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Whether New Law Applies Retroactively Is Open Question

Focus Column

By Daniel Lee Jacobson and Georgia M. Linkletter

California's Business and Professions Code is unforgiving to building contractors who fail to abide by its licensing requirements. Section 7031 contains two punishments for nonlicensed contractors. One of those punishments is new and the other one, while not new, has had its scope explained by the courts.

New Section 7031(b), effective last Jan. 1, states, "A person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract."

This sentence provides consumers with a simple yet powerful weapon to get back "all compensation" that they have paid to an unlicensed contractor. An unanswered question regarding this new weapon is whether it can be applied to pre-Jan. 1 "act[s] or contract[s]" of unlicensed contractors.

Aetna Casualty & Surety Co. v. Industrial Accident Comm'n, 30 Cal.2d 388 (1947), has been described as "perhaps the leading modern California decision on the subject [of the retroactive application of statutes]." *Evangelatos v. Superior Court*, 44 Cal.3d 1188 (1988).

In *Aetna*, the Supreme Court laid out the general rule: "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."

No legislative intent to apply Section 7031(b) retroactively can be found. See California Session Laws, 2001, Vol. 1, at 1887. But the inquiry cannot stop there.

In *Davis & McMillan v. Industrial Accident Comm'n*, 198 Cal. 631 (1926), the court stated that the presumption against retrospective construction does not apply to statutes relating merely to remedies and modes of procedure. However, the *Aetna* court followed the reasoning provided in *Morris v. Pacific Electric Ry. Co.*, 2 Cal.2d 764 (1935), wherein the Supreme Court said that procedural changes "operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect."

The *Aetna* court explained, "[P]rocedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective." The procedure or remedy operates in the present when it is invoked.

Is Section 7031(b), which provides consumers the new statutory remedy of a refund of all compensation paid to unlicensed contractors, a procedural statute? If it is, then it can be applied in current cases that concern pre-Jan. 1 acts or contracts of unlicensed contractors.

The *Aetna* court said, "[T]he distinction [between procedural statutes and substantive statutes] relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro ... ."

In *Tapia v. Superior Court*, 53 Cal.3d 282 (1991), the court stated the "general rule that statutes addressing the conduct of trials are prospective."

In *ARA Living Centers-Pacific Inc. v. Superior Court*, 18 Cal.App.4th 1556 (1993), the court was faced with new statutory language that provided for the award of attorney fees to successful plaintiffs in elder abuse cases and removed a previously imposed damages limitation that had prevented personal representatives or successors of decedents in elder abuse cases from being awarded damages based on the pain and suffering of the decedent.

After synthesizing *Aetna* and its progeny, the *ARA* court decided that its task was to decide

"whether the Legislature (1) has merely affected a change in the conduct of trials, which should routinely apply to this trial, or (2) has changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct."

The *ARA* court found that the attorney fees portion of the new legislation was procedural and, thus, applicable to the current trial, because "fee statutes ... address[] the conduct of trials." On the other hand, it found that the portion that allowed for pain and suffering damages "did considerably more than change the conduct of trial. Because of the amendment, damages up to $250,000 may be assessed against a defendant for pain and suffering if circumstances warrant."

So while Section 7031(b) is clearly a remedial, procedural statute in form, a court judging whether it can be applied in current trials to past acts or contracts of unlicensed contractors will have to judge whether the effect of the new legislation is substantial enough to be thought of not as a statute merely addressing the conduct of trials but as one that substantively changes the legal effects of past events.

For many years, Section 7031(d) has stated that "no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required ... without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person."

The "compensation" that unlicensed contractors are barred from seeking includes all sorts of payment, monetary or otherwise. *K&K Services Inc. v. City of Irwindale*, 47 Cal.App.4th 818 (1996). It also bars indemnity claims. *Ranchwood Communities v. Jim Beat Constr.*, 49 Cal.App.4th 1397 (1996) ("[C]ontracts [made in violation of Section 7031(a)] are considered illegal, i.e., malum prohibitum as opposed to malum in se.").

A contractor either must be individually qualified to perform in the trade for which a contractor's license is sought or have a responsible managing employee or officer who is so qualified. Business and Professions Code Sections 7068(b)(1), (2), (3).

"[The responsible managing employee or officer] shall be responsible for exercising that direct supervision and control of his or her employer's or principal's construction operations as is necessary to secure full compliance with the provisions of this chapter and the rules and regulations of the board relating to the construction operations." Business and Professions Code Section 7068.1.

"Once the RME [responsible managing employee or officer] is not performing his function, it is as if the contractor has no license at all." *Buzgheia v. Leasco Sierra Grove*, 60 Cal.App.4th 374 (1997). If a responsible managing employee or officer is not employed at the time relevant to the action, then the contractor is considered unlicensed for purposes of Section 7031 and, thus, is barred from bringing suit. *Construction Fin. v. Perlite Plastering Co.*, 53 Cal.App.4th 170 (1997).

In recent years, the court has been faced with situations where an unlicensed contractor has brought suit both in its capacity as a contractor and in its capacity as a land developer. In *Ranchwood*, the court faced such a situation. The unlicensed general contractor was also the owner-developer of the land on which it had built mass-produced housing.

The fact that the unlicensed general contractor was also the developer played a vital role in the outcome of the case because the court ruled that whether any particular cause of action survived depended upon whether it was brought by the unlicensed contractor in its capacity as a contractor or as a developer.

In *Ranchwood*, an unlicensed general contractor-developer cross-complained against its subcontractors when homeowners sued it for construction defects. The court barred the causes of action in the cross-complaint for express indemnity, breach of contract, breach of warranties and declaratory relief because those causes of action were thought to be the causes of action brought by the unlicensed general contractor side of the contractor-developer. It treated the other causes of action differently because it decided that they were brought by the developer side of the contractor-developer.

Ranchwood explained that because developers of mass housing face liability under a strict liability theory, it would let the other causes of action stand. The court quoted *La Jolla Village Homeowners' Ass'n v. Superior Court*, 212 Cal.App.3d 1131 (1989): "[T]he principle of risk distribution has been described as the fundamental policy underlying the doctrine of strict

liability."

The *Ranchwood* court further drew from and quoted *La Jolla*: "A homeowner-plaintiff is protected by this doctrine 'because the developer is strictly liable for the negligence of its subcontractors and the developer has adequate recourse to proceed against the subcontractors if warranted in any particular case.'" (Italics omitted.)

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