

# Cavanagh Attorneys Mear and Wohlgemuth Procure Finality for Settling Subcontractors

Feb 23, 2018 | - News & Press Releases, Richard W. Mear, Karen Wohlgemuth

**Summary.** Cavanagh attorneys Richard Mear and Karen Wohlgemuth obtained dismissal of equitable contribution claims brought by fellow subcontractor, Swann’s Grading, Inc. in Maricopa County Superior Court last year. Swann’s Grading sought contribution from several subcontractors to offset the \$1,619,127.80 levied against it in the underlying construction defect case brought by the general contractor under the extremely broad indemnification language contained in their subcontract. If allowed, the novel “equitable contribution claim” would have created uncertainty for settling defendants and would have expanded the application of the equitable contribution doctrine beyond the insurance arena where it has traditionally been applied.

**Ruling.** Judge Bailey agreed. She granted dismissal of the settling subcontractors, and explained that the doctrine of equitable contribution should not be expanded from co-insurers to co-indemnitors. Judge Bailey recognized that under the broad indemnity language at issue a subcontractor might have to pay more than its fair share of damages when its work overlaps with the work of other subcontractors. Nevertheless, each subcontractor made its own contract with the indemnitee, and trying to undo and dissect settlements to perfectly allocate risk would be an imperfect, costly, and detrimental precedent for construction defect cases in Arizona. She explained as follows:

*The Court is persuaded by the argument that determining the relationship between the damages at issue and each subcontractor’s work would require extensive discovery, expert analysis and expense. Requiring Defendants to engage in this litigation would have a chilling effect on the any subcontractors’ motivation to “settle” a construction defects case, if they could be sued by non-settling subcontractors years later regarding the same issues they purportedly “settled.”*

As a result of this landmark case, subcontractors who settle can rest easy that their settlements will have finality and not be subject to further claims from their fellow non-settling subcontractors trying to seek contribution from them.

**Background.** In 2008, several homeowners sued general contractor Amberwood Development, Inc. in stemming from a series of construction defect claims at a housing development located in the Gilbert/Chandler area of Arizona. Amberwood sought indemnification from its subcontractors pursuant to a broad contract provision requiring each subcontractor to indemnify it from any and all claims arising out of or in connection with the subcontractor’s work performed for it. The subcontractors settled with Amberwood, except for Swann’s Grading. At trial, Swann’s Grading was determined to be more than 70% at fault and a \$1,619,127.80 judgment was entered against it. The judgment was upheld by the Arizona Court of Appeals.

Ten years down the road (yes, the statue of repose was also raised in the motion to dismiss), in April 2018, Swann's Grading commenced a lawsuit for equitable contribution against the settling subcontractors. Swann's Grading alleged that it paid more than its pro rata share and that the settling subcontractors were jointly liable for the judgment based upon their identical indemnity provisions with Amberwood. Mr. Mear and Ms. Wohlgemuth argued in their motion to dismiss (which other subcontractors joined) that "[T]here are a few carved out exceptions at common law for 'equitable contribution' claims," and contribution from settling co-subcontractors is not one of them. As a matter of law, Swann's failed to plead the elements of a contribution claim because its indemnification agreement with the general contractor did not involve other subcontractors, the same interest, property, or casualty. Most importantly, the practical effect of an Arizona court recognizing contribution in this context would be disastrous for construction defect litigation.



*Richard Mear's litigation practice is driven by his desire to obtain effective and efficient results for his clients. His common sense approach is grounded in a complete immersion in his clients' businesses, goals and products. Richard's practice includes defending corporations in premises liability matters, product liability matters (including medical devices), and toxic tort matters involving asbestos and benzene exposure. He also has significant experience in cases involving transportation/trucking claims, construction defect claims, professional liability, medical malpractice, and in commercial business disputes involving claims of officer and director liability. Mr. Mear has extensive experience in all aspects of litigation including trial, mediation and arbitration. He has first-chaired and second-chaired several jury and bench trials to defense verdicts. Mr. Mear first-chaired a month-long products liability trial in Federal Court and obtained a defense verdict for his client, despite the plaintiffs' initial demand for \$30 million and \$12 million pre-trial demand. In February of 2017, Mr. Mear concluded a two-week jury trial to defense verdict, which included an award of Rule 68 sanctions. Mr. Mear can be reached at 602-322-4143 and [rmear@cavanaghlaw.com](mailto:rmear@cavanaghlaw.com).*



*Karen N. Wohlgemuth is a litigation associate focusing her practice primarily on complex civil and commercial litigation, including construction defect, premises liability, insurance bad faith, professional liability, wrongful death, and toxic tort cases. Ms. Wohlgemuth has participated in numerous trials, mediations, and arbitrations. She has also settled several cases and written insurance coverage opinions. She graduated with a Juris Doctor from Sandra Day O'Connor College of Law at Arizona State University as a Trial Advocacy fellow and was the sole 2016-2017 Paul W. Holloway Trial Advocacy Award winner. Ms. Wohlgemuth can be reached at 602-322-4188 and [kwohlgemuth@cavanaghlaw.com](mailto:kwohlgemuth@cavanaghlaw.com).*