Prince v PG&E
3/19/09

Implied Contractual Indemnity; Recreational Use Immunity

Ten year old Joshua Jackson suffered serious injuries when he attempted to dislodge a kite from a power line maintained by Pacific Gas & Electric Company. He used an aluminum pole he found on the Prince property. His lawsuit against PG&E was met with a summary judgment based on the recreational use immunity statute, Civil Code section 846, which was granted by the trial court.

Jackson s guardian then filed a complaint against Prince alleging premises liability. In it, the plaintiff alleged Prince created a forseeable risk of injury given the proximity of the metal pole to the overhead power lines. Prince then filed a cross-complaint for indemnity against PG&E claiming a breach of its contractual duty pursuant to the easement granted by Prince for PG&E to run its lines over her land.

PG&E then filed a summary judgment on Prince s cross-complaint, again asserting immunity under section 846, which provides in essence, that a property owner, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose. PG&E alleged its immunity under the statute was a complete defense to equitable indemnity. The trial court granted the motion, but on appeal, the judgment was reversed. The Court of Appeal held the case presented a claim for implied contractual indemnity, a duty separate and distinct from the general duty of care to Jackson, arising from the easement. Therefore, the statutory immunity did not apply.

PG&E petitioned the California Supreme Court for review. The Court took up the case to address two issues: (1) whether a claim for implied contractual indemnity may rest on documents granting PG&E an easement; and (2) if so, whether PG&E s immunity from liability to Jackson under section 846 bars Prince from recovering on an implied contractual indemnity claim.

The High Court observed that indemnity can be (1) expressly provided by contract, (2) implied from contract, or (3) arise from the equities of the particular circumstances. Currently, the Court ***now*** recognizes there are only two basic types of indemnity: express indemnity and equitable indemnity. (*Bay Development, LTD v Superior Court* (1990) 50 Cal.3d 1012) Implied contractual indemnity is viewed as a form of equitable indemnity. (*E.L White, Inc. v City of Huntington Beach* (1978) 21 Cal.3d 497) The doctrine of equitable indemnity is now subject to allocation of fault principles and comparative equitable apportionment of loss. (*American Motorcycle Assn. v Superior Court* (1978) 20 Cal.3d 578)

A key feature of traditional equitable indemnity is that on matters of substantive law the doctrine is ***subject*** to whatever immunities or other limitations on liability would otherwise be available against the injured party. (*Western Steamship Lines, Inc. v San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100) This rule is often expressed in the

shorthand phrase, **...there can be no indemnity without liability.** (*Children s Hospital v Sedgwick* (1996) 45 Cal.App.4th 1780)

Since Prince acknowledged she has no equitable indemnity claim because of the immunity statute, she is left with implied contractual indemnity as the sole potential basis for seeking indemnity from PG&E. The utility company argued the immunity still shielded it from liability to Prince because they had no contractual relationship, and PG&E has no contractual duty under the easement grant.

For equitable indemnity to apply there must be a joint legal obligation to the injured party. (See, *Children s Hospital*, supra) The Supreme Court Justices decided the same rule was applicable in implied contractual indemnity. In the seminal implied contractual indemnity case of *S.F. Unified Sch.Dist. v Cal. Bldg. Etc. Co.* (1958) 162 Cal.App.2d 434, the appellate court stated the doctrine *originated* as a means to equitably shift the risk of loss from one joint tortfeasor to another when both were deemed liable to the injured party. In that case, the school district and the maintenance company were joint tortfeasors with respect to the injured window washer.

Then, in *Cahill Bros. v Clementina Co.* (1962) 208 Cal.App.2d 367, the Court of Appeal concluded that, where each of two persons is made responsible by law to an injured party the one to whom the right of indemnity inures is entitled to shift the entire liability for the loss to the other party. Thus, implied indemnity may arise as a result of contract or equitable considerations. The basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay. (*Western Steamship*, supra) Ultimately, the *American Motorcycle* decision modified the equitable indemnity rule to permit a concurrent tortfeasor to obtain *partial indemnity* from other co-tortfeasors on a comparative fault basis.

A claim for implied contractual indemnity is a form of equitable indemnity subject to the rules governing equitable indemnity claims, and is based on each party s proportional share of responsibility for the damages to the injured party.(*Bay Development*, supra) The Supreme Court decided that implied contractual indemnity is subject to the rule that there can be no indemnity without liability. Because PG&E owed no duty to keep the premises safe for entry or recreational use by Jackson, Prince is unable to overcome its immunity.

The Justices found that PG&E s immunity under section 846 bars Prince s claim for implied contractual indemnity. They also noted that whenever one concurrent tortfeasor is insolvent or immunized from liability, the remaining tortfeasors must pay more than an amount measured by their proportional responsibility for the injury. Such are the realities, if not the vagaries, of multi-party litigation. (*Western Steamship*, supra)

The judgment is reversed and entered in favor of PG&E.