbing Heating Cooling Industry Trade Show. Come by from 9:00 a.m. to 4:00 p.m. to be a part of the largest industry trade show for Plumbing and HVAC professionals in the west.

Abdulaziz, Grossbart & Rudman will be there in addition to many exhibitors showing the latest innovations, technologies and services that will help you grow your business. Come by the booth to ask the experts valuable questions or just to say hello.

For more information visit http://www.phccglaa.org/tradeshow/

BEST FRIENDS

This is not highly recommended, but if you put your spouse and your dog in the trunk of your car for an hour, who would be happy to see you when you opened it?

WHO'S THE PREVAILING PARTY?

Joe Turner ("Turner") entered into a Buy/Sell Agreement ("Agreement") to become an employee shareholder of a company called Asset Allocation Advisors, Inc. ("Asset").

The Agreement provided a formula to buy out the shares of employees who left the company. The formula also required binding arbitration of any disputes.

In the event of a dispute, the Agreement allowed for an award of attorneys fees to the prevailing party. When Turner was terminated in 2004, he refused the offer for his shares. Turner also refused to participate in arbitration and sought declaratory and injunctive relief to stop the arbitration.

Declaratory relief is where you ask the court to tell you what the law is on the specific matter. Injunctive relief is having the court tell a party to do something or refrain from doing something.

The trial court denied Turner's motion and the defendants, Asset, moved for an award of attorneys fees as the "prevailing party." Turner argued that the attorneys fee award was premature as the "prevailing party" could be determined only after the resolution of the underlying dispute.

Under *Civil Code* section 1717, the award of attorneys fees to the party is to "be determined by the party prevailing on the contract." Since this contract

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specifically provides for such an award, the "prevailing party" is entitled to fees "incurred in enforcing the contract."

In this case, the Agreement specifically provided for attorneys fees to the prevailing party.

Turner's action to delay the arbitration required defendants to incur fees in enforcing the Agreement. Since the trial court determined that the arbitration should be allowed to proceed, the issue was resolved in defendants favor making them the prevailing party. This action was independent of the underlying dispute to be resolved which would be resolved in arbitration and therefore, there was a separate "prevailing party" issue.

THINGS THAT MAKE YOU GO "HMMMM?"

Why don't you ever see the headline "Psychic Wins Lottery?"

Why do we leave cars worth thousands of dollars in the driveway and put our useless junk in the garage?

Why is it that doctors call what they do "practice?"

Why is lemon juice made with artificial flavor, and dishwashing liquid made with real lemons?

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COUNSEL UNDER RARE CIRCUMSTANCES CAN CONSENT TO SETTLEMENT ON CLIENT'S BEHALF

1538 Cahuenga Partners, LLC ("Cahuenga") sued what appeared to be two property mortgage lenders, among other entities, trying to "cancel a reconveyance and to quiet title to property on Reading Avenue in Los Angeles."

A couple of years later, the parties orally stipulated to a settlement agreement before the court. Fowlkes (principal of TRE Holdings and one of the parties who had joined later during settlement) was not present. However, counsel for TRE and Fowlkes said that he would accept the settlement on behalf of Fowlkes. The court had also stated that it had met with counsel and Fowlkes to discuss the terms of the settlement, and that Fowlkes indicated he "understood the terms and agreed to them." Eventually, WMC (one of the property mortgage lenders) filed a Motion for Judgment in accordance with the Settlement Agreement against TRE and Fowlkes. The Judgment was granted.

TRE and Fowlkes then argued that the settlement was unenforceable because Fowlks was not present in court to provide the consent to the settlement agreement.

On Appeal, the settlement was affirmed. The case was that according to *Code of Civil Procedure* Section 664.6, courts "may enter judgment pursuant to the terms of the settlement." The agreement may be in writing "signed…outside the presence of the court or orally before the court." Since Fowlkes had met with

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counsel in front of the court and acknowledged that he understood the terms and gave his consent, it bound him to the settlement.

In essence, section 664.6 of the *Code of Civil Procedure*, does not require "consent to the settlement 'on the record,'" only that the party to be bound to consent orally before the court.

This satisfied the court.

MORE THINGS THAT MAKE YOU GO "HMMMM?"

Why are they called apartments when they are all stuck together?

Why isn't there mouse-flavored cat food?

Why are there drive-up ATM machines with Braille lettering?

Why do we buy hot dogs in packages of ten and buns in packages of eight?

ENGINEERS TERMINOLOGIES

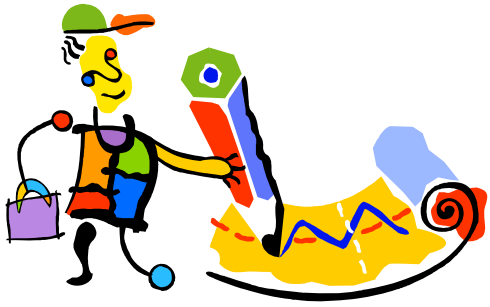
CUSTOMER SATISFACTION IS DELIVERED ASSURED -
We are so far behind schedule the customer is happy to get it delivered.

ENERGY SAVING -
Achieved when the power switch is off.

LOW MAINTENANCE -
Impossible to fix if broken.

RUGGED -
Too heavy to lift!

LIGHTWEIGHT -
Lighter than RUGGED.



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