LGC
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LGC Hosts Local Interns From SD Met

Danny Gastelum

LGC's strong tradition of giving back to the community continues with its current interns Danny Gastelum and Mateo Hurtado. Both are students at San Diego Metropolitan Regional Career and Technical High School ("The Met"), an alternative high school located on the campus of Mesa College in San Diego, CA. Danny, a senior who expects to attend either San Jose State or Sacramento State in the fall, has an interest in becoming a criminal attorney and relished the opportunity to work in the legal field. Danny enjoys spending his free time at the gym or playing football and basketball with his friends.

LGC's other intern from the Met, Mateo, hopes to pursue a career in the arts or graphic design, and is working on LGC's website. In his free time, Mateo enjoys sketching, designing logos for his brother's baseball team, reading, and is an active member of Action Impact Missions. Both interns hope to use their internship to gain valuable experience, and LGC is happy to make their experiences positive ones.

Medical Expense Recovery: The Amount Billed or the Amount Paid?

Randy Gustafson, Partner

Assume the following: plaintiff seeks recovery of $60,000 in gross medical bills for diagnosis and treatment of a knee injury. Provider agreements between plaintiff's health insurer and health care providers reduce the gross charges to $20,000 which the insurer has paid in full. The defendant asserts the $20,000 paid is the reasonable value of medical services incurred, while the plaintiff asserts admission of the $20,000 paid by an insurer violates the collateral source rule. Who's right?

A 1988 California appellate opinion has, until recently, been successfully used by California defendants to admit evidence of the amount paid as the measure of reasonable medical expense. (*Hanif v. Housing Authority of Yolo County* (1988) 246 Cal. Rptr. 192). A 2009 California appellate opinion in a different district disagreed and ruled that evidence of the amount paid by insurance is a collateral source benefit and therefore inadmissible (*Howell v. Hamilton Meats Provisions* (2009) 179 Cal. App. 686). The California Supreme Court recently accepted the matter for review, but will not rule for at least a year.

The collateral source rule, as developed through case law, prohibits evidence that that the plaintiff's damages have been reduced by insurance. In regard to insured medical expenses, defendants are not arguing to exclude evidence of the amount paid (which is likely subject to lien by the medical insurer) and thus are not seeking a reduction of true compensatory damages. Instead, defendants are asserting that recovery of "list price" charges that were never owed and will never be paid is a windfall which encourages litigation by inflating special damages which in turn influences the jury award of general damages. A liability case with $20,000 in admitted medical specials may lead to a total award under $60,000, while a case with $60,000 in admitted medical specials never will. Plaintiffs complain that evidence of the paid amount allows a windfall to the defendant where the plaintiff took the responsible step of maintaining insurance. The lines are drawn, with interest groups on both sides of the issue expected to file briefs. *(cont. on p. 3)*

CA Court Holds Witness Interviews Are Not Privileged Work Product

A California appellate court recently held that recorded or written witness statements taken by attorneys are not privileged work product. Overruling *Nacht & Lewis Architects v. Superior Court* (1996) 47 Cal.App.4th 214, the divided court in Fresno's 5th district held that the "weight of authority" holds that written and recorded statements taken by attorneys are not work product, but, rather, are "classic" evidentiary material.

Justice Betty Dawson, writing for the majority in *Coito v. Superior Court* (2010) 10 C.D.O.S. 2697, scathingly criticized the fourteen year-old *Nacht & Lewis* as "cursory," noting: "It contains no analysis to support [its] language and fails entirely to acknowledge the long line of contrary precedent." The majority noted that these statements can be admissible in court as prior inconsistent statements, prior consistent statements, or past recollections recorded, yet "if the statements are not subject to discovery, the party denied access to them will have no opportunity to prepare for their use."

The dissent had strong feelings for *Nacht & Lewis* as well, noting its "per se rule of absolute protection goes too far." The dissent felt that witness statements recorded by attorneys constitute "qualified" work product, which is undiscoverable unless a court determines that denial of the statement unfairly prejudices the party seeking it. The dissent also noted that the California Supreme Court has not weighed in on the issue and urged it to do so.

Whether the high court agrees to review the issue is uncertain, but if *Coito* is any indication, it would be well served to do so, given the majority and the dissent's dissatisfaction with the current law. Please contact Partner Teresa Beck with questions.

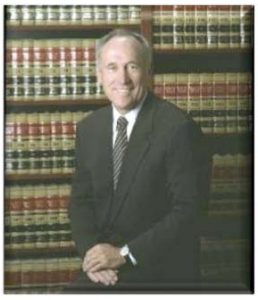
Nevada Requires HOAs Meet Class Action Elements to Have Standing to Sue For Defects

A recent Nevada district court opinion, which echoed a ruling by the Nevada Supreme Court, held that homeowners associations can sue on behalf of their homeowners for defects in the individual units, but only if the affected plaintiffs can be certified as a class. In *Dorrell Square Homeowners Ass'n v. D.R. Horton, Inc.* 2009 WL 3191401, the court expounded on the Nevada Supreme Court's recent ruling in *Court at Aliante v. D.R. Horton* 2009 WL 3191406, ultimately determining that the homeowners could not be certified as a class, thus eliminating the homeowner association's standing to bring suit.

The court noted the longstanding maxim that "each parcel of land is unique," creates a bevy of variables that make "class certification for single-family residence construction defect cases . . . rarely appropriate." In order to be certified as a class action, plaintiffs must show they fulfill the (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy prerequisites in addition to showing that a class action would be superior to other methods of adjudication.

The court concluded that the unique nature of Nevada's Chapter 40 construction defect statutes, specifically the notice requirement, would likely be hindered by most proposed class actions. The notice requirement allows contractors the opportunity to inspect and repair alleged defects, yet a class action, which permits generalized showings of universal defects, would tend to deprive a contractor of this opportunity. Additionally, given the differences in defects, and of causation, which can occur from house to house in the same development, the court held class certification is likely inappropriate. Class certification could also force non-affected homeowners to disclose defect litigation to prospective buyers. The court noted that there may be instances where a class action construction defect suit is suitable, for example, where a singular defect predominates over any other problems. In the majority of single-family home defect cases, however, it appears that such certification is unlikely. Please contact Partner Shannon Rooney with questions.

Associate Spotlight: Gene Royce



Gene Royce has been with LGC since 2007, bringing a wealth of experience with him. A graduate of the University of Arizona School of Law, Gene has worked as a deputy district attorney, as an associate with the firm Thompson & Colgate, and as a partner of Royce, Grimm, Vranjes, McCormick & Graham from 1975 to 2003. Gene is admitted to practice before all courts of the State of California, the United States District Courts for the Southern and Central Districts of California and the United States Court of Appeals, Ninth Circuit. He is also a member of the Arizona Bar and a registered patent attorney.

Gene enjoys spending time playing tennis and is a proud season ticket holder of the San Diego Chargers.

LGC Wins Department of Industrial Relations Appeal

LGC Partner Teresa Beck and Associate Susan Minamizono recently appealed to the Department of Industrial Relations on behalf of a local minority-owned nail salon business seeking relief from a $26,000 judgment. LGC's client's position was that the agency had wrongfully issued citations to the business owner for not purchasing workers' compensation insurance, when in fact, the business was not required to do so. Due to a language barrier (the salon owner spoke primarily Vietnamese) and the failure of the agency to provide an interpreter, the salon owner misunderstood the citations issued by the agency and the judgment which was subsequently filed against her. We are happy to report the agency has agreed to set aside this judgment. For further information, please contact Partner Teresa Beck or Associate Susan Minamizono.

We Appreciate Your Referrals

We would like to thank our many clients who continue to refer colleagues, friends, and family to our offices for legal services. We take pride in knowing that you have confidence in our ability to provide legal representation. THANK YOU!

Medical Expense Recovery *(cont. from p. 1)*

It is difficult to predict how the California Supreme Court will rule. Courts in Nevada and Arizona routinely exclude evidence of the amount paid by insurance while allowing evidence of the full cash price as the reasonable value of services rendered. The defendants are not allowed to introduce evidence of the different pricing structures as such evidence would involve an impermissible inference of available insurance. The defense medical experts typically charge similar cash rates and thus can not offer criticism of the amounts billed. It would not be surprising to see the California courts take the same paths as Nevada and Arizona and leave any reform of the collateral source rule to the legislature. In the meantime, we can expect inconsistent rulings at the trial court level and renewed focus on negotiating insurance liens.

LGC Completes Service Mark Registration for the San Diego Convention & Visitors Bureau

You may not know that LGC is experienced in proceedings before the United States Patent & Trademark Office. LGC recently successfully registered a series of Service Marks for the San Diego Convention & Visitors Bureau ("ConVis") relating to ConVis' most recent advertising campaign – "**happy happens"**. LGC is proud to be associated with ConVis, a non-profit organization that markets San Diego to the world. See Partner Teresa Beck or Associate Susan Minamizono for questions about Service Marks and Trademarks.

Graduation News!

'Bizzy' Lincoln

LGC would like to issue a hearty congratulations to Elizabeth ('Bizzy') Lincoln, Chelsea Gustafson, and Andrew Sorenson, who will be graduating high school next month and embarking on the next chapter in their lives. Bizzy, daughter of Partner Tom Lincoln, is graduating from Francis Parker High School and will be attending Tufts University in the fall, where she hopes to play soccer. Chelsea Gustafson, daughter of Partner Randy Gustafson, is graduating from Our Lady of Peace and will be attending Johnson and Wales University in the fall Denver, Colorado. Andrew, son of Partner Karl Sorenson, will be graduating from Coronado High School and will attend Emerson University where he plans to work towards an M.F.A. in Media and Visual Arts. LGC wishes all three the best on their collegiate adventures.

Chelsea Gustafson

Andrew Sorenson

Arizona Supreme Court Adopts Economic Loss Rule for Construction Defect Cases

In an effort to unify Arizona law regarding a potentially broad reading of the economic loss doctrine, the Arizona Supreme Court recently held the economic loss rule applies to construction defect matters in the case of *Flagstaff Affordable Housing v. Design Alliance* (2010) 223 Ariz. 320. The Court held "[w]hen a construction defect causes only damage to the building itself or other economic loss, common law contract remedies provide an adequate remedy because they allow recovery of the costs of remedying the defects, and other damages reasonably foreseeable to the parties upon entering the contract." Thus, a property owner is limited to contractual remedies when negligent design and/or construction causes economic loss[1] but there is no other physical injury to a person or other property.

The property owner in the *Flagstaff Affordable Housing* case argued application of the economic loss doctrine would reduce architect's and contractor's incentives to properly design and construct buildings. The court found this inapposite, noting that the policies of accident deterrence and loss-spreading "do not require allowing tort recovery in addition to contractual remedies for *economic* loss from construction defects." Rather, enough incentive to design and build sound and suitable buildings exists in the potential tort claims where physical injury occurs. The Court reasoned that "the policies of the law generally will be best served by leaving the parties to their commercial remedies when a contracting party has incurred only economic loss, in the form of repair costs, diminished value, or lost profits."

This opinion comes as a relief to Arizona design professionals and contractors who are now insulated from extra-contractual claims in construction defect cases when the plaintiff suffers only economic loss. This is significant as extra-contractual tort claims generally allow for more expansive damages and have a longer statute of limitations. Contact Partner Mark Collinsworth with questions.

[1] Economic loss refers to pecuniary or commercial damage, including any decreased value or repair costs for a property that is itself the subject of a contract between the parties, as well as consequential damages such as lost profits.

Baby News!

We are proud to announce the arrival of the newest member of the LGC family, Sajan Singh James! Sajan was born on February 10th to Associate Paul James and his wife, Roopi. LGC extends a hearty congratulations to Paul and Roopi and a welcome to Sajan!

Credits:

Editor:
Teresa Beck
Partner

Assistant:
Jordan Nager
Law Clerk

THE LAW OFFICES OF

LINCOLN | GUSTAFSON | CERCOS LLP.

California Office
225 Broadway, Suite 2000
San Diego, CA 92101
(619) 233-1150

Nevada Office
2300 West Sahara Ave, Suite 300, Box 2
Las Vegas, NV 89102
(702) 257-1997

Arizona Office
2415 East Camelback Rd, Suite 700
Phoenix, AZ 85016
(602) 606-5735