California Nevada Arizona LGC

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Multiple Sclerosis Three Day 50 Mile Walk

Congratulations to LGC Legal Administrator, Sharon Coughlin (right, joined by friend, Lisa Kovar), for successfully completing the Multiple Sclerosis Three Day, 50 mile walk on September 5-7th from Carlsbad, California to downtown San Diego. Walkers raised over $1 million toward a world free of Multiple Sclerosis. Sharon's team alone raised over $8,300!!

Construction Defect Litigation after *Crawford:* Happy Days Are Here Again or The Terrible, Horrible, No Good, Very Bad Day[1], by LGC Partner Karl Sorenson

Karl Sorenson,
Partner,
San Diego Office

On July 21, 2008, the CA Supreme Court decided *Crawford v. Weather Shield Mfg., Inc.,* concerning the contractual duty to defend. The court held that a subcontractor who promises to defend and/or indemnify a developer/General Contractor ("GC") against claims based on the subcontractor's work must provide an immediate defense upon receipt of a tender to the developer/GC ***even if the subcontractor is found not negligent.*** The Crawford case has the potential to significantly alter the landscape of typical construction defect cases. Below is a summary of the case, and our evaluation of the winners and losers.

The Facts & The Outcome Crawford entered into a subcontract with Weather Shield, a window supplier. The indemnity provision stated Weather Shield would (1) "indemnify and save [GC] harmless against all claims...growing out of the execution of Weather Shield's work," and (2) "at its own expense...defend any suit or action brought against [GC] founded upon the claim of such damage..." The CA Supreme Court held Weather Shield had to pay attorneys' fees/costs of $46,734 that the developer/builder incurred defending against the plaintiff's claims. Even though the subcontractor's work was found to be without fault, the duty to defend arose immediately on filing of claims based on Weather Shield's work, and given the contract language, it did not depend upon the outcome of issues to be litigated.

The Winners (Happy Days Are Here Again) Before *Crawford*, a finding of no negligence usually barred a developer/GC from recovering either defense or indemnity from a subcontractor. Now, where subcontracts require the developer/GC be immediately defended upon receipt of a tender, and Plaintiff's allegations implicate the subcontractor's work, the subcontractor will likely owe an immediate duty to defend. For developers/GCs, this is good news given growing gaps in insurance coverage due to policy exhaustion, carrier insolvency, and exclusions in additional insured policies. Developers/GCs have a tool to plug those gaps without having to prove subcontractor fault. *Crawford* also provides developers/GCs with a new potential for insurance coverage, as subcontractors will tender *Crawford* claims to their carriers. Developers/GCs will need to include language in their cross-complaints regarding subcontractors' immediate duty to defend, and send *Crawford* tenders to subcontractors. *continued on pg. 3*

[1] You may recognize this reference to the well known children's book, Alexander and the Terrible, Horrible, No Good, Very Bad Day, by Judith Viorst, published in 1972, and chronicling a day of a young boy where nothing seems to go his way.

LGC Nevada Construction Defect "Defense" Verdict Involving NRS 40.600

Congratulations to partner Nick Salerno who recently represented a stucco subcontractor in a Nevada construction defect lawsuit that originally included over 1000 homes, and just obtained a significantly lopsided construction defect "defense" verdict. The lawsuit was tried over a seven month period. By the end of trial, almost 400 homeowners' claims were dismissed and only 567 homes remained.

The case was limited to stucco issues and plaintiffs sought removal and replacement of entire stucco systems, so, LGC's client was a primary target. Plaintiffs sought $83,000,000 in construction repair damages, and an additional $100,000,000 for attorney's fees, expert costs and pre-judgment interest pursuant to Nevada's homeowner-friendly NRS 40.600 statutory provisions. The jury deliberated for close to four weeks before returning a verdict of only $4,000,000. Only 71 of the homes received a damage award. The rest of the homeowners received nothing and will now face the prospect of paying attorneys fees and costs to the defense since they were unable to beat the Offers of Judgment each homeowner received prior to the start of trial.

Hopefully, this verdict signals a change from what has formerly been a plaintiff-friendly jurisdiction. Perhaps this verdict will cause homeowners to think twice before making outrageous demands, as were made in this case.

Arizona's Civil Verdicts Grow in 2007

In the year 2007, Arizona juries delivered 22 verdicts over $1 million, a substantial increase from 2006. Real estate investors claimed the top verdict of 2007 with an award of $360 million. This amount is nearly nine times larger than 2006's largest civil verdict in Arizona. The highest verdicts included breach of contract, malpractice, and vehicle accidents. Two of the largest verdicts were recovered on breach of contract counter-claims in environmental and real estate cases. The statewide average verdict in Arizona was a little over $4 million, however the median was only $47,500. Even so, these results suggest efforts at dispute resolution continue to be worthwhile.

Associate Spotlight: Paul James

Paul James,
Associate,
San Diego Office

Paul James, originally from Oakland, California, has been with LGC since June of 2005. After graduating from the University of San Francisco School of Law in 2002, Paul worked as a law clerk for the Contra Costa County Public Defender, and subsequently as an Associate for a toxic tort defense firm, Jackson & Wallace, in San Francisco. Before attending University of San Francisco, Paul attended University of California, Santa Cruz where he majored in History.

Paul's practice focuses on the defense of developers, general contractors and subcontractors in construction defect cases, employment litigation, subrogation claims, and defense of personal injury and wrongful death claims. Paul recently prevailed in a motion to compel arbitration of a employment discrimination case. In his free time, Paul enjoys spending time with his 9-month old son, Arjun, and his wife, Roopi. Paul also enjoys cooking, hiking, and the outdoors.

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!

Construction Defect Litigation after Crawford : continued from pg. 1

Developers/GCs will need to consider how to overcome arguments that *Crawford* does not apply where the defense is already being provided by AI coverage or direct coverage by demonstrating out of pocket loss like deductibles, SIRs, or other expense.

***The Losers* (*Who May Be Having A Terrible, Horrible, No Good, Very Bad Day*)** *Crawford* does not sit well with subcontractors who already contend with terms that require indemnification of the developer/GC for even 1% fault, and now must also pay for the developer/GC's defense fees and costs, on a no-fault basis. It is important for subcontractors to examine the language of indemnity provisions to determine if their language is like language in the Weather Shield contract. If not, *Crawford* may not apply. Subcontractors should also tender any *Crawford* claims to their carriers. Finally, subcontractors might consider arguing *Bramalea* applies where the developer/GC is already being defended and has no out of pocket loss (see below).

LGC San Diego Summer Softball

The LGC softball team played against Neil Dymott, Thorsnes, Bartolotta & McGuire, and Knox Attorney Services. Thanks to Courtney Duncan and Tony Gaeta for being great team captains!

The LGC team's record for the summer league was 3-2.

Congratulations to the team for the great effort!

It's Not All Bad News For Subcontractors! There are a few silver linings, however. First, indemnity reform legislation found in Civil Code §2782 may limit the impact of *Crawford* to contracts formed prior to 2006 (concerning builders) and 2008 (concerning contractors/GCs not affiliated with builders). Second, under *Patent Scaffolding Co v. William Simpson Construction Co*. (1967) 256 Cal. App. 2d 506, and *Bramalea California v. Reliable Interiors* (2004) 119 Cal. App. 4th 468, where a developer is defended by its own insurers or by additional insured coverages, the developer arguably suffers no damage from any breach of a duty to defend. *Bramalea* and *Patent Scaffolding* may prevent recovery of *Crawford* fees/costs.

The Future Whether you are a developer, GC, subcontractor, insurer or counsel, the *Crawford* case will impact construction defect litigation, at least in the short term. Many questions remain to be answered, like whether *Crawford* claims are covered, whether carriers will seek reimbursement from named insureds under *Crawford* for defenses funded under additional insured endorsements, and how all of this will affect resolution efforts, among others. Whether you are on the developer/GC side or the subcontractor side, it will definitely be interesting. LGC Quarterly will provide an update on how the *Crawford* case is impacting litigation in the April 2009 issue. Be sure to check in, and always feel free to contact us with your comments and concerns.

California Appeals Court Issues Significant Wage and Hour Decision: Employers Are Not Required To Ensure Breaks Are Taken

A recent California appeals court ruled on an employer's responsibility to provide meal breaks and pay for "off-the-clock" work. *Brinker v. Superior Court of San Diego,* decided on July 22, 2008, involved a lawsuit filed on behalf of several restaurants within the Brinker Restaurant Corporation including Chili's Grill and Bar, Romano's Macaroni Grill, and Maggiano's Little Italy.

The suit alleged Brinker violated California law by failing to ensure employees took meal and rest breaks and by not compensating employees for missed or shortened breaks. Plaintiffs also claimed Brinker forced employees to work off the clock without pay. The California appeals court in *Brinker* held that:

1.Employers only need to make meal and rest periods available, but are not required to ensure breaks are taken.
2.Employers may not impede, discourage, or dissuade employees from taking meal or rest breaks.
3.Employers must authorize and permit employees to take rest breaks every four hours, however breaks do not have to be in the middle of the work period if it would be impracticable to do so.

The Brinker case is good news for employers who have more important things to do than making sure hourly employees take their breaks.

Baby News

Congratulations to San Diego Associate, Jay Specht, and his wife Carmela, on the birth of their second son, Dominic Specht.

Congratulations on the new addition to your family!!

Happy Halloween from LGC!

Credits:
Editor:
Teresa Beck
Partner

Assistants:
Joe Villaseñor
Lucy McFarlin
Dana Nicholas
Law Clerks

LGC Quarterly

LGC Quarterly

California Office
225 Broadway
20th Floor
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
3131 East Camelback Rd
Suite 200
Phoenix, AZ 86016
(602) 606-5735