FRANCHISE RELATIONSHIP AND FRANCHISOR'S LIABILITY FOR ACTS OF FRANCHISEE - AN UPDATE

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Presented by
James O. Eiler, Esq.
Kaiser, Swindells & Eiler
Attorneys and Counselors at Law
444 West Ocean Boulevard, Suite 900
Long Beach, California 90802
Telephone: 562.590.8471
Facsimile: 562.437.0903
www.kselawyers.com

JAMES O. EILER, ESQ.

Kaiser, Swindells & Eiler
444 W. Ocean Boulevard, Suite 900
Long Beach, California 90802
jeiler@kselawyers.com - www.kselawyers.com
(562) 590-8471 telephone – (562) 437-0903 facsimile

James O. Eiler is a partner of the firm **Kaiser, Swindells & Eiler**. He is also Chair of the Hospitality Law Practice Group. Mr. Eiler represents hotels, restaurants and recreation industry businesses in all phases of general civil litigation and operational matters.

Mr. Eiler's experience includes:

- Serving as national and regional litigation counsel, managing and monitoring all litigation for a major hotel and restaurant group.
- Acting as regional litigation counsel for a national restaurant company.
- Representing hospitality clients in a broad range of matters including franchise and management agreement litigation, third party criminal assaults, premises liability, environmental and toxic tort claims, Americans with Disabilities Act and civil rights matters, boating and/or recreational watercrafts, and food borne illness.
- Assisting clients with crisis and risk management issues.
- Over 10 years of operational experience in the hospitality industry.

Mr. Eiler is a former Adjunct Professor of Hospitality Law for the William F. Harrah School of Hotel Management at the University of Nevada at Las Vegas and School of Hospitality and Tourism Management at California State University San Diego, and publishes and speaks regularly on a wide range of issues related to Hospitality Law. As an active participant in several key trade industry associations, he helps shape regulations and legislation affecting the hospitality industries on an ongoing basis.

EDUCATION
J.D., Western States University College of Law, 1986
B.S., University of Nevada at Las Vegas, (Hotel and Restaurant Administration)

MEMBERSHIPS
Academy of Hospitality Industry Attorneys
American Bar Association
Asian American Hotel Owners Association
California Hotel & Lodging Association, Governmental and Legal Affairs Committee
California Restaurant Association
Global Alliance for Hospitality Attorneys
Hospitality Industry Bar Association
National Restaurant Association
Defense Research Institute - Retail and Hospitality Committee
Council on Litigation Management
Association of Southern California Defense Counsel
Los Angeles County Bar Association
Long Beach Bar Association

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Franchises are a common feature within the *hospitality industry*. Their use results in unique issues which reoccur with regularity in civil litigation. The issues arises from the nature of the relationship.

I. WHAT IS A FRANCHISE ?

A. A franchise is defined as "an arrangement in which the owner of a trademark or copyright licenses others, under specified conditions or limitations, to use the owner's trademark, trade name or copyright in purveying goods or services." 16 *CFR* 436 (1978). Most jurisdictions define "franchise" in a similar manner. (For example, see, *Thueson v. U-Haul International, Inc.*, 144 Cal.App.4th 664, 670 (2006); *Blankenship v. Dialist Int'l Corp.*, 209 Ill.App.3d 920, 924 (Ill. App. Ct. 5th Dist. 1991); *Texas Revised Civil Statute* Ann. art 4413(36), § 1.03(8); *Aristacar Corp. v. Attorney Gen. of New York*, 143 Misc. 2d 551, 552 (1989).

B. The use of the owner's ("franchisor's") label, trademark, brand or trade name by another ("franchisee") creates the appearance that the franchisor is involved in the day-to-day operation, management, and control of the franchisee's business, or alternatively creates appearance of principal-agent relationship.

C. While franchise agreements provide benefits which are not the subject of this discussion, those agreements also create an APPEARANCE which results in the franchisor being named as parties to actions involving claims for damages against the franchisee stemming from operation, management and control of subject property and/or business.

II. FRANCHISE AGREEMENTS

A. General Review. The franchisee Agreement is one of the first documents reviewed when there is litigation between the franchisee and the franchisor, but also if the franchisor is brought into a lawsuit in a case involving the franchisee. The terms of the agreement regarding the independent status of the franchisee, the lack of control over the day to day operations of the franchise and the insurance and indemnity obligations are important clauses in analyzing the ability to obtain the dismissal of the franchisor or whether there is any potential for the franchisor to be held in the case. Accordingly, the franchise agreement sets the road map for the analysis of the franchisor's ability to be dismissed from an action or to defend itself against claims raised that it is responsible for the acts of the franchisee.

B. *Forum Selection Clauses*

1. Split of Authority. Some jurisdictions have concluded that fourm selection clauses within franchise agreements are enforceable "unless it is unfair or unreasonable". (*ABC Mobile Systems, Inc. v. Harvey*, 701 P.2d 137, 139 (Colo. Ct. App. 1985); *Moseley v. Electronic Realty Assocs., L.P.*, 730 So. 2d 227, 228 (Ala. Civ. App. 1998); .*Pepe v. GNC Franchising, Inc.*, 46 Conn. Supp. 296, 299 (Conn. Super. Ct. 2000); and *DVDPlay, Inc. v. DVD 123 LLC*, 930 So. 2d 816, 818 (Fla. Dist. Ct. App. 3d Dist. 2006).) While others have concluded that such clauses are void as against public policy. "A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or

relating to a franchise agreement involving a franchise business operating within this state." (California *Business & Professions Code* § 20040.5; *1-800-Got Junk? LLC v. Superior Court*, 189 Cal.App.4th 500, 506 (2010); *Roxbury v. Gulf Stream Coach, Inc.*, 2010 N.J. Super. Unpub. LEXIS 2290 (Law Div. Feb. 5, 2010); and *Szymczyk v. Signs Now Corp.,* 168 N.C. App. 182, 186 (N.C. Ct. App. 2005)

C. *Choice of Law*

1. The majority of jurisdictions have concluded that "it is reasonable for a franchisor to designate a single state's law to apply to all of its franchise agreements." (See, e.g., *1-800-Got Junk? LLC v. Superior Court*, 189 Cal.App.4th 500, 514 (2010); *Capital National Bank of New York v. McDonald's Corp.* 625 F.Supp. 874, 880 (S.D.N.Y. 1986); *Carlock v. Pillsbury Co.* 719 F.Supp. 791, 808 (D.Minn. 1989); *Sullivan v. Savin Business Machines Corp.* 560 F.Supp. 938, 940 (N.D.Ind.1983).)

2. It is important to note, however, that some states may still refuse to enforce the choice of law provision where the chosen law is contrary to a fundamental policy of the forum state and the forum state has a materially greater interest in the determination of the particular issue.' . . ." (See, *1-800-Got Junk? LLC v. Superior Court*, 189 Cal.App.4th 500, 515 (2010).)

III. FRANCHISOR'S VICARIOUS LIABILITY TO THIRD PARTIES

As has been explained in past sessions, a franchisor may be vicariously liable for the acts or omissions of its franchisee where it is found that agency relationship, rather than or in addition to a franchise relationship, exists. In making that determination, the courts look to see whether an actual agency exists upon the facts presented. Alternatively, an agency relationship can be deemed to exist on the basis of the doctrine of ostensible agency. The discussion below contains a summary of recent decisions from various jurisdictions addressing the facts courts consider in determining whether an agency relationship exists.

A. Actual Agency

In determining whether an "actual agency" exists, the courts examine the degree of control exerted by the franchisor over the franchisee's day-to-day operations.

1. In *Cumpston v. McShane*, 2009 Del. Super. LEXIS 202 (Del. Super. Ct. June 4, 2009), Plaintiffs were injured when a motor vehicle driven by Defendant *McShane* struck the motorcycle upon which they were riding. At that time of the accident, Defendant *McShane* was acting within the scope of his employment as a food delivery driver for C.U.D., Inc. ("franchisee"), which owned and operated a Cluck-U Chicken franchise in New Castle County, Delaware. The franchisor was Cluck - U Chicken, which moved for summary judgment in the action.

   In denying the motion, the court concluded that a triable issue of material fact existed as to whether the franchisor retained sufficient control over operation of the business by the franchisee. In reaching that conclusion, the court focused upon the terms of

the subject franchise agreement. The subject agreement contained specific guidelines for each franchise's trade dress, trade marks, marketing, sanitation, inspections, record-keeping, food purchasing and preparation standards, among a host of other regulations concerning day-to-day operations of the franchise. In so doing, the franchisor effectively micro-managed, or retained the right to, their franchisees by requiring them to operate within the strict confines of their respective franchise agreements and operations manuals. The degree and extent of the guidelines within the agreement was evidence of sufficient control to defeat a motion for summary judgment.

2. In *Madison v. Hollywood Subs, Inc.*, 997 So. 2d 1270 (Fla. Dist. Ct. App. 4th Dist. 2009), the court of appeal affirmed the trial court's dismissal of plaintiff's complaint as to Miami Subs, a franchisor. In that case, appellant's decedent was shot and killed as a result of an altercation which occurred while the vehicle in which he was a passenger was in the drive-through lane at a Miami Subs restaurant owned by a franchisee. In its lawsuit against the franchisor and franchisee, plaintiff attached the applicable franchise agreement.

Plaintiff contended that the subject agreement was sufficiently explicit to demonstrate that Miami Subs retained sufficient control over operation of the business to establish actual or ostensible agency, and thus liability as to Miami Subs. The court rejected plaintiff's argument, noting that "the only control provided

by the agreement was to insure uniformity in the standardization of products and services offered by the restaurant." Such control was **insufficient** to establish that the franchisor exercised control over "the day to day operations" of the business, which were within the sole control of the franchisee.

3. In *Summit Auto. Group, LLC v. Clark Kia Motors Ame., Inc.*, 298 Ga. App. 875, 882 (Ga. Ct. App. 2009), the court rejected appellees' argument that *Kia Motors* could be deemed to have engaged in a conspiracy based upon its franchisor/franchisee relationship with Southern Georgia in general. After noting that a franchisor does not become liable for the acts of its franchisee merely because of the existence of a franchise relationship, the court noted that a plaintiff must show, in part, that the franchisee is not a franchisee at all, but rather an agent or alter ego of the franchisor.

In that case, the court concluded that "the test to determine whether an agency relationship exists is whether the contract gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract.". . ." The court was quick, however, to also note that a franchisor **is permitted** to exercise sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time forgoing such a degree of control that would make it vicariously liable for the acts of the franchisee.

The court then turned to an examination of the agreement itself to first determine the extent of control reserved by the franchisor therein. Significantly, in *Summit Auto Group*, the franchise agreement expressly provided that neither *Kia Motors* nor Southern Georgia was to serve as the agent or legal representative of the other party for any purpose and did not grant either party authority to assume or create any obligation on behalf of the other. In addition, the evidence demonstrated that neither of the parties acted contrary to those provisions and that *Kia Motors* in fact never controlled the time, manner, and method of Southern Georgia's daily operations. Thus, while the franchise agreement set forth general standards to maintain the franchise and provided for evaluations to ensure compliance, the court determined that merely "reserving the right to inspect or evaluate a franchisee's compliance with the franchisor's standards and having the right to terminate the franchise for noncompliance is not the equivalent of retaining day-to-day supervisory control of the franchisee's business operations as a matter of law.". . . Moreover, there was no evidence that *Kia Motors* had control over Southern Georgia's financial expenditures or was involved in the trading in of used vehicles. Under those circumstances, it could not be demonstrated that Kia Motors can be held vicariously liable for the alleged torts of Southern Georgia and its employees.

4. In *Lawson v. Schmitt Boulder Hill, Inc.*, 398 Ill. App. 3d 127, 128-129 (Ill. App. Ct. 2d Dist. 2010), Plaintiff filed a two-count complaint against defendants, *Schmitt Boulder Hill, Inc.* (*Schmitt*) and McDonald's Corporation (McDonald's). Plaintiff alleged that on December 18, 2005, she was a part-time employee at a restaurant owned by *Schmitt* and operated under a franchise agreement with McDonald's. She further alleged that just before 6 a.m. on that date she parked her car in the side area of the restaurant's parking lot. Before she was able to enter the restaurant she was robbed, abducted, and assaulted. She alleged that the attack and her resultant injuries were proximately caused by defendants' negligence.

McDonald's motion to dismiss on the ground that it owed no duty to Plaintiff as the franchisor was granted by the trial court. On appeal, the court of appeal reversed the dismissal of the claim against McDonald's. In reversing the dismissal, the court noted that the complaint specifically alleged that McDonald's "franchises its name, trademark, procedures and discipline on *Schmitt*," that McDonald's has "published standards for franchises in the areas of lighting of the parking lots and procedures and discipline for security of employees and patrons of *Schmitt*'s restaurants," and that McDonald's "monitors and enforces compliance with said standards by dispatching McDonald's security persons to *Schimdt* on a regular basis during the year to confirm compliance with

McDonald's said standards." Those allegations stated that "McDonald's mandated compliance with security procedures".

The court then noted that, under Illinois law, where a franchisor maintains mandatory security procedures the franchisor has voluntarily undertaken a duty of care toward a franchisee's employees and perhaps others. Consequently, the court determined that the allegations were sufficient to allege a claim against McDonald's.

5. In *Rainey v. Langen*, 2010 ME 56 (Me. 2010), a motorcyclist and his spouse filed suit against a franchisor, a franchisee, and a franchisee employee, for injuries the motorcyclist sustained in an accident with the employee, a pizza deliveryman. The trial court granted partial summary judgment to the franchisor on the motorcyclist's claims for vicarious liability and negligence. The motorcyclist appealed the judgment with respect to the vicarious liability claim.

On appeal, the motorcyclist referred to particular sections of the "Manager's Reference Guide" issued by the franchisor in support of the vicarious liability claim. The court, however, rejected that the requirements and standards contained therein were sufficient to impose vicarious liability upon the franchisor. The Guide materials noted, in part, that those sections were for informational purposes only and not requirements.

In addition, while the requirements and standards imposed by the franchisor in the Franchise Agreement and Reference Guide

were numerous, the controls therein fell short of reserving control over the performance of the franchisee's day-to-day operations. The court of appeal also expressly noted that **the franchisee**: (1) determined the wages it paid its employees; (2) determined the scheduling of its employees; and (3) made all day-to-day decisions concerning hiring, firing, training, supervising, and disciplining its employees.

As a result, it concluded that the quality, marketing, and operational standards did not establish the supervisory control or right of control necessary to impose vicarious liability on the franchisor.

6. In *Jamison v. Morris*, 385 S.C. 215 (S.C. 2009), plaintiffs, an accident victim and his mother, brought suit against defendants; a gas station franchisor, its franchisee, and a jobber. After trial, the jury returned a verdict against all three for $30,000,000.00 in damages, finding the franchisor and jobber vicariously liable for the franchisee's negligence. The verdict was subsequently reduced to $27,000,000.00 as a result of comparative negligence. All three defendants appealed.

In the underlying accident, the victim suffered serious injuries rendering him a quadriplegic when he was involved in a one-car accident while he was a passenger in a car driven by his 19-year-old cousin, who was killed. The cousin was allegedly intoxicated at the time of the accident as the result of drinking beer purchased illegally from the franchisee.

On appeal, the court held that the franchisor's requirements that employees be neat, clean, and courteous, without visible tattoos, and that certain signage and displays be used, did not support a finding that the franchisor or the jobber exercised control over the sale of food, beverages, or general merchandise by the franchisee. Moreover, the court noted that the franchisor did not require the sale of alcoholic beverages or exercise any control over the franchisee's decision to hire or fire employees. Therefore, the court of appeal concluded that the trial court erred in submitting the issue of the franchisor's and the jobber's vicarious liability to the jury.

The court of appeal reversed the jury's verdict. The court held that the franchisor and the jobber were entitled to a directed verdict, and that the franchisee was entitled to a new trial.

7. The court in *Viado v. Domino's Pizza, LLC*, 230 Ore. App. 531 (Or. Ct. App. 2009) concluded that it was not only whether the franchisor controlled any aspect of the operation of the business of its franchisee, but more specifically whether the franchisor controlled the particular aspect of the business operation which caused injury that was crucial to the determination of the existence of an agency relationship for purposes of imposing vicarious liability upon it.

In that case, plaintiff was injured in an automobile accident involving a pizza delivery person who was employed by the franchisee of *Domino's Pizza*. In finding for *Domino's Pizza*, the

court first focused upon the franchise agreement to determine whether *Domino*'s was vicariously liable to plaintiff.

The court noted that, under the franchise agreement, *Domino*'s retained the ability to modify the operating procedures from time to time, and those modifications constituted part of the franchise agreement as though they had been set forth in that agreement. *Domino*'s also retained "the right at any time during business hours and without prior notice to conduct reasonable inspections of the Store, its operations, and its business records[.]" In the event that Zzeeks failed to comply with "any specification, standard or operating procedure or rule prescribed by [*Domino*'s] which relates to the use of any Mark, safety and security, or the quality of pizza or other authorized food products or any beverage sold by [Zzeeks,]" Domino's had the right to terminate the agreement, provided that Zzeeks did not cure the failure within seven days after delivery of the notice of the failure.

The court concluded on the record before it that a reasonable juror could conclude that the rules and operating procedures went beyond the stage of setting standards, and that *Domino*'s retained sufficient control over certain day-to-day operations of Zzeeks, its franchisee, to establish an agency relationship. That conclusion, however, did not end the court's analysis.

Even though the court concluded as such, the court then turned to the question of what type of agency relationship. The

court noted that, under Oregon law; hence, a franchisor is vicariously liable only where the franchisor controlled the specific instrumentality or method that caused the plaintiff's injury.

After reviewing the "controls" reserved by *Domino*'s with regard to deliveries, the court concluded that none of them gives *Domino*'s the right to control the physical details of the manner of driving. The franchise agreement specifically provided that Zzeeks, not *Domino*'s, is responsible for supervising the conduct of Zzeeks's employees. The fact that *Domino*'s set age or other hiring limits on drivers was a separate issue from the physical details of driving; plaintiff alleged that he was injured because of Mathias's driving, not because of any negligence regarding Zzeeks's hiring process. Similarly, the fact that *Domino*'s required its franchisee's delivery drivers to undergo driving training does not establish control over the physical details of driving, once that training is complete. Again, plaintiff did not contend that Mathias's participation in a training program (or inadequate training program) was the conduct that injured plaintiff. Rather, plaintiff's theory was that *Domino*'s was vicariously liable for Mathias's negligent driving, and plaintiff's evidence must establish more than the fact that *Domino*'s set hiring and training standards for delivery drivers or standards for delivery vehicles.

After reviewing the facts and evidence, then, the court concluded that the franchise agreement specifically provided that the franchisee controlled the day-to-day performance of its delivery

drivers, and that *Domino*'s had no right to control the conduct of those drivers. Furthermore, the fact that *Domino*'s had the ability to protect its interests under the franchise agreement by terminating or suspending the franchisee's operations for violations of driving-related standards does not undermine that unambiguous allocation of control in the franchise agreement. Because the evidence established that the franchisee – and not *Domino*'s – had the right to control the physical details of the manner of performance of Mathias's driving, summary judgment was affirmed in favor of *Domino*'s.

B. Apparent Agency

The courts find apparent agency when it is established that the guest, patron or customer **reasonably believes** that he or she is being served by that particular franchisor and relies on the representation to his or her detriment.

1. "Reasonable Belief" By Customer or Guest

a. In *Simons v Starwood Hotels & Resorts Worldwide, Inc.*, 2009 NY Slip Op 32179U, 2-3 (N.Y. Sup. Ct. Sept. 8, 2009), plaintiff was staying at the Westin, attending a conference. As he was exiting the front entrance of the hotel, he slipped and fell on the hotel's front steps. Plaintiff filed a complaint against various entities, including Defendant *Starwood Hotels & Resorts Worldwide, Inc.*, the franchisor with regard to the subject property.

Starwood moved for summary judgment, arguing that it did not own or operate the Westin, and that it did not

control Ciga as its franchisor and, thus, that it is not vicariously liable for the acts of Ciga. In opposition, plaintiff argued that triable issues of fact exist as to whether *Starwood* held itself out as Ciga's agent.

In ruling upon the matter, the court noted that "[t]he mere existence of a franchise agreement is insufficient to impose vicarious liability on the franchisor for the acts of its franchisee." Thus, a plaintiff must come forward with evidence demonstrating that the franchisor exercised control over the day-to-day operations of its franchisee. According to the court, the evidence was sufficient to demonstrate that *Starwood* did not own, operate, or manage the hotel. Moreover, it demonstrates that *Starwood* did not exert complete control over the daily operations of the hotel so as to hold it liable as Ciga's franchisor. Thus, it concluded that *Starwood* made a prima facie showing that as Ciga's indirect owner, it is not liable to plaintiff for Ciga's alleged negligence.

The court went on to conclude, though, that plaintiff had raised a trial issue of fact as to whether *Starwood* held itself out as the owner or operator of the hotel. In reaching that conclusion, the court pointed to evidence which included (1) *Starwood*'s website stated that it owned the Westin; (2) that the Westin's website had *Starwood*'s banner at the bottom; and (3) that, prior to the conference, plaintiff

referred to a *Starwood* directory that listed the Westin as a *Starwood* hotel. That evidence raises a triable issue of fact as to whether the nature and content of these advertisements and web listings constituted a "holding out to the public of *Starwood*'s ownership of the hotel" that would estop *Starwood* from disclaiming responsibility for Ciga's negligence.

IV. INDEMNITY AND INSURANCE ISSUES

A. INDEMNITY IN GENERAL

1. "Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. . . . This obligation may be expressly provided for by contract . . ., it may be implied from a contract not specifically mentioning indemnity . . . , or it may arise from the equities of particular circumstances. . . ." (See, *Rossmoor Sanitation, Inc. v. Pylon, Inc.*13 Cal. 3d 622, 628, 119 Cal.Rptr. 449, 532 P.2d 97 (1975).)

B. EXPRESS INDEMNITY WITH THIRD PARTY VENDORS

1. The question whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. (*Crawford v. Weather Shield Manufacturing, Inc.*, 44 Cal.4th 541, 79 Cal.Rptr. 3d 721, 187 P.3d 424 (2008) and *Rossmoor Sanitation v. Pylon* 13 Cal. 3d 622, 119 Cal.Rptr. 449, 532 P.2d 97 (1975).)

2. When the Parties Knowingly Bargain for the Protection at Issue, the Protection Should Be Afforded. (*Crawford v. Weather Shield Manufacturing, Inc.*, 44 Cal.4th 541, 79 Cal.Rptr. 3d 721, 187 P.3d 424 (2008) and *Rossmoor Sanitation v. Pylon* 13 Cal. 3d 622, 119 Cal.Rptr. 449, 532 P.2d 97 (1975).)

3. Where the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity. (*Rossmoor Sanitation v. Pylon* 13 Cal. 3d 622, 628, 119 Cal.Rptr. 449, 532 P.2d 97 (1975).)

4. This Requires an Inquiry into the Circumstances of the Damage or Injury and the Language of the Contract; of Necessity, Each Case Will Turn on its Own Facts.

5. Indemnity Provisions Are Strictly Construed Against the Indemnitee.

6. Specific, unequivocal language must be employed to trigger indemnity obligation without regard to third party vendor's negligence. (*Crawford v. Weather Shield Manufacturing, Inc.*, 44 Cal.4th 541, 79 Cal.Rptr. 3d 721, 187 P.3d 424 (2008) and *Heppler v. J.M. Peters Co.* 73 Cal.App.4th 1265, 1278, 87 Cal.Rptr.2d 497 (1999).

7. The specificity of the language used is a key factor in construction of an indemnity agreement. (*Crawford v. Weather Shield Manufacturing, Inc.*, 44 Cal.4th 541, 79 Cal.Rptr. 3d 721, 187 P.3d

424 (2008) and *Heppler v. J.M. Peters Co.*, 73 Cal.App.4th 1265, 1278, 87 Cal.Rptr.2d 497 (1999).)

8. To obtain greater indemnity, more specific language must be used. (*Heppler v. J.M. Peters Co.* 73 Cal.App.4th 1265, 1278, 87 Cal.Rptr.2d 497 (1999).)

C. **EQUITABLE OR IMPLIED INDEMNITY FROM THIRD PARTY**

1. **Equitable Indemnity** - The right of what may be termed equitable indemnity enures to a person who, without active fault on his part, has been compelled by reason of some legal obligation to pay damages occasioned by the initial and active negligence of another. This involves the equitable considerations of primary and secondary liability, or, to put it differently, concepts of active and passive conduct. (See, *United Services Automobile Association v. Alaska Insurance Co.*, 94 Cal.App.4th 638, 644-645, 114 Cal.Rptr.2d 449 (2001) and *San Francisco Examiner Div., Hearst Publishing Co. v. Sweat*, 248 Cal.App.2d 493, 497, 56 Cal. Rptr. 711 (1967).)

2. **Implied contractual indemnity** - Equitable principles may also be used to impose duty to indemnify in reliance upon contractual language even though said language does not specifically deal with indemnification. (See, *Prince v. Pacific Gas & Electric Co.*, 45 Cal. 4th 1151, 1164, 90 Cal. Rptr. 3d 732, 202 P.3d 1115 (2009).)

3. **Tort of another, tender of defense and attorney's fees:** Pursuant to California *Code of Civil Procedure* §1021.6, a defendant who serves notice to another to assume the defendant's defense because of the tort that the third party committed that has exposed the defendant to expenses incurred in defending itself may apply to the court for reimbursement of its attorney's fees and costs incurred if the defendant prevails on its defense of the underlying case and its cross-complaint against the third party for implied indemnity. To invoke the attorney's fees demand, the defendant must serve notice on the third party that it should assume the defendant's defense.

4. **Payment of defense costs incurred in express or implied indemnity cross-complaints brought in bad faith:** California *Code of Civil Procedure* §1038, et seq., allows a defendant or cross-defendant to ask the court to determine if the complaint or cross-complaint was brought in bad faith and whether or not the facts and law warranted filing such a complaint or cross-complaint. If the court determines there was no substantial justification, the defendant or cross-defendant can, if they file a Motion for Summary Judgment or Motion for Judgment or Direct Verdict request the reimbursement of its defense fees and costs in defending itself in the action in exchange for not filing a malicious prosecution cause of action.

D. **ADDITIONAL INSURED ENDORSEMENTS FROM THIRD PARTY VENDORS**

1. A certificate of insurance is merely evidence that a policy has been issued. (See, California *Insurance Code*, § 384.) It is not a contract between the insurer and the certificate holder. (See, 13A Appleman, Insurance Law and Practice, supra, § 7530 (1996-1997 pocket supp.) p. 20; *Empire Fire & Marine Insurance Co. v. Bell* 55 Cal.App.4th 1410, 1423, 64 Cal.Rptr.2d 749 (1997).)

V. CONCLUSION / QUESTIONS AND ANSWERS