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California Supreme Court Decision Increases Landowners' Potential Liability to Employees of Independent Contractors

Landowners should disclose known hazardous conditions in contracts and consider adding insurance coverage and providing guidance directly to contractors' employees

By Sanjay Ranchod

A recent California Supreme Court decision creates an exception to the general rule that landowners do not owe a duty of care to employees of independent contractors. In *Kinsman v. Unocal Corporation,* 37 Cal.4th 659 (Dec. 19, 2005), the Court held that a landowner may be liable for injuries to a contractor's employees where the landowner does not disclose to the contractor a hidden, pre-existing hazardous condition on its property. This decision has contract disclosure, insurance, and other implications for California landowners.

Background

At common law, a person who hired an independent contractor in California generally was not liable to employees of a contractor for their injuries caused by the contractor's negligence. The "peculiar risk" doctrine was one exception to this general rule of nonliability. Under that doctrine, the hirer could be held liable for injuries to the contractor's employees when they were hired to perform inherently dangerous work, such as building demolition.

In a series of decisions beginning in 1993, the California Supreme Court narrowed the "peculiar risk" doctrine. The *Privette* line of cases set forth the circumstances under which a landowner may be liable for tort damages to a contractor's employee who is injured on the job.[1] A hirer may be liable when he or she a) does not fully delegate the task of ensuring the employee's safety, b) actively participates in some manner in how the job is done, and c) that participation contributes to the contractor's employee's injury.[2]

The *Kinsman* Decision

In *Kinsman,* the California Supreme Court ruled that a landowner can be held liable to a contractor's employee under the following conditions:

- the landowner knows or should have known of a concealed, pre-existing condition on its premises;
- the contractor does not know and could not reasonably have ascertained the condition; and
- the landowner fails to warn the contractor.[3]

The Court ruled the landowner can be liable even when the landowner does not retain control over the contractor's employee's work and even if the injured contractor's employee may recover under the workers' compensation system.

After the *Kinsman* decision, a landowner cannot effectively delegate responsibility for the safety of an independent contractor's employees if the landowner fails to disclose critical information – such as the existence of a hidden, pre-existing hazardous condition on its property – needed to fulfill that responsibility.[4] The decision significantly increases the potential liability of developers and other California landowners for injuries to the employees of contractors.

Ray Kinsman, a carpenter, had worked at the defendant's oil refinery facility in the 1950s. Kinsman was employed by an independent contractor hired to install scaffolding at the facility. Kinsman suffered injuries caused by his exposure to airborne asbestos produced by other workers at the facility. The "concealed, pre-existing condition" was asbestos. The refinery owner allegedly knew the asbestos was hazardous but Kinsman and the contractor did not. Kinsman sued the refinery owner, claiming it was negligent in failing to warn the contractor or provide the proper safety equipment. A jury found for Kinsman and awarded him $3 million in damages. The appellate court vacated the award, finding that the *Privette* line of cases barred any landowner liability to Kinsman. The California Supreme Court disagreed and held the refinery owner could be subject to tort liability.[5]

The *Kinsman* decision is consistent with the California Supreme Court's 1980 holding in *Johns-Manville Products Corp. v. Superior Court.*[6] That decision, which also concerned a worker's asbestos injuries, created an exception to the general rule that workers' compensation is the exclusive remedy for injured employees. The Court ruled that an employer may be held liable for aggravating an employee's work-related injury if the employer intentionally concealed from the employee the existence of the injury and its connection with the employment.[7]

Recommendations for Landowners

- ***Disclosure In Contracts.*** Landowners should disclose known hazardous conditions in construction and other contracts. Such environmental conditions include the presence of asbestos, PCBs, VOCs and other subsurface contamination. At closed military bases, the presence of unexploded ordnances also should be disclosed. We recommend disclosure of a known hazardous condition even if it does not directly impact the contractor's scope of work.

- ***Additional Insurance.*** Landowners who are redeveloping contaminated property should consider adding insurance coverage for on-the-job injuries sustained by contractors' employees. This is an important consideration for brownfield properties with potentially unknown environmental hazards.

- ***Guidance to Employees of Contractor.*** Landowners can further reduce the risk of tort liability by providing guidance about known hazardous conditions directly to a contractor's employees before they begin work.

Notes:

1. In *Privette v. Superior Court*, 5 Cal.4th 689 (1993), the Court held that liability under the peculiar risk doctrine does not extend to landowners when an independent contractor's employee is injured while performing inherently dangerous work. The Court found that no-fault recovery under the workers' compensation system allowed the hirer to effectively delegate to the contractor responsibility for providing a safe work environment for the employees. *See* id. at 702. In subsequent decisions, the Court elaborated on the *Privette* decision and held that a hirer has no duty to act to protect the contractor's employee when the contractor fails in that task. *See Toland v. Sunland Housing Group, Inc.*, 18 Cal.4th 253 (1998); *Camargo v. Tjaarda Dairy,* 25 Cal.4th 1235 (2001); *Hooker v. Dep't of Transp.*, 27 Cal.4th 198 (2002); *McKown v. Wal-Mart Stores, Inc.*, 27 Cal.4th 219 (2002).
2. *See id.*; Kinsman, 37 Cal.4th at 671.
3. *See id.* at 675.
4. *See Kinsman,* 37 Cal.4th at 674.
5. New York has endorsed similar rules to those adopted in *Kinsman. See Jablonski v. Fulton Corners, Inc.*, 748 N.Y.S.2d 634, 638 (N.Y. Civ. Ct. 2002). Other jurisdictions, however, have taken different approaches to the issue of landowner liability to employees of independent contractors, and no single approach has emerged as dominant. *See Kinsman,* 37 Cal.4th at 676, n.4.
6. 27 Cal.3d 465 (1980).
7. The holding in *Johns-Manville* subsequently was codified in statute. *See* Cal. Labor Code § 3602(b)(2).

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