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## Insurance

### Insurers claimed landlord failed to indemnify and contribute

Mediation: \$1,975,000.00

Case Type: Indemnity, Insurance - Subrogation

Case Name: Continental Casualty Company and United States Fire Insurance Company v. Shapell Industries, Inc. and American International Specialty Lines Insurance Company, No. CV 810192 c/w CV 810245

Venue: Superior Court of Santa Clara County, San Jose, CA

Judge: Robert M. Foley | Coleman F. Fannin

Date: 10-22-2003

#### Plaintiff(s):

##### Attorney(s):

- Robert M. Bodzin; Burnham Brown; Oakland, CA, for Continental Casualty Co.
- Paul D. Caleo; Burnham Brown; Oakland, CA, for Continental Casualty Co.
- Michael A. Mathews; Law Offices of Michael A. Mathews; San Francisco, CA, for United States Fire Insurance Co.

##### Expert(s):

- None

#### Defendant(s):

##### Attorney(s):

- Kevin G. McCurdy; McCurdy & Brown; Menlo Park, CA, for American International Specialty Lines Insurance Co.
- Lois A. Lindstrom; Ericksen, Arbuthnot, Kildruff, Day & Lindstrom; Oakland, CA, for Shapell Industries

##### Expert(s):

- None

#### Insurers:

- American International Specialty Lines Insurance Co. for Shapell Industries

#### Facts:

On June 7, 1995, Staples Inc., Framingham, Mass., and Shapell Industries, Beverly Hills, entered into a lease whereby Staples Inc. leased property for a Staples store in the Milpitas Town Center in Milpitas. The agreement stated that if Staples was named as a defendant in a lawsuit that arose out of a personal injury that occurred in the Center, but outside the premises, Shapell would defend and indemnify its tenant.

In addition to these defense and indemnity requirements, the parties to the lease also agreed to purchase liability insurance policies that named each other as additional insured. Thus, under the terms of the lease, Staples claimed that it had two layers of protection in the event it was named as a

defendant in a lawsuit where a personal injury occurred within the Center, but outside the premises.

Three and a half years after the lease was signed, an accident occurred on Jan. 29, 1998, when David Peterson, a HVAC mechanic, suffered a fall from an exterior ladder located at the rear of the Wherehouse Entertainment store in the Milpitas Town Center. This event triggered Shapell's defense and indemnity obligations to Staples when Peterson and his wife sued a variety of defendants, including Staples (*Peterson v. Wherehouse Entertainment, et al.*, Case No. CV 779539, Superior Court of Santa Clara County). Since Peterson sustained his personal injuries in the Center, Staples claimed that it was entitled to the two levels of protection from Shapell. At the time of Peterson's accident, Shapell maintained primary and excess liability for the Center. Both policies were with American International Specialty Lines Insurance Co. (AISLIC), New York City.

Shortly after being served the Peterson complaint, Staples tendered its defense and indemnity to Shapell. When Shapell and AISLIC refused to accept the tender, Staples was required to seek protection from its insurers, plaintiffs Continental Casualty Co., Chicago, Ill., and United States Fire Insurance Co. (USFIC), Morristown, NJ, who provided coverage for personal injuries that occurred inside the premises. Continental maintained the primary policy and USFIC maintained the excess policy.

In July 2001, a Santa Clara County jury returned a verdict in favor of the Petersons and awarded them a total verdict of \$14.8 million. After closing arguments but before the verdict was rendered, the plaintiff premises insurers paid \$3.5 million in indemnity costs on behalf of Staples to the Petersons.

In August 2002, the plaintiffs, in separate lawsuits, sued defendants Shapell and AISLIC, to recover the indemnity money they paid under the theories of contractual subrogation, indemnity and equitable contribution.

The plaintiffs contended that Shapell's indemnity obligation was based solely on the location of the accident. Since Peterson's fall occurred outside the Staples store but in the strip mall, Shapell and its insurers were required to defend and indemnify Staples for this loss. The plaintiffs maintained that since Shapell and its insurer did not accept the tender, Staples' primary and excess insurers were equitably subrogated to Staples' rights under the lease and were entitled to full recovery of all defense and indemnity payments made on Staples' behalf.

Alternatively, the plaintiffs sought recovery based on the lease term that obligated Shapell to maintain general liability insurance naming Staples as an additional insured on policies that covered the strip mall. Based on the theory of equitable subrogation, the plaintiffs sought their respective pro rate share of the overpayment made on behalf of Staples, their common insured.

The defense contended that the plaintiffs were not entitled to recover under the theory of equitable subrogation because Shapell obtained summary judgment in the underlying action and was not at fault for Peterson's accident. The defense also argued that the plaintiffs were not entitled to recover under the theory of equitable contribution because Staples was not named as an additional insured on the AISLIC policies.

#### Injury:

The plaintiffs claimed damages of \$4.6 million, which included indemnity costs to settle the underlying lawsuit, interest, attorney fees and costs.

#### Verdict Information:

In February 2003, Judge Robert Foley overruled the demurrers of the defendants. Subsequently, the parties were ordered to mediation, which was held before retired Judge Coleman Fannin of JAMS on May 20, 2003. Following the mediation, the parties agreed to settle the lawsuits for a total of \$1,975,000, of which Continental Casualty received \$225,000 and USFIC received \$1.75 million.

Continental Casualty Co.

\$225,000 Commercial: settlement

United States Fire Insurance Co.

\$1,750,000 Commercial: settlement

#### Editor's Comments:

A case report regarding the underlying lawsuit of *Peterson v. Wherehouse Entertainment, et al.* was originally reported in *California Jury Verdicts Weekly*, Vol. 45, No. 36, Sept. 7, 2001. Counsel for the defense did not contribute to this report.