

BROAD INDEMNITY LANGUAGE IN CONTRACT COVERS ALL LIABILITY, INCLUDING THAT SUBJECT TO A COVENANT NOT TO EXECUTE

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Flood Control District v. Paloma Inv. Ltd. Partnership
Ct. Appeals, Division One, May 31, 2012

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The Flood Control District undertook a flood control project in the floodplain of the Gila River from 91st Avenue to the Gillespie Dam. The project involved clearing sections of the river bed owned by the Gillespie Dam Owners. The Dam Owners granted the District a free easement over 26.8 acres of their land in exchange for the District's agreement to construct and maintain flood control measures and to indemnify the Dam Owners. The indemnity agreement said the District would indemnify the Dam Owners from "any and all liability" arising out of the District's use or occupancy of the easement, except for the Dam Owners' intentional acts or omissions.

In 1993, the Gila River flooded and the Gillespie Dam breached, causing extensive downstream flood damage to various farmers' homes. The farmers sued the Dam Owners and the District. The District filed a separate declaratory judgment action to establish that the indemnity clause did not apply to the farmers' claims against the Dam Owners. The Dam Owners counterclaimed seeking compensation pursuant to the indemnity clause. The cases were consolidated.

At trial, the jury found that the District did not cause the dam to fail, but that it was 10% at fault for the farmers' damage, and that the Dam Owners were 80% at fault. The Dam Owners and farmers executed a Damron/Morris agreement whereby the Dam Owners agreed to pay \$3.3 million to the farmers, consented to a \$14.75 million judgment, and permitted the farmers to join in the Dam Owners' indemnity action. The farmers agreed not to execute on the judgment against the Dam Owners beyond \$3.3 million. The court later held that the indemnity agreement obligated the District to indemnify the Dam Owners for \$14.75 million, the full amount of the stipulated judgment, despite a jury determination that the farmers' damage was only \$5.36 million.

The District appealed the court's determination of the scope of the indemnity agreement, and the validity of the notice of claim as to the Dam Owners' indemnity claim, which was served after judgment had been entered against the Dam Owners. The Dam Owners cross-appealed the award to them of expert fees pursuant to their Rule 68 offer of judgment, which excluded expert fees for "project management" and "expert coordination" tasks, as opposed to time spent preparing to testify, and testifying.

The court of appeals held that (1) where a contract to indemnify against "all liability" is clear and unambiguous, it covers all liability, including liability subject to a covenant not to execute; (2) the Dam Owners' notice of claim regarding indemnity was proper because it was served within 180 days of the judgment rendered against them; and (3) expert fees pursuant to an offer of judgment are appropriate only for fees that have a rational nexus to the presentation of evidence at trial