Knapp Petersen & Clarke
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Lawyers

Report

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How Do You Measure A Law Firm?

Twenty-five years. As I reflect on the first quarter century of the life of Knapp, Petersen & Clarke, lyrics from the song titled "Seasons of Love" from the Broadway hit musical and recently released movie *Rent* come to mind. "Five hundred twenty-five thousand, six hundred minutes — how do you measure — measure a year?" Here are some thoughts about how to measure the first 25 years of KPC.

Larry Clarke, Don Petersen and Ryan Knapp.

In Changes — From start-up, overcrowded offices in Sherman Oaks in 1981 to the relative luxury of Universal City and finally to our current "corporate" home in Glendale, with offices opening and closing in Newport Beach and Palm Springs along the way, the firm has experienced many changes. Not only has the geography changed, but we have seen our practice follow the path of diversification that the founding partners had in mind when they first formed the firm. Our clientele spans the life of the firm — with some clients having worked with us since 1981 to the present, and others who have just hired us this year to assist them with a new matter. Similarly, our personnel run the gamut from those of us who have been with the firm since its inception to our most recent hires in 2006.

In Friendships — So often we refer to the KPC "family" when we talk about the firm. This notion of family encompasses the myriad of strong friendships which exist between the many people who have worked at the firm and still work at the firm, as well as the friendships we have developed with our clients over the years. The loyalty, civility, and love that permeate those friendships create bonds that tie us to one another and to KPC and are the foundation for the firm's culture.

In Laughter — To be a part of KPC is to be able to laugh with each other. Being a firm composed of very talented lawyers and staff does not mean we're unable to have fun, while balancing the challenges and stresses of a very busy law practice. From Pigmania to Staff Appreciation Week, and many other events throughout the year, the firm is regularly filled with laughter and good times.

> *…this anniversary is an opportunity to thank all of our clients for trusting us to assist you…*

In Tears — During its first 25 years, the KPC family has also experienced many personal tragedies and losses, including the deaths of two of its founding partners, Ryan Knapp and Don Petersen, as well as the death of senior partner Dave Haber. Ryan, Don, and Dave each made their mark on the firm and had a significant impact on many of us individually, in many unique, long-lasting ways. We believe that as the firm celebrates its 25th anniversary, we have achieved the most important goal of the founding partners, which was to institutionalize the firm in such a way that it was positioned to succeed and thrive for years to come.

In Cases — So many trials, deals, appeals, and opinions have come and gone. Big and small, it's the legal work that happens day in and day out which challenges us intellectually and makes each day interesting and rife with new opportunities to provide high quality legal services to our clients.

In Clients — Most importantly, this anniversary is an opportunity to thank all of our clients for trusting us to assist you with the legal issues you or your company face — whether it be the first case we have handled for you or the 10th or 100th or 1000th case — we are grateful for your support and look forward to working with you during the next 25 years and beyond.

Thirteen million, one hundred forty thousand moments so dear. Happy 25th Anniversary to everyone who has been and is now a part of the KPC family!

Cynthia Trangsrud

Cynthia A. Trangsrud

Ms. Trangsrud serves as President of the firm and Chair of its Executive Committee.

EMPLOYMENT LAW

Mandatory Sexual Harassment Prevention Training

Effective January 1, 2005, California has mandated that all supervisors in California companies of 50 or more employees and all governmental employers must receive two hours of sexual harassment prevention training every two years. New hires and newly-promoted supervisors must receive training within six months of being hired or promoted.

Greta T. Hutton

KPC schedules live two-hour training sessions at your office or ours. You can expect an interactive discussion of the issues, the law, and company policies and procedures for navigating the dangerous waters of sexual harassment. The seminar includes an overview of what is and what is not sexual harassment; applicable California and federal law; claims handling, investigations, and some practical problem-solving tips. Your questions and your insight on successful strategies for preventing and redressing sexual harassment (real or imagined) will be welcome. Feel free to contact Greta Hutton or her secretary to schedule an appointment for training or to discuss your human resources issues.

> *KPC schedules live two-hour training sessions…*

Greta T. Hutton

Ms. Hutton is a Principal in the firm's employment and commercial litigation groups. For more information, you can reach Ms. Hutton at (818) 547-5108 or email: gh@kpclegal.com.

CONSTRUCTION

Construction Contract Indemnification Law

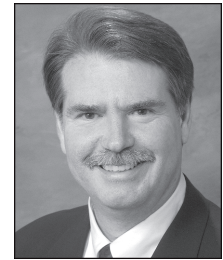
During the last legislative session, AB 758 was passed. That bill makes substantial amendments to California Civil Code section 2782 to rectify the perceived unfairness of contract provisions which shifted the risk for residential construction, regardless of fault of builder/developers, to subcontractors. While the primary aim of this legislation was to outlaw the enforcement of "Type I Indemnity" clauses, (e.g., those that required subcontractors to indemnify builder/developers for their own negligence, except sole negligence or willful misconduct), the full impact of the statute is uncertain and open to debate.

Civil Code section 2782, subparagraph (c), provides that, effective January 1, 2006:

> …all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such construction contract [contracts for residential construction], and amendments thereto, *that purport to indemnify*, including the cost to defend, the builder, as defined in Section 911, by a subcontractor against liability for claims of construction defects are unenforceable *to the extent the claims arise out of, pertain to, or relate to the negligence of the builder* or the builder's other agents, other servants, or other independent contractors who are directly responsible to the builder, or for defect in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties. *(Emphasis added.)*

Expressly exempted from the prohibition of this statute are agreements between the subcontractor and builder regarding the "timing or immediacy of the defense," provisions for "reimbursement of defense fees and costs," and the "obligations of an insurance carrier under the holding of *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571." (Section 2782(d).)

While section 2782 has historically dealt with the enforceability of only indemnity agreements, there is a substantial possibility it could be interpreted by a court to prohibit a builder/developer from successfully suing a subcontractor because it failed to indemnify it or obtain broad insurance coverage that would protect it against damages caused by its own negligence (or that of its agents, employees, or contractors acting on its behalf). The broad language of this statute, against the backdrop of the Senate and Assembly analyses to this bill, suggests, with limited exceptions, this statute could prohibit the enforcement of any type of contractual provision in residential construction agreements which, in effect, require the subcontractor to protect the builder/developer for its own negligence.



Robert D. Brugge

Several of the legislative bill analyses point out that builder/developers in the past have been able to require subcontractors to assume liability for the builder's negligence through the use of two devices: Type I indemnity clauses and additional insured endorsements. The authors of these bill analyses point out that the use of these two methods have led to increased cost of insurance for subcontractors and complex litigation requiring that subcontractors and their insurers indemnify builder/developers for liability beyond the subcontractor's degree of fault. (See Senate Judiciary Committee Analyses dated July 12, 2005, and Assembly Committee on Judiciary dated April 12, 2005.) Arguments made against AB 758 seem also to recognize the broad impact of the bill. American International Group (AIG), in opposing the bill, stated: "AB 758 would change the scope of indemnification and *additional insured agreements* that a developer or general contractor may obtain from a subcontractor." (Emphasis added.) (Assembly Committee on Judiciary dated April 12, 2005.)

> *…this statute could prohibit the enforcement of any type of contractual provision in residential construction agreements which, in effect, require the subcontractor to protect the builder/developer for its own negligence.*

One obligation which is expressly exempted from the prohibition of section 2782 is the subcontractor's insurer's duty to defend a builder/developer under an additional insured endorsement. The *Presley Homes* case specifically cited in the statute recognized that if there was a potential of coverage for the builder/developer under the additional insured endorsement of the subcontractor's policy, the subcontractor's insurer must defend the builder/developer against the entire action, but could seek equitable contribution from the other subcontractor's insurers to the extent it paid more than its share of the defense. The rationale of this case was that public policy required that the duty

to defend be broader than the duty to indemnify, so that if the suit potentially sought damages which fell within in the scope of the additional insured endorsement, the insurer must defend both potentially covered and uncovered claims.

There is a line of case authority which recognizes that when an insurer is required to defend a mixed action, that is one which seeks damages for both covered and uncovered claims, the insurer may reserve its rights to seek reimbursement from the insured for the defense costs incurred solely in defending the uncovered claims. *(Buss v. Superior Court* (1997) 16 Cal. 4th 35.) Language in this new statute seems to recognize that insurers, as well as subcontractors, would be free to seek reimbursement from a builder/developer for defense costs that relate to the defense of uncovered claims.

Because subcontractors under this statute arguably do not have to indemnify or insure builder/developers for their own negligence, subcontractor's insurers may be tempted to significantly limit the scope of the additional insured endorsements they sell. Instead of selling the very broad CG 20 10 endorsement, subcontractor's insurers may sell only endorsements that agree to indemnify the builder/developer for damages it is legally liable to pay because of the subcontractor's negligence. Under such a narrower A.I. endorsement, it may be more difficult for a builder/developer to trigger a duty to defend under the subcontractor's policy. In other words, there would have to be a potential that the builder/developer was sought to be held vicariously liable for a specific subcontractor's negligence; the fact that the injury or damage potentially arose out the subcontractor's work may not be enough.

Because the statute is not a model of artful drafting and apparently a compromise statute, we expect that its meaning will be the subject of further litigation. Builder/developers, on the one hand, will take a narrow view that the statute only precludes claims for express indemnity for that part of the claim due to the builder/developer's own negligence, and they are still free to insist their subcontractors name them as additional insureds on their policies with the broadest scope of coverage. On the other hand, subcontractors and their insurers will likely advocate a broader interpretation to prohibit builder/developers shifting their obligations, whether it be done by indemnity agreements, additional insured clauses, or a combination. While AB 738 was intended to limit litigation, its effect may arguably have the effect of creating new and complex issues for litigation. Only time will tell how the courts and the building and insurance industries will deal with the challenges raised by this new legislation.

Robert D. Brugge

Mr. Brugge is a Director in the firm's Insurance Coverage department. Email: rdb@kpclegal.com.

LEGAL AUDIT

The 95-Hour Day — or the Need for Billing Scrutiny

In a recent legal audit involving a law firm's billing in construction defect litigation, I began to notice a partner with a "heavy pen" — a term we use in legal audit to identify those who seem to bill larger amounts of time than necessary for routine tasks. In this case, it wasn't obvious at first, as the firm didn't "block-bill," and the amounts billed per entry were typically less than an hour. As with many types of litigation, however, construction defect frequently encompasses review of a myriad of documents sent by subcontractors, experts, etc. There are often cross-actions and lots of activities, including destructive testing, depositions, and law and motion tasks. Many of these result in notices or other minor documents which fill up legal files. They are frequently not substantive and only require a cursory review by a competent paralegal or associate to identify if a response is required.

The attorney's daily billing often added up to 20, 22, and, in one amazing instance 95.2 hours!!

In this case the partner had taken it upon himself to review all incoming documentation, attend all hearings, depositions, and conferences, or so it seemed. After review of numerous pages per day of typical entries, I started adding up the hours billed per day and was amazed. The attorney's daily billing often added up to 20, 22, and, in one amazing instance 95.2 hours!! There were four dates over the course of the bills (two years) where he billed in excess of 24 hours in a single day.

What is the explanation? Good question. We are still waiting to find out how he accounts for this billing "irregularity." It is likely that there were, in fact, multiple people who reviewed materials and used the same billing ID (the managing partner) to account for their work. There are other possible explanations, but none of them would make this practice acceptable.

In legal audit work, we stress the need for individual billing entries rather than "block-billing." There are many reasons why block-billing is not appropriate. However, when billing is set forth in individual entries, it is critical that there is oversight. Few lawyers will bill improperly, and most billing programs have automatic safeguards which will not allow a timekeeper to

bill more than 24 hours a day. Obviously this is a gross breach of a lawyer's ethical obligations to his/her client.

Kay C. Holmen

Billing scrutiny is important. Lawyers, like anyone else, can make mistakes on their bills. Most are minor; however, we often see errors in mathematical calculations, inadvertent "double-billed" entries, or other miscalculations that cost clients money.

Whether you utilize outside help in scrutinizing bills or perform the duty yourself, anyone who is responsible for approving payment of legal billing should shudder at the 95-hour day. This entry and the others on the bills reviewed in the course of my review passed through the law firm and the client and may never have been caught without an auditor's suspicious mind.

Kay Holmen

Ms. Holmen is senior auditor at KPC Legal Audit Services Inc. and senior paralegal at Knapp, Petersen & Clarke. Email: kch@kpclegal.com

LITIGATION

Update on Ski Law

As regular readers of this newsletter will know, the California Supreme Court has held that, absent reckless conduct or intentional torts, collisions and spills are inherent — and thus nonactionable — risks of alpine skiing. Under normal circumstances, one skier cannot sue another for negligence.

Recently, the Third District of the California Court of Appeal, which has within its jurisdiction the Mammoth Mountain resort, decided to set some limits on what is and what is not actionable conduct in the world of snow sports. The appellate court issued a pair of back-to-back published decisions setting forth factual guidelines as to when a fellow participant's conduct could be weighed by a jury as a question of fact; that is, when might the conduct be sufficiently reckless so as to place the defendant outside the protection of the assumption of the risk doctrine.

As might be expected, both of the recent cases involved teenaged male snowboarders. One hit a stationary skier so hard he sent her flying over 50 feet in the air, fracturing several bones, including shattering her lower leg in 16 places. The second young man was snowboarding backwards at high speed while throwing snow balls at his brother. He, too, hit a stationary skier, this time a ski instructor teaching a class, who was knocked unconscious. The snowboarder's mother's legally unorthodox reaction to the accident was to urge her son to flee the scene (a Penal Code infraction), maternal advice which the boy did not, to his credit, take.

REAL ESTATE LAW

New Law Requires A Seller to Disclose the Potential for Supplemental Property Tax Bills

When real property changes ownership (or when new construction is completed), California law requires that the value of the real property be reassessed for property tax purposes. This reassessment occurs at the time of transfer (or completion). However, property taxes are collected on a specific date. As such, issuance of one or two supplemental property tax bills are required to account for any difference between the property taxes relating to the old assessment value and the property taxes relating to the new assessment value. Unfortunately, many prospective buyers did not realize that after the close of escrow they may have to pay supplemental tax bills, which cannot be paid through lender impound accounts. Without a doubt, the failure to plan for supplemental tax bills can result in severe economic hardship.

> *Effective January 1, 2006, a seller (or his/her agent) of residential property that is one to four units in size must deliver to the prospective purchaser a disclosure notice regarding the potential for one or more supplemental tax bills.*

The California Legislature, acknowledging the hardship caused by the issuance of supplemental tax bills, enacted a new disclosure law. Effective January 1, 2006, a seller (or his/her agent) of residential property that is one to four units in size must deliver to the prospective purchaser a disclosure notice regarding the potential for

one or more supplemental tax bills. The newly-mandated disclosure notice must include the following language:

Notice of Your Supplemental Property Tax Bill[1]

California property tax law requires the assessor to revalue real property at the time the ownership of the property changes. Because of this law, you may receive one or two supplemental tax bills, depending on when your loan closes.

The supplemental tax bills are not mailed to your lender. If you have arranged for your property tax payments to be paid through an impound account, the supplemental tax bills will be paid by your lender. It is your responsibility to pay these supplemental bills directly to the tax collector.

If you have any questions concerning this matter, please call your local tax collector's office.[2]

The seller (or his/her agent) must deliver the above disclosure to the purchaser. Delivery of the above disclosure must be by personal delivery and before transfer of title. The seller's failure to provide the required disclosure will not, in and of itself, invalidate the transfer. However, any person who willfully or negligently fails to provide the required disclosure shall be liable in the amount of actual damages suffered by the purchaser.

The risk of a damage award should result in sellers providing the required disclosure, and buyers will not be surprised when the tax man cometh.

Gregory L. Torres

Mr. Torres is an Associate in the firm's litigation group. Email: glt@kpclegal.com

1 This title must be in at least 14-point type or a contrasting color.

2 This language must be in at least 12-point type or a contrasting color.

STRANGER THAN FICTION

Knapp, Petersen & Clarke begins, with this issue, a series of articles describing stranger-than-fiction cases that it challenges its readers to top. If any reader submits, within 30 days, a story involving a lawsuit or other legal matter with which he or she was personally involved which "tops" ours — and the story is true — Knapp, Petersen & Clarke will donate $100 to the charity of the reader's choice. Winners will have their generosity mentioned in a subsequent issue. The editors have sole and total discretion to determine the adequacy of a reader's submission.

The Long Lawsuit

The longest litigation handled by a Knapp, Petersen & Clarke attorney stretched over 20 years. In the 1970s, a municipality was sued by various homeowners who alleged their homes were damaged by a slow-moving landslide caused by the municipality's failure to maintain a leading storm drain. These dozen or so lawsuits against the city ran for 13 years between 1977 and 1990. These homeowner lawsuits led to a second level of litigation between the defendant municipality and 15 of its liability insurance carriers (which had issued policies between 1971 and 1986) over which, if any, of the insurers had a duty to pay for the homes damaged by the landslide. This insurance coverage litigation commenced in 1982 and was ultimately settled in 2002.

Fourteen coverage or bad faith suits were filed, overlapping in some ways, but each unique. There were two trials held over a decade apart. Partial settlements between some of the parties and judgments against others were entered into or rendered throughout the years. Nine judges in four different courthouses presided over various portions of the matter. Four mediation efforts were spearheaded by three different mediators (none of whom managed to settle the cases).

Eight appellate decisions arose out of the homeowners and insurance disputes. The California Supreme Court accepted hearing of the coverage dispute, and the matter was fully briefed — only for the high court to decide three years after accepting review that review had been improvidently granted and to remand the case without ever hearing oral argument.

Three litigant insurance companies went insolvent or were placed into conservatorship during those years. Several of the insurers in the case acquired other insurers in the case. Many of the litigants changed law firms at least once, some more times than that. Few of the lawyers involved represented their clients over the full 20 years.

Finally, in 2002, on the first day of the third trial, the bulk of the case settled. The remaining parties settled within the month. With a whimper rather than a bang, a dispute which began before fax machines were in use ended with the draft settlement agreements being emailed around for signature.

Can you top that?

KPC IN ACTION

Stephen C. Pasarow

In July 2005, **Stephen C. Pasarow** and **Alexis L. Walker** attained a victory for one of the largest domestic yarn manufacturers, texturizers, and distributors. Despite the close-knit and relatively small circle of attorneys who handle cases in the textile industry, KPC's client gambled with a newcomer to this niche and the leap of faith paid off.

The plaintiff, a fabric converter, is in the business of buying yarns and then contracting with knitting and dyeing companies to have the yarn "converted" into fabric. The defendants, represented by Knapp, Petersen & Clarke, make and/or texture yarn for sale to companies like plaintiff.

The plaintiff's action arose from a problem it had with a fabric buyer and garment manufacturer. It alleged that in mid-2001 the fabric being knitted with defendants' nylon began to show a striping defect called "barre." This defect became evident only after dyeing. It further alleged that a major customer also complained about the feel, or sponginess, of the fabric being supplied by defendants. Plaintiff originally alleged that these fabric defects resulted from defective or low quality yarn, which was nonconforming to its purchase orders, and eventually was the sole cause for the cancellation of its customer's order.

During litigation, and indeed just before trial, plaintiff's allegations shifted. Plaintiff then alleged that during the course of litigation, it had became aware, for the first time, that defendants had changed the base material supplier for the nylon being sold to it. Because of this newly-alleged concealment, plaintiff asserted that it was unable to properly adjust its processing of the yarn, and thus, the defects occurred in the finished fabric.

Defendants countered that the yarn was neither defective nor low quality. Further, they asserted that it disclosed all changes in base material suppliers both directly to plaintiff and publicly and that the yarn supplied was completely conforming and merchantable, if only plaintiff had properly processed it.

While there was a battle of expert testimony, one of the key evidentiary elements was the testimony of the major customer's former fabric buyer. She testified that her company had not canceled its relationship with plaintiff because of the barre, but because of late deliveries and problems with the texture of the fabric, which is only caused during the finishing of fabric.

The case was tried for two weeks before a jury in a downtown Los Angeles courtroom. The verdict found in favor of defendants and awarded plaintiff nothing. Following trial, plaintiff moved for a new trial, which was summarily denied. At the same time, defendants were awarded costs and attorneys' fees. The plaintiff has since filed a notice of appeal. An appeal is pending.

FIRM BRIEFS

The firm is pleased to announce that **Michael G. Rix** has joined KPC as an associate. Mr. Rix obtained his undergraduate degree in political science, with a concentration in international relations from UCLA in August 2000. He attended Hofstra University School of Law in New York, where he received his juris doctor in May 2004. In between college and law school, he worked as a life insurance agent at American Income Life Insurance Company in Los Angeles. Following graduation from law school and prior to joining KPC, Michael practiced with the firm of Oddenino & Gaule in Arcadia, California.

Knapp, Petersen & Clarke is pleased to announce that **Stanley Pun** has joined KPC as an associate. Stan will be working with Steve Pasarow, Maria Grover and Silvia Porter. Stan obtained his undergraduate degree in economics at UC Davis in 2002. He attended University of Southern California Law School in Los Angeles where he received his J.D. in May 2005. During law school, he worked as a law clerk at the City Attorney's office and as a legal extern to Los Angeles Superior Court Judge Lee Edmon.

Free On-Line California Cases

There's a free Website at which one can view all published California case law all the way back to 1850. Go to the Lexis/Nexis site at *http://www.lexisnexis.com/clients/CACourts* and agree to the terms and conditions. Click "VIEW OPINIONS" and you will go to the search page. Here, you can search by terms or by citation.

You can also get to the search page by going to *http://www.courtinfo.ca.gov/opinions*, where the most recent published decisions are found. There is also a link for unpublished opinions. To search for older published opinions, on the upper left-hand corner click "Searchable Opinions 1850-Present." That will take you to an information page where you click "Continue." That will then take you to the Lexis/Nexis site identified above.

Material Request Form

If you would like more information on any of the articles in this edition of the KPC Report, *please complete and return this page by facsimile to (818) 547-5329, or by mail to KPC Client Services, 500 North Brand Boulevard, Twentieth Floor, Glendale, California 91203.*

Attention: Client Services Department

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EDITORIAL BOARD: K. Stephen Tang and Gwen Freeman, Editors

This report is published by the law firm of Knapp, Petersen & Clarke
and addresses items of interest and importance to our clients and friends.

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