



## CALIFORNIA LITIGATION ALERT

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### Arbitration of Claims Against Some Defendants Has No Preclusive Effect On Resolution of Claims Against Other Defendants Who Were Not Parties to Arbitration

In a recent case, *Cuevas v. Truline Corp.*, 12 Cal.Rptr.3d 706 (2004), the California Court of Appeal (Second District, Division 8) held that, where a plaintiff asserts a claim against multiple defendants, rulings made in an arbitration of the claim against some defendants have no preclusive effect on the trial court's subsequent resolution of the claim against the remaining defendants who were not parties to the arbitration.

In *Cuevas*, plaintiffs/appellants arbitrated their liability claim against only three of five defendants in a negligence action. In determining the proportionate liability of these three defendants, the arbitrator adjudged the percentage of responsibility for all five defendants but only awarded damages against the three defendants in the arbitration. This arbitration award was eventually reduced to a judgment against the three defendants entered by the trial court.

Subsequently, the two remaining defendants who were not part of the arbitration brought a motion for summary judgment in the trial court. In response, the trial court, on its own initiative, concluded that, under the "one judgment rule," the earlier judgment based on the arbitrator's determination of each defendant's relative fault precluded plaintiffs from relitigating the relative fault of the two remaining defendants in a civil trial. (The "one judgment rule" provides that there can only be one final judgment in a single action. *Nicholson v. Henderson*, 25 Cal.2d 375, 378 (1944). This rule exists to avoid piecemeal appeals.) In so concluding, the trial court expressed concern that appellants had "split" their cause of action by litigating against only three of the five defendants in the arbitration and that an inconsistent verdict might occur if a trial against the remaining defendants reached a differ

ent result regarding apportionment of fault than the one previously reach in the arbitration.

The Court of Appeal, however, held that the arbitrator's previous apportionment of fault among the five defendants would not be binding in the subsequent proceeding in the trial court to determine the liability of the defendants who were not part of the earlier arbitration. First, the Court observed that the "one judgment rule" does not prohibit separate or partial judgments against some, but not all, defendants and, further, that such incomplete and partial dispositions are familiar in California. Second, the Court found that the appellants did not split their cause of action because the case law did not support the conclusion that arbitrating some claims while taking others to trial constitutes "splitting" a cause of action. Third, the Court noted that California Code of Civil Procedure section 1281.4 contemplates that an arbitration may proceed against some parties while court proceedings are deferred against the remaining parties. Finally, the Court emphasized that the trial court's concern regarding inconsistent verdicts was "illusory" because the arbitrator's ruling regarding apportionment of fault among all five defendants could not have collateral estoppel effect on the defendants who were not parties to the arbitration, unless those non-party defendants agreed to be bound.

## **New Decision Creates Possible Exception to the "Economic Loss Rule"**

In a noteworthy new opinion, *Mesa Vista South Townhome Assoc. v. California Portland Cement Co.*, 12 Cal.Rptr.3d 863 (2004), the California Court of Appeal (Fourth District,

Division 3) created a possible exception to the "economic loss rule" in the factual context of a construction defect case.

The "economic loss rule" is a rule of law which generally precludes a plaintiff from seeking damages under strict product liability or negligence theories from manufacturers or suppliers of defective products for the economic loss to the defective products themselves. Generally speaking, this rule limits a manufacturer's or supplier's liability under product liability laws to damages for physical injury to third parties or to property other than the defective product itself.

Economic loss to the defective product which generally may not be recovered is usually defined as "damages for inadequate value, costs of repair, and replacement of the defective product or consequent loss of profits . . ." *Sacramento Regional Transit Dist. v. Grumman Flexible*, 158 Cal.App.3d 289, 294 (1984).

However, the latest Court of Appeal opinion in *Mesa Vista* appears to create a possible new exception to this economic loss rule. The *Mesa Vista* Court noted that the California Supreme Court, in *Jimenez v. Superior Court*, 29 Cal.4th 473 (2002), left open the possibility that the "economic loss rule" did not bar recovery of damages when the only present damage is to the defective product itself.

Accordingly, the *Mesa Vista* Court held, at least in the context of a construction defect case, that the plaintiff could recover under negligence theories for economic loss to the defective product itself as long as the plaintiff satisfied various factors specified in *Aas v. Superior Court*, 24 Cal.4th 627 (2000) and *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799 (1979).

Chief among these factors is the requirement that plaintiff show an "appreciable harm" to the defective product before

being allowed to recover for economic loss to the product.

Under the particular facts of *Mesa Vista*, the Court of Appeal found “appreciable harm” in the form of submicroscopic defects in the cement foundation of a condominium project which would gradually cause the foundation to deteriorate over time. According to the *Mesa Vista* Court, such “submicroscopic” damage to the concrete constituted “present, non-speculative harm” and would result in the “continued degradation of the foundation, possibly leading to the loss of structural integrity of the homes in later years.”

The other five factors on which the *Mesa Vista* Court relied in permitting the plaintiff to sue for economic losses to the defective cement foundation were: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the closeness of the connection between the defendant’s conduct and the injury suffered, (4) the moral blame attached to the defendant’s conduct, and (5) the policy of preventing future harm.

*Biakanja v. Irving*, 49 Cal.2d 647 (1958).

Although the holding in *Mesa Vista* is limited to the context of construction defect litigation, the case is potentially significant since it appears to create a possible new exception to the economic loss rule which was not previously recognized under California law. Specifically, *Mesa Vista* leaves open the

possibility that plaintiffs may sue in the future for the economic cost of replacing or repairing defective products that have suffered “appreciable harm,” regardless of whether such defective products have caused injury to third parties or other property. It remains to be seen whether this new exception will be accepted by other courts or applied in situations other than construction defect litigation.

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