Settling Around Express Indemnity: *Bobrow/Thomas* Revisited

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Is it possible for a subcontractor to settle with a plaintiff around a cross-complainant's claim for express contractual indemnity? Conventional wisdom holds that express contractual indemnity claims will always survive a motion for a determination of good faith settlement because a determination of a good faith settlement (Code Civ. Proc. §877.6.) only eliminates cross-complaints for equitable indemnity and contribution. In practice, the answer is not that cut and dried. It is possible to achieve such a settlement given a desire to settle, the right set of facts, an intelligent and cooperative plaintiff's counsel and, of course, a receptive judge.

In a construction defect case, the correct set of facts would require indemnitee(s) (typically owners, developers, architects, engineers or general contractors) with an express contractual indemnity clause and indemnitor(s) (typically, a subcontractor or a group of subcontractors) with clearly defined scopes of work. Next you need a cooperative plaintiff's counsel who agrees for a sum certain to dismiss all claims for damages (including consequential damages) arising from the settling subcontractor's work per "the subcontract and any and all change orders." It is important that the release encompasses all of the damages that could arise from the work of a particular subcontractor or group of subcontractors. All that can remain are claims against the indemnitee(s) for its/their sole negligence for which there can be no indemnity. (Civ. Code §2782(a).)

Arguably, these terms alone should be sufficient to fulfill any indemnity obligation that might be owed by the subcontractor. However, an indemnitee (owner, etc.) will argue that it may still be exposed to liability for the acts of the settling subcontractor (under vicarious liability) and/or it may be found to be joint and severally liable with the settling subcontractor. In such cases, it could be obligated to pay for damages otherwise covered under the express indemnity agreement. Such arguments, if accepted by the court, would be fatal to a Code of Civil Procedure §877.6 application/motion for a good faith determination.

To anticipate and defeat such arguments, plaintiff's counsel must expressly agree in the Settlement Agreement to limit recovery against the indemnitee(s) (owner, etc.) to only those damages caused by the indemnitee itself. Said another way, plaintiff must expressly agree not to pursue any claims against the indemnitee (owner, etc.) for which liability may be imposed by the judge or jury under vicarious liability or joint and several liability principals for the "work" of the settling parties, *i.e.* the indemnitor(s). By expressly agreeing to such terms, the plaintiff puts the settlement on all fours with what Code of Civil Procedure § 877.6 is supposed

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to protect, i.e. the non-settling joint tortfeasor.

Following the guidelines set forth in the case of *Bobrow/Thomas & Associates v Superior Court* (1996) 50 Cal. App.4th, 1654 (hereinafter "BTA") is key to making this type of settlement work under C.C.P. §877.6. In *BTA*, plaintiff Sutter Coast Hospital entered into a contract for BTA to design and manage construction of the hospital. BTA hired Otto to serve as the prime contractor. Otto in turn hired Peninsula Floors, Inc. (PFI) to install the floors.

Otto's agreement with BTA required Otto to indemnify BTA for damages caused by the negligence of Otto or Otto's subcontractors and *not* arising out of BTA's design work. Otto and PFI agreed to settle with Sutter for a total of $350,000. Sutter signed a release in which it promised not to seek recovery from BTA based on the architect's alleged negligence in supervising the construction work or any alleged derivative liability for the negligence of others.

Although the Appellate Court sided with the developer and issued a Writ of Mandate directing the trial court to vacate its order confirming the settlement as being in good faith, a close reading of the opinion provides a useful guide for fashioning a settlement which could be confirmed as in good faith. The decision indicates that the settlement could have been confirmed as being in good faith if the settling parties had more clearly set forth their intent in the settlement agreement and had made assurances on the record that plaintiff's recovery against BTA would be limited to damages caused solely by faulty design.

In reaching this result, the appellate court was concerned with the problem of what it saw as an indivisible injury and joint and several liability. However, the court noted that those issues could have been resolved in the settlement agreement if the settling parties clearly specified how the trial was to proceed against the developer. As the court stated:

"If the settling parties contemplated trial procedures that would lead to a determination of each original defendant's actual fault, and a judgment against BTA would be limited to damages actually caused by its design negligence, then Otto may be correct that the settlement did not injure BTA's contractual rights. However, if this is what they contemplated, the settlement did not reveal their thoughts. Sutter's release stated only that Sutter agreed that it would not "seek recovery in said action against the architect based on the architect's alleged negligent supervision of the construction work or any alleged derivative liability of the architect…It did not state that Sutter agreed to waive its right to full compensation from BTA for all proven damages not previously paid in settlements, or that Sutter agreed that the court could determine comparative fault among the original defendants and allocate damages according to fault." (*BTA, supra*. at 1663.)

Any limitation of plaintiff prosecuting claims against the non-settling parties

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must be included in the written settlement agreement. Using the *BTA* court's language as a guide, a settlement seeking to go around a written express indemnity agreement would require the plaintiff to agree:

1) to prosecute only those claims that do not arise out of the services to be provided or work to be performed by the settling defendants, as such services or work are described in the settling defendants' respective written contracts and change orders;

2) to allow the trier of fact in the trial against the non-settling parties to allocate fault among the original defendants, including those who have previously settled with plaintiff;

3) to waive its right to full compensation from the non-settling parties for all proven damages attributable to the settling defendants under joint and several liability;

4) to permit the trier of fact to learn of the prior settlements; and

5) to permit the trier of fact to make a determination for each original defendant's actual fault, if any, for any claim prosecuted by plaintiff against the non-settling parties at trial.

In each instance where I have successfully implemented such a settlement, plaintiff's counsel was also willing to inform the court of the settlement, place the terms of the settlement on the record, and make a binding promise to the court regarding the specifics of the limitations to its further prosecution of its claims against the non-settling parties. It also helped that the amount of the settlement was in excess of the "realistic" cost to implement the agreed scope of repair.

ALLOCATION ISSUES:

Allocation of the settlement proceeds among the plaintiffs was one of the seven factors weighed by the seminal good faith case *Tech-Bilt, Inc. v Woodward-Clyde & Assoc.* (1985) 38 Cal.3rd 488, 499. Over the years this factor has become a requirement, and has been expanded to address allocating the settlement proceeds as set-offs for the non-settling parties. (See *Alcal Roofing & Insulation v Superior Court* (1992) 8 Cal.App.4th 1121, 1124-1125; *Erreca's v Superior Court* (1993) 19 Cal App.4th 1475,1491, 1495-1496, review denied; *Regan Roofing Company, Inc. v Superior Court* (1994) 21 Cal.App.4th 1685, 1702; *L.C. Rudd & Son, Inc. v Superior Court* (1997) 52 Cal.App.4th 742, 750.)

When a settlement is fashioned within the guidelines of *BTA*, no allocations are necessary because the non-settling parties would, by express agreement with the plaintiff, be immune from joint and severally liability for the torts of the settling parties. An allocation is only necessary if the Court needs to determine if a settlement amount "is within the reasonable range of the settling tortfeasors' proportional share of comparative liability for the parties' injuries." *Tech-Bilt, supra*, at 499. If the settlement agreement properly follows the framework outlined above, there should be no remaining claims involving comparative liability of the parties.

EXPRESS INDEMNITY CLAIMS CAN BE ELIMINATED

Typically an indemnitee with favorable indemnity language in its contract tenders its defense to the indemnitor and files a cross-complaint for express contractual indemnity. However, if the indemnitor settles for a release of itself, its subcontractors, *and* the indemnitee, for any and all claims and damages, including consequential damages (arising from their scopes of work as described by their contacts and change orders) the indemnitor it is paying for a release of *everything* it was contractually obligated to do concerning the construction of the project. By entering into such a settlement agreement, the indemnitor has removed from the case any claim that could arise from its work at the project. The only claims that remain against the non-settling indemnitee are only those for which the indemnitee is directly or solely liable. Said another way, there is simply nothing left for the indemnitor to indemnify the indemnitee against. Additionally, removing any claims for vicarious liability and/or joint and several liability allows the court to determine that the settlement is in good faith, the effect of which is the dismissal of all claims and/or cross-complaints for equitable or express indemnity.

CRAWFORD CONSIDERATIONS

What about the immediate duty to defend under *Crawford*? A settlement under the conditions set forth above should cut off any further contractual duty to defend from the date the settlement agreement is finalized. It would not eliminate the obligation of the indemnitor to pay the indemnitee its fees and costs incurred from the date of tender to the date of the settlement.

CIVIL CODE §2782

Settlements expressly incorporating the terms discussed above should cut off further obligations to pay the indemnitee's defense fees and costs after the date of the settlement, but it would not eliminate the obligation to pay defense fees and costs between date of tender and the settlement.

CONCLUSION

Parties interested in obtaining a settlement should not let an express contractual indemnity clause stop them. Under the right circumstances, a settlement can be reached, the settlement can be determined to be in good faith, and indemnity cross-complaints (express or equitable) can be dismissed. Note that even with such a settlement, express contractual indemnity obligations may impose liability on the indemnitor for defense fees and costs incurred by the indemnitee from the date of tender to the date of the settlement. ■

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