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Experts – One of the Most Critical, and Often Underused, Elements in the Defense of a Case

The use of experts in litigation can be a critical element supporting the defense effort. Experts, however, are often under-utilized. If the defense team in a case is not fully exploring each expert's abilities, knowledge, contacts in the industry, and tools for the best possible defense and trial preparation, the expert's full resources may not be maximized. This article will address some of the ways lawyers, insurers, and insureds can maximize this valuable (and costly) resource, focusing primarily on a typical construction defect case (though the concepts are applicable to all types of cases).

Defense Counsel Should Meet With the Experts. The best way to ensure all necessary defense activities have been completed is for counsel to meet with the experts at critical stages of the case and talk about the allegations, defenses, strategy, and damages. Experts have deep knowledge about their areas of expertise which can include defects alleged, injuries claimed, and/or the type of work involved. Experts can help counsel understand, for example, how a building was constructed, what was expected in the industry, what inspectors would have looked for, what areas are of concern, and what expert opinions should be further explored. Meeting with the experts develops these issues for the defense.

Use Defense Expert Information to Assess Credibility of Opposing Experts. The credibility of opposing experts is a critical piece of the defense. Verifying opposing experts' credentials is sometimes overlooked because the experts have an aura of implied credibility. Opposing experts can take great offense that anyone would conceive of questioning their credibility. With targeted information from the experts on the defense team, the credibility of opposing experts can be effectively tested and any vulnerabilities can be fully taken advantage of.

For example, in a recent case handled by LGC Nevada, the use of a defense expert's knowledge of the American Architectural Manufacturers' Association's ("AAMA") certification requirements for experts was used to the defense advantage. The defense expert discovered that an opposing architectural expert submitted an application to AAMA for certification in window testing and inspections. AAMA certification requires at least one year of installation experience with windows and the AAMA generally does not allow architects to become certified.

During the opposing expert's deposition, the opposing expert opined that his window installation experience was limited to *two summers* during college with possible installation of just one or two windows. By using LGC's expert's investigation, the defense team discovered the opposing expert's application for AAMA certification referenced *over 30 years* of construction experience installing windows! The LGC defense team was able to establish that the opposing expert's AAMA application was submitted with incorrect information. Ultimately, the AAMA revoked the expert's certification due to the incorrect information conveyed in the application. The opposing expert since revised his (Continued on Page 3.)

LGC Hosts Annual Happy Hour Event on May 17, 2011 at This Year's West Coast Casualty Construction Defect Conference: Join Us!!

On May 17-18, 2012, the 19th annual West Coast Casualty Construction Defect Seminar is being held at the Disneyland Resort in Anaheim, California. 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.

On May 17, 2012, 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.◆

Shannon Splaine
Partner

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Associate Spotlight: Lucy M. Knutson

Lucy Knutson is an associate in LGC California's San Diego office. Although originally from the San Francisco Bay Area, Ms. Knutson received a Bachelor of Science degree in Accounting and Finance and a Bachelor of Arts degree in Political Science from the University of Colorado in 2004. In 2006, Ms. Knutson traveled back to California to attend California Western School of Law, receiving her J.D. in 2008.

After law school, Ms. Knutson worked as a claims handler for a large insurance company handling toxic tort related personal injury and property damage claims in Denver, Colorado. Ms. Knutson primarily litigates personal injury, lemon law, property damage and construction defect cases. Ms. Knutson enjoys cooking, reading and spending time with her husband and seven month old baby girl. ◆

Federal Judge in Arizona Recommends Partial Summary Judgment in Favor of Class in Polybutylene Pipe Case Against State Farm

A magistrate's ruling in a recent polybutylene (PB) pipe case against State Farm suggests potential significant exposure for insurers in cases involving PB pipe. In *Guadiana v. State Farm Fire and Casualty Company*, 2012 U.S. Dist. LEXIS 8262 (D. Ariz. Jan. 25, 2012), the plaintiff's house had PB piping that leaked. Plaintiff claimed that because of a defect in the piping, it was not feasible to repair the leaky section of pipe, and that State Farm was contractually obligated to replace all of the piping in the house, in addition to replacing parts of the structure that must be torn out in order to access the piping.

Background: In March 2011, the court granted certification of an Arizona statewide class. After notice was sent to the class and the opt-out period expired, plaintiff filed a motion for partial summary judgment on coverage. The policy provision at issue provided that "If loss to covered property is caused by water or steam not otherwise excluded, we will cover the cost of tearing out and replacing any part of the building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which the water or steam escaped."

State Farm's position was that the water damage was covered, but there was no coverage for the cost of accessing and replacing parts of the plumbing system that were not leaking. State Farm also relied on an exclusion for loss due to a "latent defect" and an exclusion for "loss consisting of . . . defect . . . in . . . materials used in construction or repair." It does not appear there was any focus on the second sentence quoted above, i.e., "We do not cover loss to the system . . . from which the water or steam escaped" (which seems potentially applicable).

The magistrate judge concluded the above exclusions were not applicable because "[t]hese provisions exclude any loss consisting of defective construction materials," and "[t]he water damage is the covered loss, not the defective plumbing system." The court also concluded that "repair" could mean total replacement if the "If Guadiana can establish as a matter of fact that the system that caused the covered loss includes all the pipes in her house and it was necessary to replace all the pipes to repair that system, State Farm is obligated to pay the tear-out costs necessary to replace all the pipes, even those not leaking." (*Id.* at 18-19.) (Continued on Page 3.)

LGC CA is Now a Certified MCLE Provider, Approved by the California State Bar

LGC is proud to announce that LGC was recently accepted as an approved MCLE provider by the California State Bar. LGC CA regularly provides MCLE training, and this formal acknowledgement of LGC as a recognized MCLE provider in CA is an important distinction for the firm.

Client and colleagues interested in scheduling MCLE presentations should contact LGC CA partner Teresa Beck.◆

LGC Has Joined The Claims and Litigation Management Alliance (CLM)

LGC is proud to announce that the firm has joined The Claims and Litigation Management Alliance (CLM). CLM is an inclusive, collaborative organization that promotes and furthers the highest standards of claims and litigation management and brings together the thought leaders in both industries. CLM's Members and Fellows include risk and litigation managers, insurance and claims professionals, corporate counsel, outside counsel and third party vendors. The CLM sponsors educational programs, provides resources, and fosters communication among all in the industry.

LGC jumped into CLM recently when Partner Teresa Beck was invited to address CLM's Retail, Restaurant & Hospitality ("RRH") Committee's monthly conference call in March 2012. Ms. Beck presented a lively discussion about 2011 jury verdicts affecting retail, restaurant, and hospitality businesses, challenging the RRH committee members to correctly guess the outcomes of various real life cases which went to verdict.

LGC looks forward to a long and productive relationship with the CLM and its members. To learn more about the CLM, please visit www.TheCLM.org. ◆

Nevada News and Updates. . .

HOA Standing for Building Envelope Claims: The Nevada Supreme Court currently has several Writs pending regarding HOA standing to pursue "building envelope" claims in a representative capacity pursuant to NRS 116: Oral argument was recently held in the View of Black Mountain case (A590266). Finally, in the High Noon at Arlington v D.R. Horton matter, oral argument took place April 2, 2012.

Although each of these cases share common questions regarding standing, the individual cases have unique issues related to CC&Rs or the District Court's compliance with the Supreme Court's directive from the case of First Light II (215 P.3d 697 (2009) regarding Rule 23 (class action) analysis. LGC awaits rulings on these matters and will brief clients about the impact on NV CD litigation.

Recovery of Costs: Judge Johnson recently held in the Copper Sands HOA v. Flamingo 94, LLC case that subcontractors who were not named as direct defendants were entitled to recovery of costs as "prevailing parties" when Plaintiff's case was summarily dismissed. Judge Johnson agreed with case law from various state and federal courts, including Florida, Nebraska, Arizona, (Continued on Page 3.)

English Only Workplaces in California: Are They Legal?

In our multi-cultural country, it is not uncommon for employees to speak to each other in a language other than English. This can create communication barriers which lead many employers to consider requiring employees to speak only English while at work.

California Law: California law (Govt. Code §12951) prohibits an English only policy unless 1) the language restriction is justified by ***business necessity***; **and** 2) the employer has notified employees of the circumstances and the time when the language restriction is required to be observed, as well as the consequences for violating the restriction. On the federal level, the Equal Employment Opportunity Commission has made a similar finding. (See 29 CFR §1606.7.)

Business Necessity: California law defines "business necessity" as an overriding legitimate business purpose such that the language restriction is necessary for the safe and efficient operation of the business. The restriction must also effectively fulfill the business purpose, and there must be no alternative that would accomplish the business purpose as well with a lesser discriminatory impact. (CA Govt. Code §12951(b).)

Examples: The EEOC agrees business necessity is shown when:
- Customers, co-workers, or supervisors speak only English;
- In emergencies where safety requires speaking a common language;
- In cooperative work assignments to promote efficiency; and
- When an English-speaking supervisor needs to monitor performance of an employee who communicates with co-workers and/or customers.

Since inappropriate efforts to establish an English only workplace can lead to misunderstandings which may be interpreted as discrimination on the basis of ethnicity, or related bases, employers should clearly identify the need for any language restriction and carefully consider alternatives. Contact Senior Associate Jill Dickerson with questions. ◆

Nevada Updates (Continued from Page 2)

and Idaho, that a Plaintiff knows or should know when filing a construction case against a builder that the subcontractors will be named in the action. Thus, when the defense "prevails," the recovery of costs by the subcontractors should not be borne by the developer, but rather by the party who filed the original action.

The rationale is that the Plaintiff knew, or should have known, that filing the original action would result in the developer filing a Third-Party action against its subcontractors. As a result, in Copper Sands, the HOA owes more than $285,000 in costs to the various subcontractors. The matter is now on appeal regarding this ruling as well as several other rulings dismissing Plaintiff's case, striking Chapter 40 claims, and also related to conversion and statute of repose issues. ◆

Arizona PB Pipe Case (Continued from Page 2)

The ruling creates substantial exposure for the insurance industry if courts rule that every time a leak occurs with PB piping, then their homeowners' policies require that the entire piping system must be replaced. Potentially, this ruling will be limited to the facts, but the case certainly has far-reaching implications.

Contact LGC Partner Teresa Beck with questions. ◆

Experts (Continued from Page 1)

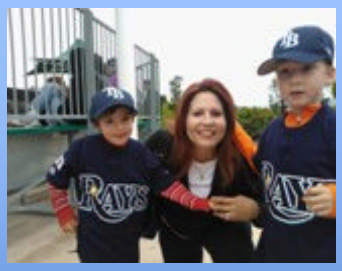
Curriculum Vitae to remove the AAMA certification, and must explain this discrepancy at future depositions. Without LGC's defense expert's advice about the opposing expert, this information may never have come to light.

Been There, Done That. The same experts are often seen over and over in cases. The experts know one another and the "games" their counterparts engage in at inspections, depositions, or during medical treatment by opposing experts. It is critical that defense attorneys are educated by their defense experts so that counsel can properly respond to such gamesmanship. When opposing experts realize opposing counsel understands the expert themes in a case, opposing experts will often cease such games. On the other hand, when experts sense counsel is not familiar with the expert issues, experts will use that to their advantage.

Find Out What the Defense Expert Needs to Know. Defense experts often have questions about facts, opposing experts' reports, and/or other information which defense counsel may need to develop during depositions. To use experts efficiently, it is critical that defense counsel find out what the defense expert needs to know in order to finalize solid opinions.

Practice Makes Perfect. Defense counsel can maximize the expert contribution in a case by going over critical depositions of opposing experts in advance with the defense expert. The defense expert can explain what Plaintiff's expert will likely testify about, suggest lines of questioning and statutory references, and give advice about the best photographs or other physical evidence to use at deposition. Such techniques have resulted in Plaintiff experts crumbling on the stand or at deposition. In a case handled by LGC Nevada recently, the expert was impeached so often during cross-examination, that he resignedly conceded key points. This type of handling of expert assistance can cause cases to be dismissed, promote settlement, and/or greatly reduce exposure.

The Moral of the Story. So the moral of the story - experts are a great tool. Since our clients pay for them, we should use them effectively and efficiently. Our defense experts want the defense team to succeed and will, if asked, help in many important ways. ◆



LGC CA Senior Associate Lisa Mersereau's Twins Play Baseball in the Miracle League

LGC CA Senior Associate Lisa Mersereau proudly reports that her twin boys, Will and Jake (who are already 6 years old!), are playing baseball for the Rays in the Miracle League this spring! The Miracle League is a non-profit organization that gives kids with disabilities the chance to play baseball in an organized league. Will was born with Down syndrome, and Jake (who's also an avid golfer), has mild cerebral palsy. Each game always somehow ends up in a tie with the opposing team, but the boys still have a great time! For more information, go to www.miracleleagueofsandiego.org.

Credits
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