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## Improving Litigation Outcomes by Improving Contracts

By Calvin R. Stead, Esq.

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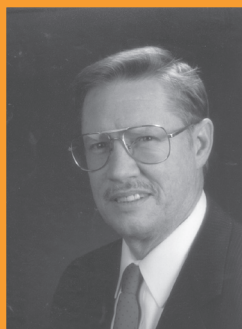
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A contractor can limit or eliminate some expenses and problems by agreeing to include a dispute resolution procedure in their contract. Consider some of these helpful devices:

- **Quick Mediation** – Expedited mediation can solve a lot of problems. If a dispute develops, it can be sent to mediation within ten (10) days. If it's decided to go this route, a mediator can be named in the contract. The method of submitting claims and the type of pre-mediation submissions that might be acceptable may also be included in the contract. Fast mediation just might keep the project from going into the full blown construction defect litigation that causes builders so many headaches. Of course in California there is SB 800 but since that is notoriously ineffective, putting something in the subcontracts and homeowner purchase and sale agreements could actually prove more effective, instead of just relying on SB 800.
- **Binding Arbitration** – Like mediation, arbitration can be accessed quickly and allow for customization. Discovery rules, deadlines, hearing dates and even a mediator can be determined before a dispute ever arises. The contract should stipulate that both parties be required to split fees and submit them on time, or be in default and subject to additional penalties. If the procedure is elected, select the Federal Rules, as they provide for an appeal process which is not available under California rules.
- **Discovery Rules** – Whether the arbitration or the state court system is used, restrictions can be set on the amount of discovery expenses allowed. Discovery is often the most costly part of the dispute resolution process. Every attorney wants every sheet of paper, every electronic submission and every witness statement; it gets costly. The contract can be used to set some limitations, in order to save money and speed up motion work.
- **Service for the 21st Century** – Nothing delays the process in construction defect litigation more than 19th century service. Prevent that from happening by requiring each party to conduct service of process through an easily identifiable means of communication like e-mail or commercially available electronic services. Electronic communication is a great way to save some costs and headaches and speeds up the communication with numerous parties.
- **Use SB 800** – The statute provides for alternative procedures that can be drafted to be very favorable to the builder. All California builders should use them in their contracts. For example, inspection periods can be set up so they are not so close together that they become meaningless. If the plaintiff fails to request a timely inspection, work should be able to continue without harming the legal position.

The most effective way to avoid construction defect litigation is to address all warranty claims from homeowners and make the necessary repairs. Choose an attorney who is familiar with using SB 800 to revise contracts. 

### Calvin R. Stead, Esq.



Calvin R. Stead is a partner in the Bakersfield office of Borton Petrini LLP. Cal's areas of legal expertise include construction defects, realtor errors and omissions, commercial and environmental litigation, land use consulting, oil field litigation and toxic tort litigation. Cal has represented builders, developers and sub-contractors on a wide variety of construction issues, including grading, soils, foundation, asphalt, concrete, flat work, tile, framing, floor coverings, roofing, masonry and stucco. Within the area of toxic torts, he has handled a vast array of cases, including toxic molds, vaccine reactions, asbestosis, cancer phobia, chemically induced asthma, pesticide and herbicide contamination, EMF, and AIDS contamination and phobia claims.

# ***AFTER BUST, SACRAMENTO LOSES \$2 BILLION IN CONSTRUCTION WAGES***

At the height of the housing boom in 2006, Sacramento's construction workers earned \$6.3 billion. According to new figures from the U.S. Bureau of Economic Analysis, by 2010, that figure had fallen by \$2.3 billion. To put the loss in perspective, census data shows, \$2.3 billion is enough to pay the wages of every worker living in the city of Folsom.

The wage losses are, in part, the result of local home construction hitting a historical low. This, along with the region's state and local government earnings falling \$531 million during the last two years and manufacturing earnings falling \$1 billion during the last five years, can largely explain why the region's economy is stuck.

All that said, several other large metro areas have seen even larger construction declines. Las Vegas, for instance, watched construction wages drop by 50 percent during the last five years. This chart shows the 20 metro areas with the largest nominal drops in

Source: U.S. Bureau of Economic Analysis.  
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## **METRO AREAS WITH THE LARGEST DECLINES IN CONSTRUCTION EARNINGS, 2006-2010**

AREA	2006	2010	DIFF.	CHANGE
Los Angeles-Long Beach-Santa Ana, CA	\$26,861,787,000	\$18,580,977,000	-\$8,280,810,000	-31%
Chicago-Joliet-Naperville, IL-IN-WI	\$21,609,240,000	\$14,749,192,000	-\$6,860,048,000	-32%
Phoenix-Mesa-Glendale, AZ	\$12,334,735,000	\$ 6,619,650,000	-\$5,715,085,000	-46%
Miami-Fort Lauderdale-Pompano Beach, FL	\$12,751,024,000	\$ 7,521,106,000	-\$5,229,918,000	-41%
Washington-Arlington-Alexandria, DC-VA-MD-WV	\$15,741,637,000	\$11,430,270,000	-\$4,311,367,000	-27%
Riverside-San Bernardino-Ontario, CA	\$ 9,839,957,000	\$ 5,579,490,000	-\$4,260,467,000	-43%
Las Vegas-Paradise, NV	\$ 7,278,461,000	\$ 3,650,939,000	-\$3,627,522,000	-50%
Atlanta-Sandy Springs-Marietta, GA	\$11,719,812,000	\$ 8,119,320,000	-\$3,600,492,000	-31%
New York-Northern New Jersey-Long Island, NY-NJ-PA	\$33,830,030,000	\$30,500,743,000	-\$3,329,287,000	-10%
San Francisco-Oakland-Fremont, CA	\$12,467,812,000	\$ 9,326,619,000	-\$3,141,193,000	-25%
Dallas-Fort Worth-Arlington, TX	\$14,125,970,000	\$11,068,743,000	-\$3,057,227,000	-22%
San Diego-Carlsbad-San Marcos, CA	\$ 8,536,933,000	\$ 5,746,370,000	-\$2,790,563,000	-33%
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	\$13,191,763,000	\$10,531,380,000	-\$2,660,383,000	-20%
Orlando-Kissimmee-Sanford, FL	\$ 5,558,278,000	\$ 3,171,145,000	-\$2,387,133,000	-43%
Boston-Cambridge-Quincy, MA-NH	\$11,829,117,000	\$ 9,445,269,000	-\$2,383,848,000	-20%
Sacramento-Arden-Arcade-Roseville, CA	\$ 6,307,591,000	\$ 3,961,763,000	-\$2,345,828,000	-37%
Detroit-Warren-Livonia, MI	\$ 7,939,859,000	\$ 5,703,707,000	-\$2,236,152,000	-28%
Minneapolis-St. Paul-Bloomington, MN-WI	\$ 7,228,648,000	\$ 5,044,586,000	-\$2,184,062,000	-30%
Seattle-Tacoma-Bellevue, WA	\$ 9,640,404,000	\$ 7,486,430,000	-\$2,153,974,000	-22%
Tampa-St. Petersburg-Clearwater, FL	\$ 5,273,120,000	\$ 3,327,506,000	-\$1,945,614,000	-37%

## ***Additional Insured Cliff Notes***

By Calvin R. Stead, Esq.

Additional insured (AI) endorsements require the named insured be held "liable" before coverage applies to the additional insured. The idea being an obligation does not exist until the named insured has been found liable by a jury. Not only do these endorsements inhibit settlement of construction defense cases, they are often misused by carrier representatives and defense counsel to wrongfully deny defense tenders. This could lead to trouble for all concerned if a developer hires competent coverage counsel, as pursuing coverage as the specter of first party bad faith is likely to take on a larger dimension.

*One example of typical language in pertinent part reads as follows:*

"The coverage provided for additional insured(s) is only to the extent of and in the proportion the additional insured is held liable for the negligence or strict liability/conduct/acts of the named insured. No coverage is provided for liability to the extent based upon the acts, errors or omissions of the additional insured."

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# Condominium Exclusion Bars Coverage for Construction Defect

By Calvin R. Stead, Esq.

California Traditions, the developer and general contractor for a 30 residential unit development, subcontracted with Ja-Con to perform the rough frame work for the residences. The project had 146 separate, freestanding residences. Since there were no shared walls, roofs, halls, plumbing or electrical lines, this allowed for a higher density development and the project was developed, marketed and sold as condominiums.

The purchaser of one of the units filed a complaint against California Traditions alleging property damage from defective construction. California Traditions cross-complained against Ja-Con.

Ja-Con's insurer, Claremont, initially defended, but later withdrew its defense based on the condominium exclusion. This exclusion barred coverage for property damage arising out of an insured's operations, work product or products that were incorporated into a condominium or townhouse project. Ja-Con was aware the policy did not cover work on condominium projects.

California Traditions obtained a default judgment against Ja-Con for more than \$2 million. It then sued Claremont for recovery on the judgment. Claremont moved for summary judgment, arguing the undisputed facts showed

the exclusion was applicable because Ja-Con's work was incorporated into a condominium project. California Traditions opposed the motion, contending the term "condominium project" was undefined and the policy was therefore ambiguous as to what was excluded from coverage. Finding the exclusion was not ambiguous and that there was no potential for coverage, the trial court granted Claremont's motion. The California Court of Appeal affirmed that the exclusion was not ambiguous. Both "condominium" and "condominium project" were defined by statute and California law expressly included freestanding units as a type of condominium unit that could comprise part of a "condominium project."

California Traditions also argued there was a triable issue of fact whether Ja-Con had a reasonable expectation of coverage because it believed it was working on non-condominium single family residences. The court rejected this argument because an insured's reasonable expectation of coverage was merely an interpretative tool used to resolve an ambiguity once it was found to exist. The judgment was affirmed.

*California Traditions, Inc. v. Claremont Liability Ins. Co.* (2011) 197 Cal.App.4th 410. 

## CO2 Emissions


By Calvin R. Stead, Esq.

On June 20, 2011 the U.S. Supreme Court issued an opinion on *American Electric Power Co., Inc. v. Connecticut* (2nd Cir. 2011) 564 U.S. \_\_\_\_.

The Supreme Court dismissed a lawsuit which several states and environmental groups brought against the 5 largest carbon dioxide emitters in the U.S. All the defendants were electric utilities. The plaintiffs sought to reduce the defendant's greenhouse gas emissions alleging the emissions were a public nuisance. Plaintiffs alleged the emissions violated federal common law by constituting a nuisance and state tort law. The plaintiffs also requested a cap for carbon dioxide emissions, to be reduced annually.

The Supreme Court first dealt with the issue of jurisdiction. The Court was split on the issue of whether the plaintiffs had Article III standing, i.e., whether there was sufficient specific injury to the plaintiffs such that the Article III Claims and Controversies requirement would be met, allowing the plaintiffs to avail themselves of the jurisdiction of the federal court system. Half of the Court believed there was no standing, the others believed (assuming the prior cases are an indication) some of the plaintiffs (the states) had sufficient enough standing that the case could be brought. This issue was addressed in the *Massachusetts v. EPA* (2007) 549 U.S. 497 case in which the Court held that greenhouse gases were regulated under the Clean Air Act. In this case the state of Massachusetts was found to have had sufficient standing to allow the case to be heard.

On the question of whether the federal common law of nuisance was trumped by the Clean Air Act, even though no emission standards are due from the EPA for carbon dioxide until 2012, the Court decided the EPA should take a primary role with the courts taking a limited secondary role. This was allowed because the EPA is an expert agency better equipped to do the job.

The Court did not address the issue of the viability of the state nuisance claims since they had been dropped by the lower courts when they held the federal common law governed over state law. Since there was no briefing on the state law preemption issue, the issue was left for consideration on remand. The Court did indicate that the standard for preemption of the federal common law by federal legislation is not as rigorous as for preemptions of state law. 


*continued from page 2*

### Additional Insured Cliff Notes

These endorsements are not unusual. As a consequence, the issue has frequently been litigated in California courts. However, the way California approaches the limitations in such endorsements is apparently not well known or is routinely ignored. For example, there was a "held liable" endorsement considered by the 4th District Court of Appeal in *Maryland Casualty Co. v. Nationwide Ins. Co.* (1998) 65 Cal. App. 4th 21. The Court pointed out that the endorsement limit coverage for the AI to "liability" arising from the named insured's work but didn't expressly or implicitly limit the defense obligation. In addition, the AI endorsements made the indemnitee an "insured" under policies that expressly imposed a defense duty. The court found the endorsement did not expressly or implicitly limit the defense obligation.

Nationwide argued the ruling that the insurance applied only to the extent the indemnitee was "held liable" was a clear and unambiguous statement eliminating its duty to defend the additional insured. However, the San Diego court found it was just as reasonable to view this phrase as referring only to the scope of Nationwide's indemnity obligation and limiting this obligation to situations where the AI is held liable for the acts of the named insured.

Those who are familiar with California coverage law know that the defense duty is broader than an indemnification obligation. The court held the limitation on the scope of coverage does not eliminate the defense duty, but instead merely forms the parameters for that duty. The court went on to find that Nationwide's argument that the endorsement language was meaningful only if it was interpreted to exclude a defense duty, to be unpersuasive. The Court in *Presley Homes, Inc. v. American States Ins. Co.* (2001) 90 Cal. App. 4th 571 expressly adopted this same analysis.

Simply put, if nothing is outlined in the AI endorsement that establishes or excludes the defense duty, carriers and counsel that deny tenders of defense based on such endorsements are taking a huge risk the additional insured won't pursue a Bad Faith action. As newer policies attempt to restrict situations where the Additional Insured is entitled to a defense and indemnity, this particular endorsement is not one that can be safely relied on to avoid AI defense obligations. 

**DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF CONSTRUCTION LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN CONSTRUCTION LAW.**

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