

November 18, 2009



**Michael Murphy**  
Attorney at Law  
[mmurphy@sirote.com](mailto:mmurphy@sirote.com)

In this week's SWALU, we review two decisions from the Alabama Supreme Court. The first case concerns the enforcement of indemnification provisions under Alabama law, and the second addresses trial court enforcement of arbitration decisions. Other opinions issued last week by the Alabama Supreme Court, the Alabama Court of Civil Appeals and the United States Court of Appeals for the Eleventh Circuit were of lesser significance.

#### ALABAMA SUPREME COURT

**Holcim (US) Inc. v. The Ohio Cas. Ins. Co. and Indus. Services of Mobile, Inc., \_\_\_ So.2d \_\_\_ (Ala. 2009) (indemnity questions addressed).** In this case, the Alabama Supreme Court considered two questions certified to the Court by the United States Court of Appeals for the Eleventh Circuit.

1. Whether, under Alabama law, an Indemnitee may enforce an indemnification provision and recover damages from an Indemnitor resulting from the combined or concurrent fault or negligence of the Indemnitee and Indemnitor?
2. Whether, under Alabama law, a court may look behind (or beyond) the pleadings (in particular, the complaint) of an underlying tort action in determining the application of an indemnification provision between an Indemnitor and Indemnitee.

The questions presented arose in connection with the following events: Holcim (US), Inc. (Holcim) engaged Industrial Services of Mobile, Inc. (ISOM) as a general contractor pursuant to a supply agreement which provided that ISOM would indemnify Holcim from liabilities arising from breaches of warranty or performance under the agreement. However, the agreement also provided that ISOM would have no obligation to Holcim for losses attributable to the negligence or willful misconduct of Holcim.

Thereafter, Holcim was named in a lawsuit by an ISOM employee (White), who was injured as a result of a fall, alleging negligence of Holcim. White did not name ISOM in the suit. Holcim demanded that ISOM defend and indemnify it, and ISOM, through its insurer, disclaimed coverage. Following mediation, Holcim settled with White for \$5 million. ISOM's insurer filed a declaratory judgment action with the United States District Court for the Southern District seeking a declaration that it had no duty to defend or indemnify Holcim. In its motion for declaratory judgment, ISOM relied on Alabama law requiring clear and unequivocal language to require an Indemnitor to indemnify an Indemnitee for its own negligence. Since the suit filed by White alleged negligence only on behalf of Holcim, the district court granted summary judgment in favor of ISOM and its insurer. Holcim appealed to the Eleventh Circuit Court of Appeals, which certified the questions above to the Alabama Supreme Court as the law in Alabama appeared to be unsettled.

#### Question 1

The Alabama Supreme Court acknowledged that while the general rule in Alabama is that joint tort-feasors were not entitled to indemnity or contribution, Alabama law does recognize both freedom to contract and the general enforceability of indemnity agreements. The Court also noted that Alabama law would recognize indemnity agreements as valid even when the agreement allowed the Indemnitee to recover from the Indemnitor from claims resulting solely from the negligence of the Indemnitee. Since indemnification despite the negligence of the Indemnitee is not a barrier to enforceability, the Court answered that there was no barrier to an agreement's ability to provide for allocation of a proportionate part of the obligation or damages based on the parties' respective faults.

#### Question 2

As to the second question, the Alabama Supreme Court noted that a duty to indemnify may be triggered even when the plaintiff has not named the Indemnitor as a party. Further, the Court noted that in the insurance context the Court is permitted to look beyond the underlying pleadings to determine whether the plaintiff's injury was a covered event under the insurance contract. On this basis, the Court held that when determining liability under an indemnity provision, a court may look beyond the complaint in the underlying action to the underlying facts shown by admissible evidence.

**Smallwood, et al. v. Holiday Dev, LLC, \_\_\_ So.2d \_\_\_ (Ala. 2009) (enforcement of arbitrator's order).** In this case the Court considered an appeal from the Baldwin Circuit Court related to the dismissal of an arbitration proceeding. This case arose when several individuals and business entities (Purchasers) contracted with Holiday Development, LLC (Holiday) to purchase condominiums. The Purchasers ultimately filed suit in Baldwin Circuit Court seeking a restraining order prohibiting the title company from releasing their escrowed funds to Holiday, on the basis that the construction was not of the promised quality. The trial court compelled arbitration pursuant to the contracts signed by the Purchasers; however, after two years the arbitration was dismissed and remanded to the trial court because Holiday failed to pay its share of the arbitration fees.

After the arbitrator dismissed the proceedings, the Purchasers filed an amended complaint for default judgment in the trial court. Holiday opposed the motion, arguing that the court was required by the Federal Arbitration Act (FAA) to enforce the order entered by the arbitrator and to enter an order of dismissal exactly as the arbitrator had determined. The trial court granted Holiday's motion, and the Purchasers appealed to the Supreme Court of Alabama.

The Court noted that under the FAA courts must enforce awards made in arbitration unless the aggrieved party establishes that the award should be vacated on the grounds of (i) fraud, (ii) partiality of the arbitrator, (iii) arbitrator misconduct, or (iv) where the arbitrator exceeded its powers. However, in this case rather than enforce the order, the trial court mistakenly concluded that the arbitrator's order could be enforced by simply repeating the action taken by the arbitrator and dismissing the case. The Court reversed and remanded the case, explaining that the proper way to give effect to the arbitration order was to schedule the further proceedings necessary for the Purchasers to pursue their claims.



The Answer Is Sirote.

To subscribe to SWALU, simply e-mail the editor at [mshevin@sirote.com](mailto:mshevin@sirote.com) and list your name, e-mail address, and company or organization. To change the e-mail address at which you wish to receive the update, e-mail the editor with that request. To be removed from this or any of our other e-mail distribution lists, please reply to this e-mail and indicate "unsubscribe" in the subject line. This message may be considered an advertisement or solicitation. For more information about Sirote & Permutt's statewide law offices and mediation centers, please visit us on the web at [www.sirote.com](http://www.sirote.com).

This e-letter is a periodic publication of Sirote & Permutt, P.C. and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information only, and you are urged to consult an attorney concerning your own situation and any specific legal questions you may have.

The Alabama State Bar requires the following disclosure: No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.