



Alert: California Court of Appeal Holds Economic Loss Rule Bars Indemnity and Contribution Claims Against Professional Engineering Firm

The California Court of Appeal just handed down an important decision for the design and construction industry: *State Ready Mix, Inc. v. Moffatt & Nichol* (<http://www.courts.ca.gov/opinions/documents/B253421.PDF>). The Court ruled that concrete supplier State Ready Mix, Inc. (State) was unable to pursue any claim for equitable indemnity or contribution against the civil engineer, Moffatt & Nichol (Moffatt).

State was sued by the general contractor, which had retained it to supply the concrete for a new travel lift pier at the Channel Islands Harbor, when a portion of the pier had to be demolished and rebuilt after it was discovered that the concrete supplied by State and used to construct the pier was defective. Moffatt, like the general contractor, was under contract to the project manager to draft the pier plans and had gratuitously reviewed and approved State's concrete mix design prior to construction at the general contractor's request. Although heavily influenced by State's "smoking gun" admission of defects in the concrete mix's preparation, the Court accepted that the concrete mix design was also defective, calling for 32 times more of an air-entraining admixture used to increase the concrete's workability than the manufacturer recommended, thus increasing the risk that the concrete would not achieve the required compressive strength. After the concrete was cast, lab testing showed it had a compressive strength of only 3,650 PSI, thus failing to meet the contractually required performance specification of 5,000 PSI. Still, the Court affirmed the trial court's sustaining of Moffatt's demurrer, clearing the firm of any responsibility notwithstanding its approval of the defective mix design.

The Court relied on *Aas v. Superior Court* (2000) 24 Cal.4th 627, in which the California Supreme Court held that claims for construction defects that have not caused personal injuries or ripened into property damage or "involuntary out-of-pocket losses" may be pursued only under contract-based legal theories, not under torts such as negligence. The *State Ready Mix* case is important, however, since it held the economic loss rule applicable to a professional engineer. In *Aas*, for example, the defendants were a developer, a general contractor and subcontractors and at least one other Court of Appeal in California has suggested that the economic loss doctrine is not applicable to matters involving the performance of professional services. The Court in *State Ready Mix* did not directly address whether Moffatt's review of the concrete mix design was a professional service. It acknowledged that Moffatt's review was not part of its "job duties," but that could have been in recognition of Moffatt having had no contractual duty to perform the review. Nor did the Court discuss whether the necessity of demolishing and rebuilding a portion of the pier was an "involuntary out-of-pocket loss" sustained by the general contractor such as to render the economic loss doctrine and *Aas* inapplicable.

Independent of the economic loss rule, the Court cited another basis to support its opinion. Consistent with *BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (2004) 119 Cal.App.4th 848, the Court held that since the general contractor's complaint against State did not assert a tort claim, State was unable to state a claim against Moffatt for equitable indemnity or contribution since those causes of action are premised on the parties being jointly and severally liable in tort to the primary claimant.

We believe Moffatt was particularly fortunate. Ordinarily, professional firms are well advised to not perform extra-contractual services on their projects since their liability can then be contractually unlimited. Here, however, although guilty of “scope creep,” Moffatt was ultimately cleared of any non-contract-based responsibility to State.

The main takeaway from *State Ready Mix* for design and construction professionals, as we see it, is that their potential liability for economic losses, even in the course of performing professional services, may well be limited to contractual liabilities, demonstrating the importance of negotiating as favorable terms as possible when taking on a new project.

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