Contracting Clarity

FOCUS COLUMN

By Daniel Lee Jacobson

One realizes that he has reached the zenith of attorney-nerdness when he is enthralled with the Supreme Court's publication of a case that finally puts to rest what he has seen as a burning controversy; whether implied contractual indemnity sounds in contract. But even non-nerds will benefit from the Supreme Court's clarity on the subject, the nailed-down description of just what implied contractual indemnity is, and the real world application of that clarity and that description.

In *Prince v. Pacific Gas & Electric*, 45 Cal.App.4th 1151, published on March 19, the Supreme Court reaffirmed that "implied contractual indemnity is a form of equitable indemnity." *Bay Development v. Superior Court*, 50 Cal.3d. 1012 (1990). Equitable indemnity does not sound in contract.

There are many practical reasons why it matters that implied contractual indemnity is not based in contract. For instance, if the cause of action is contract-based then the protection afforded by a good faith settlement determination order under Code of Civil Procedure Section 877.6 is unavailable. Such orders are reserved only for joint tortfeasors. *Prince* explicitly says that Section 877.6 protection is available to one sued in implied contractual indemnity. Also, depending on the course of a particular lawsuit, attorney fees may be available depending on whether the cause of action is based in contract.

Soon after the Supreme Court's *Bay Development* ruling that implied contractual indemnity was simply a form of equitable indemnity not sounding in contract, some courts began examining just how conclusive the ruling had been.

In *West v. Superior Court*, 27 Cal.App.4th 1625 (1994), the 4th District Court of Appeal said, "The right to implied contractual indemnity is predicated upon the indemnitor's breach of contract." The *West* court quoted *Bear Creek Planning Commission v. Title Insurance & Trust Co.*, 164 Cal.App.3d 1227 (1985): "An action for implied contractual indemnity is ... grounded upon the indemnitor's breach of duty owing to the indemnitee to properly perform its contractual duties." The *Bay Development* court had disapproved *Bear Creek Planning*, noting, "to the extent that ... [it is] inconsistent with the views expressed in [*Bay Development*]." This imprecise language allowed legitimate debate as what in *Bear Creek Planning* was no longer law.

The debate is over. *Prince* exclaims that implied contractual indemnity is merely a form of equitable indemnity, not sounding in contract; it is founded on two or more obligors owing one or more duties to the injured person; and, while it requires a contract between co-obligors, it is not dependent on a breach of that contract. Also, implied contractual indemnity is subject to comparative liability principles.

In *Prince*, the 10-year-old plaintiff was injured when he tried to dislodge his kite from a PG&E power line located on Eve Prince's property. Because there is statutory immunity from tort liability for recreational use of another's property, as defined in Civil Code Section 846, and because the kite-flyer's accident was on PG&E's easement, PG&E was not directly liable to the plaintiff.

But an exception to Section 846 may apply to Prince, the fee simple property owner. So, the plaintiff sued her, and she cross-complained against PG&E for implied contractual indemnity. PG&E brought a summary judgment motion, arguing that implied contractual indemnity is a type

of equitable indemnity. As such, the duty at issue is a general tort-based co-obligation owed to the plaintiff by both Prince and PG&E. That would make Prince's cross-complaint a squabble amongst joint tortfeasors over who in fairness is more liable to the plaintiff; a squabble that is only an illusion because PG&E cannot be a joint tortfeasor as to the plaintiff because of statutory immunity. Thus, PG&E would have to prevail.

Prince argued that her implied contractual indemnity cause of action was based on her contractual relationship with PG&E, which requires PG&E to keep the power line in good repair. Prince argued that the contractual relationship impliedly obligated PG&E to indemnify Prince for any damages suffered as a result of PG&E not keeping the power line in good repair. If Prince were correct, this PG&E contractual duty would be independent of any duty that PG&E owed the plaintiff. Thus, PG&E's immunity would be irrelevant to the cross-action.

In a 6-1 opinion, the Supreme Court said that it really meant what it said in *Bay Development*, implied contractual indemnity is a form of equitable indemnity, not based in contract. The one justice who did not join the majority concurred in the majority's result, and wrote that the development of equitable indemnity has simply enveloped the concept of implied contractual indemnity. Indeed, a careful reading of the majority opinion shows that while implied contractual indemnity still exists, it is simply the name that is applied to equitable indemnity when there is a contract in the mix.

The *Prince* court's recitation of the development of indemnity is instructive.

"Historically, the obligation of indemnity took three forms: (1) indemnity expressly provided for by contract (express indemnity); (2) indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and (3) indemnity arising from the equities of particular circumstances (traditional equitable indemnity)." The court cited *Bay Development* and *E.L. White v. City of Huntington Beach*, 21 Cal.3d 497 (1978), in explaining that although these three types of indemnity were at one time distinct, now there is only express indemnity and equitable indemnity, with implied contractual indemnity simply being a form or equitable indemnity. Equitable indemnity "is premised on a joint legal obligation to another for damages."

The doctrine of implied contractual indemnity was reified in California in *San Francisco Unified School District v. California Building Maintenance Co.*, 162 Cal.App.2d 434 (1958). At the time that *S.F. Unified* was decided, there was a common law rule that generally barred any right of contribution between joint tortfeasors. The *S.F. Unified* court adopted the doctrine of implied contractual indemnity as an exception to the then common law rule of noncontribution between joint tortfeasors. So, from its California birth implied contractual indemnity had equitable considerations. It came from what the *S.F. Unified* court apparently perceived as the unfairness that would result without it.

In the meantime traditional equitable indemnity was developing. In *Cahill Bros. Inc. v. Clementia Co.*, 208 Cal.App.2d. 367 (1962), the court noted a conflation of the concepts of equitable indemnity and implied contractual indemnity. "[A] right of implied indemnification may arise as a result of contract or equitable considerations."

Prince explains the development of implied contractual indemnity as a form of equitable indemnity at the Supreme Court level. "Relying on the analysis in *E.L. White*, our decision in *Bay Development*, ... rejected the contention that a claim for implied contractual indemnity should be equated with a claim for express contractual indemnity. That consideration, as well as our observation that 'equitable considerations have always played an integral role in defining the scope of the implied contractual indemnity doctrine' ... supported our conclusion that 'a claim for implied contractual indemnity is a form of equitable indemnity subject to the rules governing

equitable indemnity claims.'"

Prince explains that implied contractual indemnity is available when contracting parties are each responsible for injuring a third party. The theory is that such a contract implies that it will be performed properly, and that damages resulting from any improper performance are compensable in indemnity. "Now ... implied contractual indemnity, like traditional equitable indemnity, is subject to comparative equitable apportionment of loss."

Because "a key restrictive feature" of equitable indemnity, which is often expressed in the shorthand "there can be no indemnity without liability," subjects joint obligors to the "whatever immunities or other limitations on liability ... [that are] available against the injured party," PG&E successfully asserted its Civil Code Section 846 defense against Prince.

Prince's concurring opinion points out that the majority opinion identifies no difference between, and indeed exclaims the sameness of, equitable indemnity and implied contractual indemnity, other than the existence of a contract. The concurring opinion argues for simplification. It says that the doctrine of implied contractual indemnity should be gone; equitable indemnity can simply utilize the existence of a contract when doing so is appropriate.

While the concurring opinion is not the law, it's simplicity argument makes the point of the majority, which is the law. Implied contractual indemnity is just a form of equitable indemnity; it requires that the indemnitor and the indemnitee each have a duty to the injured person; it is subject to modern apportionment principles; it is subject to the rule that there can be no indemnity without liability; and it requires a contract, but all that that contract needs to do is to justify the employment of equitable indemnity.

Prince's comprehensive view of implied contractual indemnity at the same time raises and answers a question, although the answer is not fully satisfying. If the doctrine is not grounded in the law of contract, in what area of law is it grounded? *Prince* explicitly says that one who settles an implied contractual indemnity claim is eligible for protection under Code of Civil Procedure Section 877.6, which by its own terms is only available to joint "tortfeasors." Also, equitable indemnity, of which implied contractual indemnity is a form is tortious in nature. *Stop Loss Insurance Brokers Inc. v. Brown & Toland*, 143 Cal.App.4th 1036 (2006); *Baird v. Jones*, 21 Cal.App.4th 684 (1993). So, at least for those purposes, the doctrine is grounded in tort.

Yet *Prince* is also careful to trace implied contractual indemnity's restitutionary roots, and exclaims that "implied contractual indemnity is and always has been restitutionary in nature," and that "[o]ur reiteration that indemnity is restitutionary in nature ... will avoid ... recovery of tort damages." At least for the purpose of assessing damages, the doctrine is grounded in restitution.

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This article appears on Page 7
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