

California



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Erickson Arbuthnot's Construction Group Obtains Dismissal of Indemnity Claim Under Labor Code § 3864 Despite Alleged Prior Written Indemnity Agreement

Erickson Arbuthnot's Construction Practice Group obtained dismissal of its client, the employer of an injured worker, who was sued by another contractor on the job in Cross-Complaints for express and implied indemnity, declaratory relief, and apportionment of fault based on the contractor's assertion that language of indemnity in its favor on its form invoices constituted a prior indemnity agreement that was effective to satisfy the sole exception to an employer's immunity from indemnity claims under Labor Code 3864.

The contractor failed, in its original Cross-Complaint, to allege facts sufficient to state a claim for express contractual indemnity. The Superior Court sustained our client's demurrer to the original Cross-Complaint with leave to amend, if possible, by alleging a factual basis for indemnity, declaratory relief, or apportionment of fault against our client, the employer of the injured worker who had sued the contractor in the underlying action.

The contractor's first amended Cross-Complaint sought express contractual indemnity as a basis for which it alleged that language of indemnity contained on the reverse of contractor's invoice, without a signature on which the product it was supplying would not be released, and which was partially in blank in that it failed to identify the parties to the indemnity provision and, critically, **was unsigned by the contractor**, satisfied the requirements to gain the prior indemnity agreement exception to Labor Code 3846 and allow contractor to proceed against our client on the amended Cross-Complaint.

An indemnity provision of a contract is to be construed under the same rules governing other contracts with a view to determining the actual intent of the parties. The applicable principles are (a) the agreement for indemnification must be strictly construed against the indemnitee, and (b) in order to include acts amounting to active or affirmative negligence, the indemnity provision must be clear, positive and specific to that effect. *Herman Christensen & Sons, Inc. v. Paris Plastering Co.* (1976) 61 Cal. App. 3d 237, 245-246.

In addition, equitable cross-claims against an employer are improper and prohibited by California's workers compensation immunity scheme pursuant to Cal. Labor Code § 3864. See [citations omitted]....The language of section 3864 clearly requires **execution** of the written agreement (i.e., signatures of all parties / the document cannot be executory) **before** the injury. [citations omitted]

Had the Legislature intended to require only the signature of the employer/indemnitor prior to the injury in section 3864, they easily could have so provided. The Legislature did not, however, choose to include such language limiting execution (i.e., signing) of the agreement to only the employer/indemnitor. Instead, the Legislature required "a written agreement . . . to [indemnify] executed prior to the injury." *Nielsen Construction*, 18 Cal. App. 4th at 868-869. A written agreement is "executed" when all parties sign the agreement; only then is the written agreement completed and all necessary formalities performed. *Nielsen Construction*, 18 Cal. App. 4th 869.

In *Hansen Mechanical* we have a prime example of this principle in action..... As the indemnitee contractor did not sign the subject invoice or subcontract agreement, the contractor was ultimately persuaded to voluntarily dismiss the first amended Cross-Complaint during the parties' meet and confer process, saving the contractor – and our client – the cost of a further demurrer and / or a motion for summary judgment.