



**Nevada Supreme Court Issues  
Indemnity Ruling Favoring Subcontractors**  
By LGC NV Partner Loren S. Young

**SUMMARY:**

On June 2, 2011, the Nevada Supreme Court published the Reyburn v. Plaster Development<sup>1</sup> decision concerning the scope of the duty to defend and indemnify under an express indemnity provision in a construction subcontract. In summary, the Court confirmed an indemnity clause must *unequivocally* set forth an obligation to indemnify another for its own negligence in order to trigger any obligation. Referring to the out of state California case of Crawford v. Weather Shield Mfg., Inc.<sup>2</sup> and to insurance contract cases, the Court found the duty to defend stemming from an indemnity clause is broader than the duty to indemnify, however, the duty to defend is not a separate and independent duty as in an insurance agreement. Importantly, the Court found whether a complaint sufficiently alleges negligence on the part of a subcontractor triggering a duty to defend is a material issue of fact for the jury to decide, and if a jury finds sufficient allegations in the complaint implicating a subcontractor's work, the Court must apportion an award of fees and costs incurred by the General Contractor that are directly attributable to the subcontractor's work. Details of the case are set out below.

**UNDERLYING FACTS:**

By the time of trial, Reyburn involved a single issue relating to retaining walls and fences at the Marble Canyon residential project. Plaster Development was the General Contractor, Bill Young's Masonry<sup>3</sup> constructed the walls, and Reyburn performed rough and final grading. Plaster subcontracted with Reyburn to perform grading. An indemnity clause required Reyburn to indemnify Plaster for claims, "arising directly or indirectly out of the obligation herein undertaken or out of the obligations conducted by Subcontractor . . ." The indemnity clause concluded with the provision that, "If requested by Contractor, Subcontractor will defend any such suits at the sole cost and expense of Subcontractor." The homeowners filed suit against Plaster claiming the subject walls and fences were defective as a result of "improper design, preparation, materials and construction." The only evidence of negligence on the part of Reyburn was Reyburn may have covered wall drains with four inches of sand during final grading.

**THE RULING:**

Before Reyburn, the Nevada Supreme Court had not specifically addressed the duty to defend in a construction indemnity agreement. The Court took a leap, finding that the duty to defend is broader than the duty to indemnify because it covers claims for which the subcontractor could be found liable, but the duty is owed *only if* the contract language unequivocally requires indemnification *and* a jury determines the subject claim encompasses the indemnity. (Interestingly, the Court relied on the California Crawford case in reaching its decision. In Crawford, the California Supreme Court held a subcontractor had an immediate duty to defend the General Contractor against claims based on the subcontractor's work, whether or not there was a finding of negligence, because the duty to defend was independent of the duty to indemnify based on the undertaking of such an obligation in clear and unequivocal language. Even though there was no finding of fault by the subcontractor, the Crawford court weighed several factors and found the duty to defend arose immediately on tender of claims related to the subcontractor's work and the specific contract language.)

**NV SUPREME COURT DECLINES TO FOLLOW CRAWFORD:**

Although the Supreme Court of Nevada also found the duty to defend is broader than the duty to indemnify, the Court did not go as far as California, explaining the duty to defend is *not* an immediate and separate duty because the jury must first decide if the complaint sufficiently alleges negligence involving the subcontractor's work. Further, the Court found that unless unequivocally stated otherwise, the duty to defend is *limited* to those claims directly attributed to the subcontractor's work, and this is also an issue for the jury to decide.



Loren S. Young  
Partner

**Table of Contents**

Nevada Supreme Court Issues  
Indemnity Ruling Favoring  
Subcontractors..... 1

Partner Teresa Beck Nominated for  
ATHENA Leadership Award ® ..... 2

Partner Tom Lincoln and Associate Jill  
Dickerson Teach Civil Litigation Classes  
at USD Paralegal Program..... 2

Nevada S. Ct. Indemnity Ruling  
*continued*..... 2

Supreme Court Upholds Arizona's  
Employer Sanctions Immigration Law... 2

Associate Spotlight: LGC California  
Associate Katie C. McCurdy..... 2

Baby News..... 3

Graduation Corner..... 3

Protecting Your Trade Secrets..... 3

Violent Video Games Entitled to First  
Amendment Protection..... 3

Arizona Employer Immigration Law  
*continued*..... 3

*Continued on p. 2*

<sup>1</sup> 127 Nev. Adv. Op. 26 (June 2, 2011).  
<sup>2</sup> Crawford v. Weather Shield Mfg. Inc. (2008) 44 Cal. 4th 541.  
<sup>3</sup> Prior to trial, Bill Young's Masonry settled out of the case.

**EVALUTION OF IMPACT OF REYBURN**

The Reyburn decision is likely to favor subcontractors. Historically, Plaintiffs and General Contractors have leveraged subcontractor settlements in Nevada with fear of the "last man standing" situation where the subcontractor will be required to pay all uncompensated fees and costs if fault is established to any degree. Such an argument is now significantly undermined since per Reyburn, liability for fees and costs must be attributed and allocated to the subcontractor's work. The Reyburn decision will also strongly support the defense position that a separate and immediate duty to defend does not exist due to questions of fact that must be determined by the trier of fact, depending on the specific language of individual contracts. General Contractors, however, can be expected to modify their standard subcontract language to address the Reyburn court's concerns as Nevada law in this area continues to develop.

**Supreme Court Upholds Arizona's Employer Sanctions Immigration Law**

On May 26, 2011, the U.S. Supreme Court, in a 5-3 decision, upheld Arizona's employer immigration law, the Legal Arizona Workers Act of 2007, in the case of *Chamber of Commerce of the United States v. Whiting*.<sup>1</sup> The Act provides that the licenses of state employers who knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. The law also requires that all Arizona employers use a federal electronic verification system ("E-Verify") to confirm that the workers they employ are legally authorized workers.

*Continued on pg. 3*

**Associate Spotlight: *Katie C. McCurdy***



*Katie C. McCurdy*  
LGC California Associate

Katie McCurdy, born and raised in San Diego, has been with LGC California since 2007. Katie graduated from the University of San Diego School of Law, where she competed nationally on the USD National Mock Trial Team. While in law school, Katie had the opportunity to study international law at Trinity College in Dublin for one summer. Before attending law school, Katie attended The George Washington University in Washington D.C., graduating magna cum laude with a degree in Criminal Justice. In undergrad, Katie had the unique opportunity to travel the world while studying abroad on a program called Semester at Sea.

At LGC, Katie's practice focuses primarily on construction defect litigation, defending general contractors and developers. In the past year, Katie successfully wrote and argued two Motions for Summary Adjudication on behalf of a developer based on the California Supreme Court holding in Crawford v. Weather Shield Mfg., Inc. (2008) 44 Cal. 4th 541, where the Court held the duty to defend in an indemnity agreement between a general contractor and subcontractor obligated the subcontractor to defend, from the outset, any suit against the general contractor insofar as that suit was founded upon claims alleging damage or loss arising from the subcontractor's negligence, regardless of whether or not the subcontractor was later absolved of liability.

Katie volunteers annually as a Judge for the San Diego Defense Lawyers Mock Trial Competition and volunteers with the Civil Practicum Course at the University of San Diego School of Law. In her free time, Katie enjoys running and has competed in various races, including the San Diego Rock n' Roll Marathon in 2006 and 2010.

**Partner Teresa Beck Nominated for ATHENA Leadership Award® Program**



Partner Teresa Beck

Congratulations to Partner Teresa Beck on being nominated for the ATHENA Leadership Award® Program! The ATHENA Leadership Award® is presented to a woman ---or man--- who is honored for professional excellence, community service and for actively assisting women in their attainment of professional excellence and leadership skills.

Nominees are those who demonstrate excellence, creativity, and initiative in their business or profession; provide valuable service by contributing time and energy to improve the quality of life for others in the community; and actively assist women in realizing their full leadership potential.

For more information on the ATHENA Leadership Award®, visit: [http://www.athenainternational.org/pages/athena\\_leadership\\_award\\_/14.php](http://www.athenainternational.org/pages/athena_leadership_award_/14.php)

**Partner Tom Lincoln and Associate Jill Dickerson Teach Civil Litigation Classes at USD Paralegal Program**

Partner Tom Lincoln and Associate Jill Dickerson have been teaching Civil Litigation evening classes at the University of San Diego's paralegal program. Paralegals are a vital part of a successful law office. They assist attorneys in document management and organization, prepare summaries of key case information, draft documents for attorney review, keep track of key dates, and provide discovery and trial support.

Tom and Jill use their day-to-day expertise and experience to help students learn about civil litigation practice in preparation for careers as paralegals. According to Jill Dickerson, "Teaching is a challenge, but is also very rewarding and provides an opportunity to contribute to the development of our legal community."

Tom and Jill's students are lucky to have such great teachers!

**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!*

You're already dealing with the economy.



Now is the time to make sure you're in compliance with your annual corporate requirements, shareholder meetings, board of directors meetings, and corporate filings before it's too late. Contact attorney Jill Dickerson at 619-233-1150 or [jdickerson@lgclawoffice.com](mailto:jdickerson@lgclawoffice.com) today for a consultation.



## BABY NEWS!

LGC welcomes the newest member of the LGC family, Elizabeth Anne Grant. Elizabeth was born on March 31, 2011 to LGC Nevada associate Annalisa N. Grant. She weighed 8 lbs., 10 oz.

Annalisa is originally from San Diego and moved to Las Vegas with her husband in September of 2010. She has been with LGC since November of 2010 and handles primarily construction defect cases. Annalisa represents both general contractors and subcontractors in Nevada CD cases. Congrats on the new addition to your family, Annalisa!

## Graduation Corner



Amanda Gustafson, daughter of LGC Partner Randy Gustafson and his wife Alison, graduated from Regis University in Denver, CO with majors in fine arts and religious studies. She will be attending graduate school in the fall at John Paul the Great in San Diego. Congratulations, Amanda!

Ted Cercos, Jr., son of LGC Partner Ted Cercos, graduated from Hyde High School in Bath, Maine. He won the Hyde Academic Triangle Award for the top graduating student, the Most Valuable Athlete award, and the Maine Association of Independent School Athletic Directors' All Academic Award for maintaining a straight A average and performance in athletics. He will be attending Cal Poly San Luis Obispo in the fall, majoring in Civil Engineering. Congratulations!

Katelyn Holland, daughter of LGC Legal Assistant Chrystal Flick, will be starting college this fall at the College of Southern Nevada. Her ultimate goal is to become a pharmacist. Good luck, Katelyn!

## Protecting Your Trade Secrets



Many businesses derive success and financial benefit from trade secrets. LGC has lawyers with experience in helping clients identify and formulate plans to protect trade secrets. Companies like Coca-Cola (with its recipe for Coca-Cola) and Kentucky Fried Chicken (with its Original Recipe fried chicken), for example, have likely taken steps to protect their secret recipes. It is not just multi-million dollar companies who protect trade secrets though. The protection of trade secrets is important for any company that derives benefit from such secrets, which can include contact lists, formulas, information, data, and more.

For more information, contact LGC Partner Tom Lincoln or LGC CA Associate Monica Yoon.

## Violent Video Games Entitled to First Amendment Protection

On June 27, 2011, the U.S. Supreme Court struck down a California law that banned the sale of violent video games to minors.<sup>1</sup> The law would have imposed a \$1,000 fine on anyone who sold or rented a video game to someone under 18 that featured the "killing, maiming, dismembering or sexual assaulting" of a human image and "appeals to deviant or morbid interest."<sup>2</sup> Although the law was passed in 2005, it never took effect because it was challenged by video game publishers, distributors, and sellers.

In a 7-2 decision, the Court concluded video games are subject to full First Amendment protection. Justice Antonin Scalia wrote, "Like the protected books, plays and movies that preceded them, video games communicate ideas through many familiar literary devices and through features distinctive to the medium." The Court noted that the government's power to restrict expression because of its messages, ideas, subject matter, or content is subject to a few limited exceptions, such as incitement, obscenity, and fighting words.

Because the Act imposed restrictions on the content of protected speech, it had to pass the strict scrutiny test, i.e., the law is justified by a compelling government interest and is narrowly drawn to serve that interest. The Court held that California could not meet that burden because any demonstrated effects from violent video games are both small and indistinguishable from effects produced by other media, such as Saturday morning cartoons. Furthermore, the video game industry's voluntary rating system already assists parents in restricting their children's access to violent video games.

This case is considered a 'win' for the entertainment industry, giving violent video games the full protection of the First Amendment. The California legislature, however, can be expected to draft new/amended legislation in efforts to pass constitutional muster now that the U.S. Supreme Court has given guidance about which restrictions may be acceptable.

See LGC Partner Teresa Beck with questions.

<sup>1</sup> *Brown v. Entertainment Merchants Assn.*, No. 08-1448, slip op. (U.S. June 27, 2011).  
<sup>2</sup> California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. 1746-1746.5.

## Arizona Employer Immigration Law

*continued from p. 2*

The U.S. Chamber of Commerce and various business and civil rights organizations brought the case against the State of Arizona, arguing that the state's law was preempted by the federal Immigration Reform and Control Act (IRCA), which makes it unlawful for an employer to knowingly hire unauthorized aliens, and imposes both civil and criminal sanctions for violations.

Both the district court and the Ninth Circuit Court of Appeals rejected the claim, and the U.S. Supreme Court affirmed. The Supreme Court concluded that Arizona's law falls within IRCA's exception that preserves state authority to impose sanctions [for employing illegal aliens] "through licensing and similar laws." Additionally, the Court noted that a state's decision to require employers to use the E-Verify system "is entirely consistent with the federal law."

As a result, employers who knowingly or intentionally employ unauthorized aliens may have their business licenses suspended or revoked. Additionally, employers must use the federal E-Verify system to confirm the authorization status of employees.

Contact LGC Partner Teresa Beck with questions.

<sup>1</sup> *Chamber of Commerce of the United States v. Whiting* (2011) 2011 U.S. LEXIS 4018. (Justice Kagan was recused).

### Credits

**Editor:**  
Teresa Beck,  
Partner

**Assistant:**  
Katie Nowak  
Law Clerk

# LGC Quarterly

## Partners

Thomas J. Lincoln\*+  
Randall D. Gustafson\*+◇  
Theodore R. Cercos\*+  
Teresa M. Beck\*◇  
Nicholas B. Salerno +\*‡  
Charles K. Egan\*  
Karl E. Sorenson\*◇  
Loren S. Young+  
Shannon Rooney+

## Associates

Lisa M. Mersereau\*  
Jill S. Dickerson\*  
Christian W. Schmitthener\*  
Paul H. James\*  
Monica J. Yoon\*  
Anthony P. Gaeta\*  
Christopher A. Turtzo+‡  
Darcie A. Frounfelter\*  
Jason J. Julius\*  
Gene E. Royce\*◇  
James M. Barrington+  
Susan S. Minamizono\*

Katie C. McCurdy\*  
Harry J. Rosenthal+  
Ryan S. Peterson+  
Lucy M. Knutson\*  
Dana C. Nicholas\*  
Annalisa N. Grant\*+  
Jordan T. Nager\*  
Elyse K. Simmerman\*  
Andre V. Farinha+  
J. Taylor Oblad+  
Russell D. Collings+  
Reginald Russell\*

\*California ◇Arizona +Nevada ‡Florida

[www.lgclawoffice.com](http://www.lgclawoffice.com)

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, Suit 700  
Phoenix, AZ 85016  
(602) 606-5735

### Florida Office

14105 McCormic Drive  
Tampa, FL 33626  
(619) 233-1150