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LGC Prevails Against New Construction Defect Theory

LGC Partners Randy Gustafson and Shannon Splaine recently prevailed on a critical Motion for Summary Judgment against an expansive new theory of liability in construction defect cases.

In the case, a time share owners' association in Las Vegas sued a client of LGC for alleged construction defects. The attorney for the association tried to argue that the time share units were subject to Nevada's residential construction defect laws, commonly known as "Chapter 40," in order to obtain an award of attorneys' fees – an argument that had no precedent.

LGC filed a motion for summary judgment, arguing that Chapter 40 did not apply. The motion was based on the argument that Chapter 40 only applies to residences, and time shares are not residences. Chapter 40 defines "residence" as "any *dwelling* in which title to the individual units is transferred to the owners." The term "dwelling" is not defined in Chapter 40, and LGC argued that the term applies only to a unit where a person lives.

The term "time share," meanwhile, is likewise not used or defined in Chapter 40, but is defined elsewhere under Nevada law as "the right to use and occupy a unit on a recurrent *periodic basis* according to an arrangement allocating this right among various owners." LGC used this definition of the term to argue that a time share is more like a hotel than a residence because a time share is essentially the right to use a unit for a limited time, rather than a free-and-clear ownership interest in the unit.

In this case, the time share owners used the units for vacation purposes on a transient basis. The owners owned 1/52, 1/104, or 1/156 of each unit and were generally only allowed to use a unit for up to one week per year. The owners were also required to abide by a "vacation plan" that limited their use of the time shares and required the owners to make reservations well in advance of their stay. LGC used these facts to support its argument that the time share units were more like hotel rooms than residences.

The Court agreed with LGC and granted its motion for summary judgment, holding that the time shares did not qualify as residences under Chapter 40. This ruling has significant implications. Chapter 40 allows a plaintiff to recover damages that are not otherwise permitted, most notably attorneys' fees. Attorneys' fees generally add about one-third to a plaintiff's total damages, often accounting for millions of dollars in extra recovery against the builder.

The court's decision marks a significant victory for developers and contractors who build time shares in the Las Vegas area, as well as their insurance carriers.

Congratulations to Randy and Shannon.

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Appellate Decision Narrows Scope Of SB 800

In *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC*, the Court held that the Right to Repair Act (SB 800) is not the exclusive remedy for plaintiffs in cases where the alleged defect caused damage.

In the case, a sprinkler pipe at a home in the Brookfield development burst, causing damages that were partially paid by Liberty Mutual, the homeowner's insurance carrier. Liberty Mutual then pursued a subrogation action against Brookfield.

The builder filed a demurrer, arguing the claim was barred by the SB 800 statute of limitations. Specifically, Brookfield argued that Civil Code § 896(e) applied to the plumbing claims, and that such claims must be brought within four years of the close of escrow.

The Court found that SB 800 was not the exclusive remedy for property owners where defects caused actual damage. Rather, the Court interpreted SB 800 as only providing an exclusive remedy in cases where a defect violates one of the standards set forth in Civil Code § 896, but does not cause damage.

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Difficulties In Applying SB 800 To Multi-Unit Projects

In the landmark case *Aas v. Superior Court*, in which LGC partners Tom Lincoln and Chuck Egan served as trial counsel, the California Supreme Court held that a construction defect must cause property damage to be actionable under tort law.

In response to *Aas*, the legislature enacted SB 800 (Civil Code §§ 895, *et seq*.), which established specific standards for residential construction and imposed liability on builders that fail to meet those standards, regardless of resultant damage.

Civil Code § 938 limits SB 800 to "new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003." Conversely, the ruling in *Aas* applies to all units sold prior to that date.

A problem arises, however, when some units in a multi-unit project are sold before January 1, 2003, and some are sold after. SB 800 does not address this situation, and appellate courts likewise have not weighed in on this issue.

A handful of attorneys have argued that, in such a situation, SB 800 applies to units that were sold after January 1, 2003, but does not apply to units in the same project that were sold prior to that date. While potentially workable for individual unit claims, this theory is untenable for common area claims, because unit owners generally own an undivided fractional interest in the common area.

Other attorneys argue that if any units in the project were sold after January 1, 2003, then SB 800 applies to the entire project. This interpretation, however, can lead to results unexpected at the time of construction. If a 100-unit project was completed in 2001 and all but one of the units were sold before January 1, 2003, the entire project, which was originally subject to the ruling in *Aas*, would be shifted to the regulations of SB 800. The entire legal standard applicable to the project would change merely because one unit took longer to sell.

Finally, some attorneys argue that if any units in the project were sold prior to January 1, 2003, SB 800 does *not* apply to any part of the project. This interpretation would provide a clearer and more definitive operative date, but some unit owners who purchased after January 1, 2003, might take issue with being "deprived" of SB 800 protections otherwise applicable to them.

Of course, a fourth, Solomon-like option may exist. SB 800 could apply to projects where at least 51% of the units were sold after January 1, 2003, and not apply when at least 51% of the units were sold before that date. This would, however, leave in question projects with a 50% split of units sold before and after the effective date.

This issue is arising more frequently as projects from the 2002 and 2003 timeframe have entered litigation before the running of the 10-year statute of limitations. Until appellate courts address this issue, litigants will be left to argue this on a case-by-case basis, leading to differing results.

For more information about this issue, please contact Rich Reese in LGC's San Diego office.

LGC Assists With Trademark Protections

San Diego
HAPPINESS is calling
answer the call at sandiego.org

LGC Associate Dana Nicholas recently successfully registered the San Diego Tourism Authority's (formerly known as ConVis) service mark for its Happiness is Calling campaign.

The United States Patent and Trademark Office ("USPTO") allows individuals and entities to search and register a trademark or service mark for goods or services. A trademark is a word, phrase, symbol or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others. A service mark is a word, phrase, symbol or design, or a combination thereof, that identifies and distinguishes the source of a service rather than goods.

Owning a federal trademark or service mark registration on the USPTO's Principal Register provides several important benefits, including public notice of your claim of ownership of the mark, a legal presumption of your ownership of the mark, and the exclusive right to use the mark nationwide on or in connection with the goods or services listed in the registration. We strongly encourage our clients to register their trademarks and service marks to take advantage of these protections.

For more information about the benefits of or process of registration, contact Darcie Colihan or Dana Nicholas in LGC's San Diego office.

LGC Obtains Workplace Restraining Order For Client

Partner Ted Cercos and Associate Jennifer Zaharris recently represented a client seeking a workplace violence restraining order against a disgruntled former employee. In the days following the client's termination of a management-level employee, the client's CEO and other executives began receiving threatening text messages and emails. The threats were serious enough to require the temporary closure of two of the client's offices.

Like most workplace violence situations, the client's issue was very time sensitive, so upon being contacted by the client, LGC moved quickly to identify the client's options and adopt a course of action. After assessing the particular threats and client's desire to prevent any future communication from the ex-employee, LGC determined a workplace violence restraining order was the most appropriate type of restraining order because it prevents the restrained person from contacting any employee or any employee's family member in any capacity.

The first step in obtaining a workplace violence restraining order is obtaining a temporary restraining order ("TRO"). If granted, a TRO serves as a restraining order for a short period (usually two weeks) or until the long-term restraining order hearing.

LGC gathered all the necessary facts, evidence, and supporting witness statements needed to complete the TRO request. Ms. Zaharris promptly filed the paperwork and attended the TRO hearing and, after questioning regarding the specific threats and need for immediate protection, the court granted the TRO and set a restraining order hearing for two weeks later.

Judges have broad discretion in determining the presentation of evidence for a restraining order. Some judges rule based on the written paperwork and evidence, while others require live testimony. In this case, the court required live testimony.

As a result, at the hearing for the restraining order, LGC put on evidence during a half-day bench trial, including opening statements, direct and cross-examination of witnesses, documentary evidence, and closing arguments. At the end of the hotly contested, five-hour hearing, the court ruled in favor of LGC's client, granting a three-year restraining order and adopting all restrictions requested by LGC.

Dealing with an ex-employee communicating threats of violence against an entity's employees can be a scary situation. Employers facing such scenarios should be aware of the workplace violence restraining order as a tool for protecting employees against potential violence. As part of LGC's broad employment practice, LGC has the experience to quickly and effectively obtain a restraining order to protect its clients and their employees.

For more information about the case or obtaining a workplace violence retraining order, contact Jennifer Zaharris in LGC's San Diego office.

Ted Cercos

Jennifer Zaharris

San Diego Superior Court Restricts Setting MSCs

On September 23, 2013, the San Diego Superior Court announced it "will no longer be scheduling mediator supervised mandatory settlement conferences."

The new policy was due to three main reasons: lack of personnel due to the elimination of several judges; lack of space; and legal issues due to recent appellate cases restricting MSCs with private mediators.

The Court will permit parties to request MSCs without private mediators (i.e. with sitting judges), but only near the end of cases and only with a limited number of parties.

In light of this, clients with multi-party cases, particularly construction defect cases, should plan accordingly in setting and conducting private mediations.

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Upcoming Partner Presentation

Partner Teresa Beck will be speaking on a panel at the Claims and Litigation Management Alliance's annual Construction/Environmental Conference on November 8, 2013, at the Hilton Orange County in Costa Mesa, California. The topic of the panel's presentation is "Unconventional Approaches to Resolving Construction Defect Cases." The panel will use real-world examples of unconventional methods to give attendees practical advice on ways to efficiently resolve these complex matters.

For information about the conference, click here or contact Teresa.

Significant New SB 800 Appellate Decision

(cont. from page 1)

As a result, the Court held that because the sprinkler leak caused actual damage, the plaintiff was not limited to SB 800 claims and their associated statutes of limitation. Rather, the plaintiff could file a common law negligence claim, with a statute of limitation that runs from the date of incident, not close of escrow.

This holding could have broad implications. At the very least, a plaintiff can likely avoid SB 800 defenses in cases where a defect causes damage. Potentially, such a plaintiff might be able to avoid all aspects of SB 800, including the mandatory pre-litigation repair procedures, by alleging damage caused by a defect.

New Appellate Case Expands Employer Liability For Employee Actions

In the new California case of *Purton v. Marriott International, Inc.*, the Court of Appeal issued a ruling that dramatically expands traditional notions of an employer's liability for an employee's actions.

In the case, an employee drank alcohol at his employer's holiday party. He drove home safely, but later left his home again to drive to a friend's house, during which he crashed into another car, killing the driver. The defendant employer successfully moved for summary judgment before the trial court, arguing that the employee had arrived home prior to the accident, meaning his subsequent drive (and accident) were not within his scope of employment under the "coming and going rule."

The Court of Appeal reversed, holding that the operative question was not whether the employee was in the scope of employment at the time of the accident, but rather whether the proximate cause of the accident occurred during the scope of employment.

Assuming the intoxication was the proximate cause of the accident, the Court held that the employee's drinking was within his scope of employment if the event was of "conceivable benefit" to the employer and the drinking was "a customary incident to the employment relationship." The Court concluded the party was held to improve morale, and thus "of a conceivable benefit" to the employer; the drinking was customary because the employer gave express permission by providing drink tickets and having managers drink with employees.

With the holiday season rapidly approaching, employers should pay particular heed to this case, including instituting measures to avoid over-serving employees and providing alternate transportation from holiday parties.

Contact Partner Chris Schmitthenner with any questions about the case.

Changing Of The Guard

LGC is pleased to announce that Chris Schmitthenner will be taking over for Teresa Beck as Editor of the LGC Quarterly. In stepping down from her role, Teresa plans to focus more of her time on publishing material for the Claims and Litigation Management Alliance and Defense Research Institute, as well as engaging in new speaking opportunities.

Teresa proudly served as the Quarterly's editor since its launch in 2007, working hard to create and refine the publication. LGC thanks Teresa for her hard work over the past six-and-a-half years. Chris Schmitthenner, a partner in LGC's San Diego office, will strive to continue to grow and evolve the LGC Quarterly.

Along with the change of editors, LGC is also launching a new format for the LGC Quarterly, which readers have likely noticed with this issue. We hope you enjoy the new version, along with more changes undoubtedly following in the years to come.

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