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Recent Arizona & California Cases Expand Defense Obligations Under CGL Policies

By LGC Partner Mark Collinsworth

Within the past eight (8) months, courts in both Arizona and California have handed down important decisions expanding the duty of Commercial General Liability (CGL) carriers to " defend suits" under typical CGL policy language. The decisions are important to insureds and insurers alike, and careful attention should be paid by insureds in reviewing policies up for renewal to determine the scope of coverage they are obtaining. Decisions in two important cases are summarized below.

ARIZONA:
Desert Mountain Properties, L.P. v. Liberty Mutual Fire Ins. Co.
236 P.3d 421; 588 Ariz. Adv. Rep. 59 (Ct. App., 2010)

In this matter, the Arizona Court of Appeal held a CGL carrier may have a duty to indemnify even where no lawsuit has been initiated. The case involved claims by about 50 homeowners in Scottsdale who alleged damage to their homes caused by soils subsidence. After paying nearly $200,000/home for repairs, the developer sought reimbursement from its CGL carrier. The applicable Liberty Mutual policies provided the insurer would "pay those sums that the Insured becomes legally obligated to pay as damages because of . . . property damage to which the insurance applies." Liberty argued since no lawsuit was filed by the homeowners against the developer the amounts incurred in performing the repairs were not amounts the developer was "legally obligated" to pay. The court held, "Coverage for sums an insured becomes legally obligated to pay as damages may be triggered *even in the absence of a civil lawsuit against the insured or a court order* requiring the insured to make payment." (Emphasis added.)

Liberty also argued the "legal obligation" of the developer to pay was based upon a breach of contract claim for which there would be no coverage[1], but the Arizona Court of Appeal rejected this argument relying on the California case of *Vandenberg v. Superior Court* (1999) 21 Cal.4th 915, which held a carrier cannot avoid coverage for damages on grounds the damages were contract based. The *Desert Mountain* court would not say all contract based damages are covered under CGL policies, but rather, the proper inquiry is whether the "occurrence" caused property damage, and not whether the loss arose out of contract or tort.

This case is important for a couple of reasons. First, Arizona has relatively little coverage case law, so any new cases on coverage are important to be aware of. Second, the case seems contrary to insurers' interpretation of policy language evaluated differently by other jurisdictions, and thus, may give rise to modification of standardized terms within Arizona policies.

[1]Another recent Arizona case, *Flagstaff Affordable Housing v. Design Alliance, Inc.*, 223 Ariz. 320 (S. Ct.; 2010), recently discussed the impact of the "economic loss doctrine" on contract claims.)

Continued on p. 3.

Mark T. Collinsworth
Partner

Table of Contents

Recent Arizona & California Cases Expand Defense Obligations Under CGL Policies.....1

LGC Happy Hour at the West Coast Casualty Construction Defect Seminar...1

LGC Partners Mark Collinsworth and Jay Specht Successfully Defend Developer in SB 800 Claims..... 2

LGC Nevada Associate Chris Turtzo Successfully Argues Motion for Summary Judgment..... 2

Tom Lincoln Selected as Super Lawyer..... 2

Associate Spotlight, LGC California Associate Susan Minamizono.....2

Recovery of Medical Expenses Update: *Cabrera v. E. Rojas Properties, Inc*..... 2

Meet LGC's Paralegals..... 3

Recovery of Medical Expenses Update: *Continued*..... 3

How Employers Can Respond to The Rise in EEOC Claims.....3

Recent Arizona & California Cases *continued*.....3

West Coast Casualty Construction Defect Seminar: Join LGC For Happy Hour – NEW LOCATION

Happy Hour!

On May 12-13, 2011, the 18th annual West Coast Casualty Construction Defect Seminar is being held at the Disneyland Resort. The seminar is the world's largest peer-to-peer information exchange on construction defect matters. There will also be numerous speakers from a wide variety of backgrounds such as judges, lawyers, claims directors, and contractors, including LGC Partner Thomas Lincoln.

ESPN ZONE

On May 12, 2011, LGC will be hosting LGC's Annual Happy Hour event on the patio at the ESPN Zone from 5:00 p.m. to 7:00 p.m. We hope you will join us! Look for your invitation via email.

Contact Partner Teresa Beck with questions.

LGC Partners Mark Collinsworth and Jay Specht Successfully Defend Developer Against SB 800 Claims

Just last month, LGC Partners Mark Collinsworth and Jason Specht completed their third binding arbitration of SB 800 claims on behalf of a residential developer. The case, which involved claims brought by the owners of 49 single family homes, centered around stucco, window, drywall, framing, concrete, and tub/shower defects. The claimants sought in excess of $640,000 in alleged damages. The defense was successful in carrying its burden on many of the affirmative defenses codified within Civil Code Section 945.5, and limited the damage award to $101,800 (less than 16% of the claimed damages). In addition, Mark and Jay successfully cut the claimants' alleged expert investigative expenses in half – from more than $70,000 to $35,000. In the three SB 800 cases arbitrated by Mark and Jay this past year for the same developer, claimants have been awarded less than $250,000, despite seeking recovery of damages in excess of $1.7 million. Congratulations, Mark and Jay!

LGC Nevada Associate Chris Turtzo Successfully Argues Motion for Summary Judgment

Chris Turtzo of LGC Nevada recently won an important Summary Judgment Motion. The case involved a single family home with significant problems caused by alleged soil issues. LGC's client , a mass grader, cleared and graded the property for the developer, who, years later, sold the graded property "as is" to a builder. Subsequently, the homeowner sued the builder who, in turn, sued LGC's client for indemnity and contribution.

Chris successfully argued that there was no special or pre-existing relationship between the builder and LGC's client to support an equitable indemnity claim. Additionally, Chris argued that specific NRS Chapter 40 sections precluded the availability of contribution in the situation. The judge agreed with all arguments and granted the motion.

Congratulations on the excellent result, Chris!

Associate Spotlight: Susan Minamizono

Susan Minamizono
LGC California Associate

Susan Minamizono, originally from Los Angeles, California, has been with LGC California since 2007. Susan graduated from the University of San Diego School of Law where she was the Lead Articles Editor for the San Diego International Law Journal. Before attending law school, Susan attended the University of California at San Diego, graduating with a degree in Political Science. Her practice focuses primarily on Construction Defect, Personal Injury, Employment, and Trademark Law.

Recently, Susan served as a pro-bono attorney through the ABA Immigration Justice Project. Susan successfully represented a client who, as a result of her efforts, was granted permanent legal residency in the United States and who will eventually become a United States citizen. The case involved a non-citizen single father with five children, who had been living and working in the United States for fifteen years, and fought deportation so that he could parent his children, one of whom remains in a full care medical facility due to various medical conditions.

Susan is particularly proud of this accomplishment because she is a daughter of immigrants herself. Susan thanks her mentor, Donald Sheppard of Jacobs Schlesinger & Sheppard LLP for his assistance, her husband, Kanji Kawanabe for his paralegal work, and LGC's Administrative Assistant, Alma Machado for her translation assistance. Congratulations, Susan!

In her free time, Susan also enjoys traveling, hiking, yoga, and singing to her daughter, Akemi.

Partner Thomas Lincoln Selected As A Super Lawyer

Partner Tom Lincoln

Congratulations to Partner Thomas Lincoln for being selected as a San Diego Super Lawyer. Tom has been listed as a San Diego Super Lawyer for over five years now.

Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The selections are made annually on a state-by-state basis. The selection process is rigorous and highly managed to avoid manipulation. The exclusive final published list represents less than 5% of the lawyers in the state. Congratulations Tom!

For more information on the Super Lawyer selection process, visit:
http://www.superlawyers.com/about/selection_process.html

Recovery of Medical Expenses Update: *Cabrera v. E. Rojas Properties, Inc.*

By: LGC California Associate, Monica Yoon

As readers may recall from LGC's January 2011 newsletter, the California Supreme Court recently had several cases pending before the Court concerning whether an injured plaintiff in a personal injury action may recover the full amount of medical costs billed by a doctor/hospital even if the plaintiff's insurance company paid a reduced rate. The newest development in this heavily-debated area of law occurred on February 24, 2011 when a California appellate court published a new opinion in *Cabrera v. E. Rojas Properties, Inc*. (Cal. App. 2d Dist. Feb. 8, 2011) 192 Cal. App. 4th 1319.

The appellate court in the *Cabrera* case held that it is appropriate to reduce a plaintiff's award for past medical expenses "from the amount billed by her medical provider to the amount paid by her private medical insurer." So, for example, if an injured plaintiff's doctor bills her $100,000 but accepts $30,000 from the plaintiff's medical insurer as payment in full, the plaintiff can only recover $30,000 (not the full $100,000) for past medical expenses in her personal injury case. Of course, this issue is important to parties in litigation since a multiplier of 1.5 to 3 is often applied to total medical expenses to develop a range for total general damages (i.e. pain and suffering). *Continued on p. 3*

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!

Meet LGC's Paralegals

In the October 2010 and January 2011 issues of LGC Quarterly, we featured the LGC Billing Team. This issue, we feature LGC paralegals Amanda Bremseth, Jacqueline Daniel, and Amy Massa. LGC's paralegals handle a wide array of tasks including helping LGC associates and partners with trial preparation, document review, and other various assignments. They are a vital part of the LGC team.

Amanda Bremseth

Amanda began working at LGC CA in 2008. A San Diego native through and through, Amanda attended San Diego State University, where she obtained Bachelors degrees in Political Science and Sociology. She received her paralegal education at the University of San Diego, and is currently in her second year of law school at Thomas Jefferson School of Law. In the limited free time she has, Amanda enjoys spending time with her family and friends, running on the beach, and watching sports.

Jacqueline Daniel

Jacqueline is LGC NV's newest paralegal. Originally from Novi, Michigan, Jacqueline has been in Las Vegas, NV for about 23 years. She received both her Bachelors degree in Broadcast Journalism and her paralegal education from the University of Nevada Las Vegas. Jacqueline and her husband, J.T., who both love the law, have a six-year-old son, Jolan, and the three of them call themselves the J Team. In her free time, Jacqueline enjoys staying fit and healthy, serving others, searching for peace and wisdom, and spending time with her family. Welcome Jacqueline!

Amy Massa

Amy Massa is LGC CA's newest paralegal. Originally from San Diego, Amy lived in both Minnesota and Tennessee before returning to San Diego. Amy attended the University of Minnesota Duluth where she received her Bachelors degree in Theater, and she completed her paralegal education at Cuyamaca College. Amy has been married for ten years, and enjoys being outdoors in her free time. Amy also enjoys Middle Eastern Dance, and is an apprentice at the Ethnic Dance Academy. Amy is excited to join LGC CA and looks forward to her time here. Welcome Amy!

Recovery of Medical Expenses Update *continued*

The issue of whether a plaintiff may recover more in medical expenses than what was actually paid is still pending before the California Supreme Court.[1] Until the Supreme Court rules on the issue, California trial courts will likely follow the ruling made by the *Cabrera* appellate court (i.e. a plaintiff's recovery of medical expenses may be reduced to the amount paid by private insurance, even if the amount billed by the provider was higher) because all opinions to the contrary have been depublished for pending California Supreme Court review, and are thus no longer citable. (*See Cabrera v. E. Rojas Properties, Inc*. (Cal. App. 2d Dist. Feb. 8, 2011 192 Cal. App. 4th 1319).)

[1] *Yanez v. SOMA Environmental Engineering, Inc. (2010)* 238 P.3d 1251; *King v. Willmett* (2010) 240 P.3d 1215; *Howell v. Hamilton Meats & Provisions, Inc.* (2010) 227 P.3d 342.

Responding to the Rise in EEOC Claims

It is a safe assumption that when employment levels are down, the number of discrimination claims filed against employers increases. It therefore comes as no surprise that since the United States is experiencing the lowest levels of unemployment since the Great Depression, the Equal Employment Opportunity Commission (EEOC) recently reported an unprecedented number of workplace discrimination filings against private-sector employers in the 2010 fiscal year.

On January 11, 2011 the EEOC reported that 99,922 private-sector workplace discrimination claims were filed during the 2010 fiscal year, and increase of over 6000 claims. Although the agency reported a staggering number of claims, the EEOC was happy to report that the number of files waiting to be processed had only grown slightly. Interestingly, of the types of claims filed, retaliation took the top spot, knocking out race discrimination which had held the top spot since 1965.

As a result of the increase, employers are urged to re-evaluate their policies to ensure that they are protecting themselves. There are several precautions employers can take to avoid lawsuits. These include: maintaining updated equal opportunity policies; training all employees, including managers, on the policies; and moving quickly to investigate alleged violations. Additionally, employers should always document employment actions so that they are prepared to avoid or defend claims, and seek legal advice when tricky situations arise.

Interestingly, the increase in filings has not meant an increase in the number of decisions against employers, which provides some good news for employers!

See LGC Partner Teresa Beck with questions.

Expansion of Defense Policies *continued from p. 1*

CALIFORNIA:
Ameron Int'l Corp. v. Ins. Co. of PA, et al,
2010 Cal. LEXIS 11679 (November 18, 2010)

In this case, Ameron, the manufacturer of concrete siphons used in some of Arizona's aqueducts, was sued by the U.S. Department of the Interior who alleged the siphons were defective. Pursuant to the Contract Disputes Act of 1978, the matter was heard before an administrative law judge with the Interior Board of Contract Appeals ("IBCA"). Ameron's CGL carrier refused to provide a defense or indemnity to Ameron, citing the definition of "suit" under its policy, and the prior California case of *Foster-Gardner, Inc. v. National Union Fire Insurance Co.* (1998) 18 Cal.4th 857. (*Foster-Gardner* held a "suit" as defined by a CGL policy contemplated "a court proceeding initiated by the filing of a complaint.")

The California Supreme Court in *Ameron*, however, found that the administrative law proceeding was sufficiently "trial-like in nature" to constitute a "suit" under the terms of the policy. The administrative hearing was initiated by the filing of a "complaint," was presided over by an administrative law judge, utilized sworn witness testimony, and followed Federal Rules of Evidence. As such, the "quasi-judicial" proceeding before the IBCA was a "suit" under the CGL policy.

CONCLUSION

Based on the recent decisions and the expansion of the definition of "defend suits" under CGL policies, both insurers and insureds should pay careful attention to policies up for renewal to determine the scope of coverage which may be different from current policy language.

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