IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CENTURY INSURANCE CO., LTD,
Plaintiff-Appellant,

v.

TAC INTERNATIONAL CONSTRUCTORS, INC.,
Defendant-Appellee.

Supreme Court Appeal No. 03-027
Civil Action No. 02-421

OPINION

FOR PUBLICATION

Cite as: ***Century Ins. Co., Ltd. v. TAC Int'l Constructors, Inc.,*** **2006 MP 10**

Argued and submitted on August 18, 2004
Saipan, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; JESUS C. BORJA, *Justice Pro Tempore*; EDWARD MANIBUSAN, *Justice Pro Tempore*.[1]

DEMAPAN, Chief Justice:

I.

¶ 1 This is an appeal from an order and decision by the trial court granting a Motion to Dismiss pursuant to Rule 12(b)(6) and denying a subsequent Motion for Reconsideration. The trial court found that the claim presented by Century Insurance Company, Ltd. ("Century" or "Appellant") against TAC International Constructors, Inc. ("TAC" or "Appellee") was time barred, as the statute of limitations had expired. There are two issues in this case. First, whether the trial court erred in holding that when an indemnification contract covers both loss and liability, the covenants can not be separated so that the claim for indemnification against loss is not time barred.[2] Secondly, we are asked to determine whether the trial court erred in declining to hear Century's Motion for Reconsideration. For the reasons discussed below, the ruling of the lower court on the Motion to Dismiss is REVERSED and REMANDED.

II.

¶ 2 Appellant asserts facts which were not presented as evidence until after the original claim was dismissed by the trial court. Appellant included these new facts first in the pleading for the Motion for Reconsideration and then in this appeal. These facts will not be considered in this appeal. Therefore, only the facts asserted in the original filings are presented here.

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[1] The panel originally included Justice *Pro Tempore* Pedro M. Atalig. Unfortunately, Justice Atalig passed away while the appeal was under advisement. Therefore, Justice *Pro Tempore* Manibusan replaced Justice Atalig on the panel. Justice *Pro Tempore* Manibusan read all pleadings and documents related to the case and participated in discussion and conference with panel members. Audio recordings of the oral arguments were also available for Justice Manibusan.

[2] Appellant also asserted a claim of estoppel which was later withdrawn at oral arguments.

¶ 3 On July 20, 1994, TAC and Kwun Kee Co, Inc. ("Kwun Kee") entered into a contract wherein TAC agreed to construct a three-story commercial and residential building. On December 17, 1994, TAC executed two contracts with Century. The first was a performance Bond in which TAC guaranteed to perform and fulfill all of the undertakings, covenants, terms, conditions, and agreements of the construction contract. Century insured TAC's performance in favor of Kwun Kee in the amount of $380,000. The second contract was an Agreement of Indemnity wherein TAC agreed

> to indemnify and reimburse the Sureties (Century) from and against any and all loss, costs, damages, expenses, and attorney's fees, and any and all liability arising, resulting, sustained or incurred, or which can or may arise result from or be sustained or incurred by Surety (Century) by reason of having executed the (Performance) bond

¶ 4 In November 1995, a dispute arose over the quality of the construction. Kwun Kee declared a breach in January 1996. On March 26, 1996, a complaint against Century and TAC was filed by Andy K. Lee and Kwun Kee for breach of contract, negligence, intentional misrepresentation, equitable indemnity, declaratory relief, and violation of the CNMI Building Code.[3] During the original action, Century did not file its own answer nor did it file a cross-claim against TAC on grounds of indemnification.

¶ 5 On September 21, 1998, the trial court issued an Order for Partial Summary Judgment in the original action, wherein the court found that TAC was in breach of the construction contract and that Century was bound by its obligation on the bond to pay Kwun Kee the sum of the bond. On January 13, 2000, Century entered into a Release

[3] Because Century had insured the project with the Performance Bond, Century was named as a defendant in the original action. Century was requested to indemnify and reimburse Kwan Kee, but was not named in the other causes of action. *See Andy K. Lee and Kwun Kee Co, Inc. v. TAC Int'l Constructors, Inc., Antonio Lim, J.G. Sablan Constru. Co, and Century Ins. Co. Do. Ltd.*, Civ. No. 96-0349 (N.M.I. Super. Ct March 26, 1996).

and Settlement agreement with Andy K. Lee and Kwun Kee and paid the sum of $220,000 for Century's liability to those two parties under the performance bond. Century also paid $3000 to Kwun Kee for attorney's fees in the original action. The original action continued against TAC, until Kwun Kee and TAC settled on their own terms.

¶ 6 Two and a half years later, on July 17, 2002, Century filed this cause of action seeking reimbursement from TAC pursuant to the terms of the Agreement of Indemnification. Century sought damages in the principle amount of $223,000, prejudgment interest at 9% on the breach of the contract, for attorney's fees, and for costs and post-judgment interest. The trial court granted TAC's Motion to Dismiss this claim under Rule 12(b)(6) on July 22, 2003.[4]

III.

¶ 7 On August 5, 2003, Century filed a Motion to Reconsider the order dismissing the case. While waiting on that motion, Century also filed a "conditional" appeal with this Court on August 21, 2003. The Motion for Reconsideration was denied on procedural grounds on October 31, 2003. Century filed a second Notice of Appeal on November 21, 2003. In this notice, Century appeals the denial of the Motion for Reconsideration as well as sets forth an "unconditional" appeal of the dismissal. Having been fully disposed by the court below, this Court has jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution and 1 CMC § 3102(a).

[4] TAC moved to dismiss the claim pursuant to Rule 12(b)(6). The trial court order is entitled, "Order Granting Defendant's Summary Motion." This is probably just a clerical oversight as the final paragraph of the order does grant a motion to dismiss.

IV.

A. Original Cause of Action—Not Time Barred

¶ 8 The first issue before this Court concerns whether or not the statute of limitations exhausted prior to when Century initiated this cause of action. This issue encompasses two distinct sub-issues. First we must determine whether in an agreement which indemnifies against both loss and liability, there is only one cause of action or whether the covenants are separate. Next, we must determine when the statute of limitations begins to accrue on this type of agreement. These are questions of law, which we review *de novo*. *CNMI v. Bergonia*, 3 N.M.I. 22, 35 (1992); *Santos v. Santos*, 3 N.M.I. 39 (1992).

¶ 9 The applicable statute of limitations is 7 CMC § 2505, which reads, "All actions…shall be commenced within six years after the cause of action accrues." There is no dispute regarding the applicable statute of limitations. Rather, the question presented is on which day did the statute of limitations begin to run.

1. Indemnity Against Liability and Loss are Separate Covenants

¶ 10 The applicable contractual provision covers both loss and liability. Under the terms of the contract, TAC agreed

> to indemnify and reimburse the Sureties (Century) from and against any and all *loss*, costs, damages, expenses, and attorney's fees, and any and all *liability* arising, resulting, sustained or incurred, or which can or may arise result from or be sustained or incurred by Surety (Century) by reason of having executed the (Performance) bond (emphasis added)

From the plain language of the agreement, the covenants do seem to be separate and distinct. The loss and the liability clauses are clearly separate and distinct. Further, the Ninth Paragraph of the indemnity agreement between the parties states that "separate

suits may be brought hereunder as causes of action accrue, and the bringing of a suit or the recovery of judgment on any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereunder arising." Thus, the contract clearly indicates that the parties contemplated separate causes of action arising under this agreement. As the parties contemplated and agreed to separate causes of action, we turn now to whether the covenants are indeed separate and distinct, as the language of the contract indicates.

¶ 11 The law is well-settled regarding agreements which indemnify against loss and agreements which indemnify against liability. In this case, however, we are faced with a third breed of indemnity agreement—that which covers both loss and liability. Each party points to conflicting law. Appellant urges the Court to follow the rule of California, which is followed in *Globe Indem. Co. v. Larkin*, 145 P.2d 633 (1944). In this and other California cases, courts have treated the covenants as separate and have allowed a party to bring a cause of action on one or the other. Conversely, Appellee argues that this Court should follow Connecticut law, which purportedly states that the cause of action for both loss and liability accrues at the time of the breach of the underlying contract and are not to be separated. *Balboa Ins. Co. v. Zalenski*, 532 A.2x 973 (Conn. App. 1987). In its order, the trial court also cited a passage from the Connecticut Supreme Court and found that "under a contract to indemnify against liability as well as loss, the right of action accrues to the indemnitee immediately upon failure of the indemnitor to perform, whether or not the indemnitee has incurred actual damage or loss." *Century Ins. Co., Ltd., v. TAC Int'l Constructors, Inc.,* Civ. Action. No. 02-421 (Order Granting Defendant's Motion for Summary Judgment, p.4).

¶ 12 Surprisingly, few jurisdictions have dealt with this question. For this Court, it is also an issue of first impression. Thus, we shall consider how other courts have treated this issue before adopting a rule for the Commonwealth.

¶ 13 Appellee relies on *Balboa Ins. Co. v. Zalenski*, 532 A.2x 973 (Conn. App. 1987), for the proposition that the cause of action for both loss and liability accrues at the time of the breach of the underlying contract. We decline to follow the Balboa court's holding for several reasons. First, and most importantly, the Connecticut Legislature overruled *Balboa* by statute. *Republic Ins. Co. v. Di Nardo Auto Sales*, 678 A.2d 516, 519 (Conn. 1995).[5] Further, as the latter case noted, Balboa did not reflect "settled" law in the state at the time it was decided. Id. Secondly, the reasoning of Balboa is flawed. The court relied upon a Mississippi case where the issue was not the statute of limitations. Instead, the question presented was whether the indemnittee's suit against the indemnitor was premature where the indemnification agreement permitted a suit based upon both liability and loss. The Mississippi court held that the contract between the parties permitted the indemnitee to bring suit when liability occurred irrespective of loss. *Dickson v. United States Fidelity & Guar. Co*., 117 So. 245, 247-48 (Miss. 1928).

¶ 14 For similar reasons, we also decline to adopt the reasoning of the trial court. The trial court quoted language from *Amoco Oil. Co. v. Liberty Auto & Elec. Co*., 810 A.2d 259, 264 (Conn. 2002):

> [w]hen an agreement indemnifies against both loss and liability, we have concluded that the statute of limitations begins to run as soon as liability is incurred. It is logical that the action accrues when liability is incurred because if loss is the payment that discharges the liability, loss will always

[5] The courts of Connecticut are now bound by legislation which holds than "[a]n action for indemnification may be brought within three years from the date of the determination of the action against the party which is seeking indemnification by either judgment or settlement." *Republic Ins. Co. v. Di Nardo Auto Sales*, 678 A.2d 516, 521 (Conn. 1995).

> follow liability. Thus, the first moment in time when an indemnitee can successfully maintain an action to enforce the terms of the agreement that indemnifies against both loss and liability is when liability is incurred.

We first note that this passage is not the rule of the case. In *Amoco*, the court found that instead of an action for indemnification, the parties are really bringing a general contract action because no third parties were involved. *Id*. at 263. The court discussed indemnity in great detail in order to illustrate why it was a general contract case rather than indemnity. *Id*. Therefore, the paragraph quoted above is dicta, rather than the ruling of the case. Accordingly, while the trial court concluded that the "statute of limitations begins to run once liability is incurred," this rule of law belongs within the realm of contracts in general, not indemnity contracts.

¶ 15 Secondly, the passage quoted above does not necessarily mean that covenants which indemnify against loss and liability must be treated as one. This is the same type of flawed reasoning relied upon in *Balboa*. The passage in *Amoco* states that the first moment in time that a party under this mixed type of agreement can successfully maintain an action is when liability incurs. To say "first moment in time" suggests that there would also be a second moment in time. That second moment in time is when loss actually occurs. Indeed, in the *Amoco* opinion itself, the court finds that the statute of limitations starts at different times for loss and liability, noting that this distinction between indemnity against loss and that of liability has been understood for over 140 years. *Id*. at 264. The quoted language is permissive and concerns ripeness of the cause of action. It does not bar the cause of action, nor does it mean that the covenants are not separate.

¶ 16 We support the proposition that where indemnity agreement indemnifies against liability as well as against loss, indemnitee does not have to wait until loss occurs, but may sue on the agreement as soon as liability is incurred. *See, e.g. 24 Leggett Street Ltd. Partnership v. Beacon Industries, Inc*. 685 A.2d 305 (Conn. 1996). This holding is consistent with the interpretation of the above-stated rule; namely, the indemnitee has a claim for the liability and may so move before the loss is actually incurred. This does not mean, however, that the indemnitee *must* file suit at the time the liability is incurred. It simply means that the party does not need to wait until the loss occurs—it may file immediately when the liability incurs. It is also consistent with the ruling that the covenants are separate and the cause of action for the liability claim may be asserted even though the loss has not yet occurred. This is a subtle distinction, but one that should be considered clearly by this Court for the case at bar.

¶ 17 The final authority upon which Appellee relies for the proposition that the covenants should not be treated as separate is *Superintendent of Ins. of State of N.Y. v. Livestock Market Ins*., 709 S.W.2d 897 (Mo. App. 1986). We disagree with Appellee's interpretation of this case. In Superintendent, the court stated

> Indemnity contracts are of two kinds: indemnity against loss and indemnity against liability. In either case, the right of action accrues when the covenant is breached. In the case of an indemnity against loss, the covenant is breached and the cause of action accrues when the indemnitee sustains an actual loss. In the case of an indemnity against liability, the covenant is breached, and the indemnitee becomes entitled to sue, as soon as the indemnitee incurs liability, and actual loss need not be shown to recover. There are also indemnity contracts which intermix the two covenants. 41 Am.Jur.2d *indemnity* § 29 (1968); *Globe Indemnity Co. v. Larkin,* 62 Cal.App.2d 891, 145 P.2d 633, 634 [1] (1944); *Levin v. Friedman,* 271 Md. 438, 317 A.2d 831, 834[4] (1974). The indemnity LMIA covenants to Associated Surety--against *all liability and loss cost*--is of that ilk. (some internal citations omitted).

Id. at 903. In a footnote, the court notes that the law is not settled on how to treat agreements which intermix the two covenants and concludes that "[w]hether the …promise of indemnity…be against liability, loss, or a glomeration of both, *is of no consequence here*, since, as our discussion presently shows, *both* the liability…and actual loss…accrued…more than five years before…Liquidator brought suit." (emphasis added and emphasis in original). *Id*. at n. 6. Thus, the court does not rule on the present issue before this Court.

¶ 18 We now look to the authority relied upon by the Appellant which holds that the covenants may be separated. Appellant cites *Globe Indemnity v. Larkin, 145 P.2d 633* (Ca. App. 1944). In that case, the action was brought four years after the liability had accrued and sued based upon the covenant to indemnity against loss rather than the covenant to indemnify against liability. The appellate court relied upon the California Supreme Court ruling in *Oaks v. Scheifferly*, 16 P.252 (Cal. 1887) and found that the covenants are to be treated as distinct. *Id*. at 634. This rule was again upheld in *United States Credit Bureau, Inc. v. Claus*, 179 P.2d 36 (Cal. App. 1947). In that case, the California appellate court again found two separate "covenants" based on the language in the indemnity agreement and held that those covenants may be treated at separate agreements. *Id*. at 37. The plaintiff was thus allowed to recover the actual loss even though the time had expired for an action to recover on the covenant to indemnify for liability. *Id*. Thus, California is the only jurisdiction in which we find well-settled law on this issue.

¶ 19 Most recently, a New Jersey appellate court was also faced with this issue as a matter of first impression. In *First Indem. of America Ins. Co v. Kemenash*, the appellate court considered, as we do, the law of Connecticut and California. 744 A.2d 691 (N.J. Super. App. 2000). The court also declined to follow the *Balboa* case, for reasons similar to ours. *Id*. at 698. The court adopts the approach cited by our Appellant, because California law is the only law well-settled on this issue and "[t]he California approach resolved the statute of limitations issue based on sound, fair principles of law. Most importantly, it fulfills the expectation of the parties under the clear terms of the agreement and affords the surety the benefit of its bargain." *Id*.

¶ 20 We therefore find that in an agreement that indemnifies against both loss and liability, the covenants are separate and distinct. While a party may initiate a cause of action once the liability incurs, they are not required to do so. A cause of action may be filed based upon indemnity against liability, loss, or both. The statute of limitation accrues to each covenant separately.

2. Accrual of Statute of Limitations

¶ 21 We now determine when the statute of limitations began on the indemnity agreement before us. The statute of limitations begins to run from the time the cause of action accrues. *Levin v. Friedman*, 317 A.2d 831, 834 (Md. 1974). *See also, Indemnity Insurance Co. of North America*, 42 N.Y.S.2d 633 (N.Y. Sup. 1943); *24 Leggeett Street Ltd. Partnership v. Beacon Industries*, Inc., 685 A.2d 305 (Conn. 1996).

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[6] Century misunderstood a statement by the trial court to mean that this is the minority rule. It is true that the court said that the general rule does not apply. The full sentence is, "The agreement for indemnification does in fact cover both liability and loss and, therefore, the general rule does not apply." ER at 57. The court is distinguishing a general rule for indemnity pertaining to loss and a rule covering indemnity pertaining to liability. Thus, the general rule Century speaks of pertains to indemnification for either loss or liability which is indeed inapplicable, as this agreement covers both loss and liability. We do note, however, that California may not follow this rule we now adopt. In *Globe Indemnity Co. v. Larkin*, 145 P.2d 633 (Cal 1944), the court held that the party could move forward on the covenant indemnifying the loss, even if the statute of limitations regarding liability had extinguished.

¶ 22 In the pleadings presented to this Court, Appellant asks for relief based upon the covenant against loss only. Therefore, we focus on when the cause of action accrues based upon the indemnification against loss only. A cause of action on an agreement indemnifying against loss does not arise until the indemnitee has actually incurred loss. *McDermott v. City of New York,*. 406 N.E.2d 460 (1980); *Appalachian Corp. v. Brooklyn Cooperage Co., 91 So. 539* (La. 1922); *Globe Indemn. Co. v. Larkin*, 145 P.2d 633 (Cal. App. 1944). In the Commonwealth, we also look to the restatements of law approved by the American Law Institute to determine the rules of the common law. *See*, 7 CMC § 3401. RESTATEMENT (THIRD) OF SURETY AND GUARANTY § 62 (1996) states:

> A secondary obligor's cause of action against a principal obligor to enforce the principal obligor's duty to reimburse or the secondary obligor's right of restitution accrues at the later of:
>
> (a) the date of performance of the underlying obligation; and
>
> (b) the date of the secondary obligor's performance of the secondary obligation

In this case, the cause of action accrued when the settlement was paid, which was the performance of the underlying obligation. Appellant performed the obligation and incurred a loss when it paid out the settlement on January 13, 2000. Having initiated the current action in 2002, this cause of action is also well within the applicable statute of limitations of six years. Therefore, it is not time-barred.

B. Motion for Reconsideration

¶ 23 The final issue before this Court is the trial court's denial of the Motion for Reconsideration. Because we reverse the ruling of the trial court on the grounds discussed above, we do not consider this issue.

V.

¶ 24 Agreements which indemnify against both liability and loss consist of two separate covenants. The statute of limitations runs at different times for each covenant. In this case, the Appellant's cause of action was initiated within the statute of limitations for indemnification against the loss, as it did not start until that loss was incurred through the payment of the settlement. Therefore, the ruling of the trial court is REVERSED and REMANDED.

¶ 25 Signed this 13th of April 2006.

/s/_____

MIGUEL S. DEMAPAN
Chief Justice

/s/_____
JESUS C. BORJA
Justice *Pro Tempore*

/s/_____
EDWARD MANIBUSAN
Justice *Pro Tempore*