

TAYLOR & GUTIERREZ LLP

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CONSTRUCTION

Sulfate Attack on Concrete Foundations

Mesa Vista South Townhome Assn. v. California Portland Cement Co.
118 Cal.App.4th 308

Recent appellate decision is cautionary tale for concrete suppliers: even submicroscopic damage constitutes nonspeculative damages such as to waive the protection of the economic loss rule.

The Court of Appeal of California recently handed down its much anticipated ruling in *Mesa Vista South Townhome Assn. v. California Portland Cement Co.* This was a construction defect case where the plaintiffs, represented by Kasdan, Simonds, Riley & Vaughan, alleged numerous construction defects including “sulfate attack” on the concrete slabs and foundations. It is just a matter of time, they allege, before the concrete turns to rubble. These types of cases are increasingly common, and the Kasdan firm has been very active in bringing these claims against concrete contractors and suppliers. The appellate court upheld a \$5,369,769.33 judgment against the concrete ready mix supplier, California Portland Cement Company. While the Kasdan firm and other plaintiffs’ counsel may be expected to use this case

and the threat of similar judgments to justify increased settlement demands in other concrete cases, we believe that the decision of the Court of Appeal is instructive and can be used to minimize or prevent potential liability in the future.

I. THE MESA VISTA CASE

The *Mesa Vista* case involved a 40-unit condominium development in Orange County. The homeowners’ association (“HOA”) filed suit against the developer, general contractor, and various subcontractors. The geological engineers, in a grading plan sent to the developer, stated the following: “Based on previous soluble content test results, Type V cement or equivalent should be used for concrete in contact with the onsite earth. It is expected that onsite soils would possess a sulfate content rating of ‘severe.’ All requirements presented on Table No. 26-A-3 of ‘Severe Sulfate Exposure’ in the 1991 UBC should be utilized for preliminary concrete mix design.”

The concrete contractor’s estimator testified that he had seen the grading plan, and had spoken with the ready mix supplier’s representative about the specific reference to the UBC Sulfate Table in the soils report. The ready mix supplier then forwarded a mix design, and the concrete contractor ordered concrete using

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IN THIS ISSUE

CONSTRUCTION: The economic loss rule may apply in the consumer claim context, but appreciable, nonspeculative, present injury is a fundamental prerequisite to such a claim (1)

INSURANCE: Multiple primary general liability insurers on the same risk will prorate litigation and indemnification costs according to policy limits, ‘other insurance’ clauses notwithstanding (3)

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the mix design number. The concrete supplied for foundations and slabs had a water-to-cement ratio of between 0.60 and 0.65. Because there were severe sulfate levels, this was in violation of the UBC Sulfate Table, which required 0.45 or less.

Plaintiffs argued that because the concrete supplied did not comply with the Sulfate Table, it had a high porosity and permeability, which would allow sulfate attack in the slabs and foundations. The trial court's finding was that "submicroscopic" damage had already occurred, and that the concrete would deteriorate over time due to sulfate attack. The trial court further found that the ready mix supplier had a duty to know the applicability of the Sulfate Table and to supply concrete that complied with it.

The ready mix supplier raised two issues on appeal: first, whether it could rely on a defense that it had supplied a nondefective material that met project specifications and was then misused (i.e. the ready mix concrete itself was not defective if not placed in a sulfate-heavy environment) and, second, whether plaintiff's claim is barred by the "economic loss rule," which prohibits recovery for a defective product where only the product itself is damaged and does not cause damage to anything else.

On the first issue, the appellate court held that a ready mix supplier should be aware of the UBC Sulfate Table, and of the soil conditions into which the concrete will be placed based upon the specification to use Type V cement. The ready mix supplier may not have been negligent in manufacturing the concrete, but it was negligent in preparing the mix design. The supplier argued that it should not be held liable because it had supplied concrete that complied with specifications prepared by the consultant that prepared the post-tension slab design. The trial court held, and the appellate court agreed, that according to

industry standards, whenever Type V cement is used, it should be mixed with a water-to-cement ration of 0.45 or less. Thus, the ready mix supplier should have known to comply with the UBC Sulfate Table due to industry standards, and was negligent by not complying in preparation of the mix design.

Moreover, more than just should have known, there was evidence that the ready mix supplier actually did know of the requirement of Sulfate Table compliance.

On the "economic loss rule," the appellate court held that there was existing damage, even if it was submicroscopic within the concrete, and that there was evidence that the concrete would continue to degrade. This would lead to loss of structural integrity of the buildings over time as the foundation systems eventually collapsed.

Thus, even though serious harm had not yet occurred, there was a finding that it would happen, and was therefore not speculative. In light of this, the economic loss rule did not protect the ready mix supplier. The result: affirmation of a \$5.6 million judgment against the ready mix supplier.

II. A RESPONSE TO MESA VISTA

Although each project and each case are different, we believe that there are some things that a ready mix supplier can do to protect against this type of outcome, both in the way that bids are prepared, and in the way that construction defect cases are litigated.

California Portland Cement Company was found liable because the court held that it should have known that there was a sulfate issue with the soil, simply by the fact that Type V cement was specified. A concrete supplier wanting to avoid the same fate could enact a hard and fast policy that any time Type V or equivalent cement is specified, a mix design using a water-to-cement ratio of 0.45 or below should always be provided to the subcontractor. If

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"[T]he concrete, while suitable for use in some soils conditions, was not suitable for use in severe sulfate conditions, so the question was not whether the product was inherently defective in all contexts, but whether California Portland was at fault for specifying a mix design that was inappropriate for the known soils conditions."

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the contractor prefers another mix, that choice will be their responsibility.

Another possible response could be to include some disclaimer language on all mix designs, delivery tags, invoices, etc., to the effect that the ready mix supplier has relied upon the specifications for this job in preparing this mix design and supplying this concrete, and has not made any assumptions about site conditions, including but not limited to soil conditions, in preparing this mix design and this concrete, and cannot be held liable for any conditions or specification not supplied to it. Similarly, language to the effect that sulfate resistant concrete is available upon request could be helpful. The salespeople would routinely ask if the job is in a high sulfate area. This would be intended to put the burden back on whomever ordered the product to inform the ready mix supplier of everything that it needs to know in preparing the mix design. In the *Mesa Vista* case, knowledge on the part of the ready mix supplier was assumed; these practices would be intended to remove that assumption.

Regarding these “sulfate attack” cases, we believe that certain tactical responses can be made. We are currently defending several of these cases, including some against the Kasdan firm, and we have already seen that firm tailor its approach to take advantage of the benefits of *Mesa Vista*. First and foremost, we believe that it is highly beneficial to the defense to obtain proof of what the condition of the soil and the concrete truly is. Only by obtaining core samples from a representative sample of homes can the severity of the sulfates and the water-to-cement ratio be determined. Only then can a rational determination of whether to settle, and for how much, be made.

Additionally, economic considerations must be weighed. If there are only a few homes involved, litigation costs may exceed the settlement value. In a larger case with more potential exposure, the cost of testing core samples and other expenses is obviously smaller compared to the overall value of the case.

These are only suggestions based upon the result of the *Mesa Vista* case, and each client’s situation is different. Please feel free to contact us to discuss this case further, or to help you prepare your response to it. We would be happy to advise you on an individual basis, or meet with your employees and consultants to train them and consult on the results of this case or any California or Federal law that impacts your business.

Taylor & Gutierrez Associate Michael T. Kennedy, Jr., contributed this article.

INSURANCE

Insurers Go Head-to-Head Over Conflicting "Other Insurance" Clauses

Travelers Casualty and Surety Co. v. Century Surety Co.

2004 Cal. App. LEXIS 781

Defendant insurer had duty to contribute on a pro rata basis to the litigation and indemnification expenses incurred by plaintiff insurer in defending a common insured sued in a construction defect lawsuit.

Standard Wood Structures, Inc., ("Standard") provided carpentry and framing work to homes being built in Canyon Estates, a residential development. Standard had primary commercial general liability insurance policies through three carriers: Travelers Casualty & Surety Company ("Travelers"), Century Surety Company ("Century"), and CNA. Both the Travelers and Century policies contained 'other insurance' policies, whereby each purported to be 'excess' insurance over all other available insurance policies. When Standard was sued by Canyon Estates homeowners, it tendered its defense to all three of its carriers. Century eventually withdrew its tender on the basis of the 'other insurance' clause contained in the policy. Travelers and CNA settled the claims, with Travelers paying out \$156,137.50, and CNA paying \$97,762.50. In addition, Travelers picked up the cost of Standard's defense, which ran to \$200,029. Travelers then sued Century for

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declaratory relief and equitable contribution. The trial court found for Travelers, awarding them \$53,054.84 as Century's pro rata share of the costs of litigation and indemnification. Century appealed.

On appeal, the judgment was affirmed. The Court of Appeals chose to follow the modern trend and require equitable contribution on a pro rata basis from all primary insurers, regardless of 'other insurance' clauses in their policies, when multiple liability insurance policies provide primary coverage for the same risk.

The holding constitutes an exception to the general rule that an insurer's coverage terms will be honored, if possible. The reality is that finding otherwise would allow one insurer to profit at the expense of the others, a result that the Court believed to be unjust.

In addition to considerations of equity, the Court's position was also partially based on public policy: "'Excess-only' provisions in otherwise primary liability insurance policies have been analogized to so-called 'escape' clauses whereby coverage purports to disappear in the presence of other insurance. Such 'escape' clauses are generally disfavored as a matter of public policy."

Moreover, the Court noted that the original purpose of 'other insurance' clauses was to prevent multiple recoveries by insureds where there were overlapping insurance policies providing coverage for the same loss. To allow such clauses to shift the burden from one primary insurer onto another would stray far afield from this historical objective.

The Court did note that the California Supreme Court has yet to directly address this issue. We will keep you informed of any changes.

In Brief

TORTS

Vasquez v. Residential Investments, Inc.
118 Cal.App.4th 269

Landlord of apartment building may have owed tenant duty to replace missing glass pane in front door used by murderer to gain entry to victim's apartment. Burden of repair will be compared to foreseeability of particular kind of harm in assessing scope of duty imposed by the court on the landlord.

CONSTRUCTION

Siegel v. Anderson Homes, Inc.
2004 Cal. App. LEXIS 763

A cause of action for construction defect lies with the structure, not its owner. Therefore, even if the structure suffers physical damage, the owner has no viable cause of action until such time as he or she also suffers some economic injury resulting from that damage.

TORTS

State of California v. Superior Court (Bodde)
2004 Cal. LEXIS 4629

Plaintiff must allege facts demonstrating or excusing compliance with the Torts Claims Act claim presentation requirement as an element of a cause of action against a public entity.

CONSTITUTIONAL RIGHTS

Lentini v. California Center for the Arts
2004 U.S. App. LEXIS 10442

Claim of violation of Unruh and Disabled Persons Act does not require establishment of intentional discrimination when claim is premised on claim of Americans with Disabilities Act violation.

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