

RESOLUTION 08-10-04

DIGEST

Motion for Good Faith Settlement: Right to Sever Contractual Indemnity

Amends Code of Civil Procedure section 877.6 to permit the court, as part of a good faith settlement, to bar contractual indemnity claims against a settling party.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 877.6 to permit the court, as part of a good faith settlement, to bar contractual indemnity claims against a settling party. This resolution should be disapproved because it would impermissibly impair contractual rights and deprive litigants of the right to a jury trial of their contract claims.

This resolution proposes to discharge a settling party's contractual indemnification obligations by the same procedure used to discharge equitable indemnity claims. The right to equitable indemnity, however, was created by case law (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578), and the legislature is free to modify or eliminate these rights by statute. The same cannot be said of contractually created rights, however, because of the constitutional prohibition against impairment of contracts (U.S. Const. art. 1, § 10, cl. 1; Cal. Const., art. 1 § 9) and the constitutional right to a jury trial (U. S. Const., 7th Amend.; Cal. Const., art. 1 § 16) on these legal issues. This resolution would impermissibly impinge on both of these rights.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 877.6, as follows:

- 1 §877.6
- 2 (a) (1) Any party to an action in which it is alleged that two or more parties are
- 3 joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue
- 4 of the good faith of a settlement entered into by the plaintiff or other claimant and one or
- 5 more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in
- 6 subdivision (b) of Section 1005. Upon a showing of good cause, the court may shorten the
- 7 time for giving the required notice to permit the determination of the issue to be made
- 8 before the commencement of the trial of the action, or before the verdict or judgment if
- 9 settlement is made after the trial has commenced.
- 10 (2) In the alternative, a settling party may give notice of settlement to all parties
- 11 and to the court, together with an application for determination of good faith settlement
- 12 and a proposed order. The application shall indicate the settling parties, and the basis,

13 terms, and amount of the settlement. The notice, application, and proposed order shall be
14 given by certified mail, return receipt requested. Proof of service shall be filed with the
15 court. Within 25 days of the mailing of the notice, application, and proposed order, or
16 within 20 days of personal service, a nonsettling party may file a notice of motion to
17 contest the good faith of the settlement. If none of the nonsettling parties files a motion
18 within 25 days of mailing of the notice, application, and proposed order, or within 20 days
19 of personal service, the court may approve the settlement. The notice by a nonsettling
20 party shall be given in the manner provided in subdivision (b) of Section 1005. However,
21 this paragraph shall not apply to settlements in which a confidentiality agreement has been
22 entered into regarding the case or the terms of the settlement.

23 (b) The issue of the good faith of a settlement may be determined by the court on
24 the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in
25 response, or the court may, in its discretion, receive other evidence at the hearing.

26 (c) A determination by the court that the settlement was made in good faith shall
27 bar any other joint tortfeasor or co-obligor from any further claims against the settling
28 tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative
29 indemnity, based on comparative negligence or comparative fault. The court may further
30 bar any other joint tortfeasor or co-obligor from any further claims against the settling
31 tortfeasor or co-obligor for contractual indemnity if the court in its discretion finds that the
32 settling party has substantially complied with its contractual obligations up to the time of
33 settlement.

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35 [Subdivisions (d) through (e) remain unchanged.]

(Proposed new language underlined and bold, language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Section 887.6 of the Code of Civil Procedure allows a party to seek a determination of good faith settlement from a court in order to bar any joint tortfeasor or co-obligor from further claims against the settling party for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. However, the statute as currently written, gives the court no power to terminate contractual indemnity claims.

This Resolution: This resolution will allow the court to sever the contractual indemnity rights of a settling party upon a showing that the settling party has substantially complied with its contractual obligations up to the time of settlement. The non-settling party holding the contractual indemnity rights can still oppose the motion on the grounds that the settling party has not adequately fulfilled its contractual obligations. However, where the settling party has substantially complied (i.e. a subcontractor who has provided an additional insured endorsement to the general contractor) the court will be able to sever any further contractual indemnity obligations thereby potentially allowing the party to reach a settlement in the litigation. This

would promote quicker settlements in litigation by allowing plaintiffs to negotiate directly with cross-defendants.

The Problem: Courts can currently sever a party's equitable indemnity obligation, but not their contractual indemnity obligation. In complex construction litigation, a general contractor sued by homeowners can exert an unfair advantage over subcontractors in the litigation. Where a subcontractor might otherwise negotiate directly with the plaintiffs to negotiate an early settlement, a contractual indemnity obligation in their subcontract agreement gives the general contractor the absolute right to prevent any settlement, simply by refusing to voluntarily relinquish its contractual indemnity claims. Subcontractors who perform even the smallest tasks on a job can find themselves held "hostage" for years in a construction defect case by the general contractor who wants to continue receiving payments from the subcontractors' insurance company for their attorney's fees. Where the subcontractor is willing to pay a fair and equitable settlement, the courts should have the ability to terminate both their equitable and contractual indemnity obligations allowing them to negotiate settlements to promote judicial economy and efficiency.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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