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# LGC Prevails Against Third-Party Express Indemnity Claim

Partner Loren Young and Associate Karissa Mack recently prevailed on a Motion for Summary Judgment against a third-party claim for express indemnity in a personal injury case.

In the case, an employee of LGC's client filed suit against an equipment rental company in Las Vegas for injuries sustained by an alleged defect in the equipment. The equipment rental company, in turn, brought a third-party claim against LGC's client for express indemnity. The rental company argued that, pursuant to a provision on the back of the rental agreement, LGC's client owed indemnity outside of the immunity typically afforded under the Nevada Industrial Insurance Act ("NIIA").

LGC filed a motion for summary judgment on the basis that the indemnity provision improperly expanded the liability covered under the NIIA and was unconscionable. In doing so, LGC argued that the rental company sought to pass all liabilities directly to LGC's client and was therefore seeking indemnity for LGC's client's own negligence, which is covered by the NIIA.

As to the unconscionable nature of the agreement, LGC argued that the rental agreement was not negotiated at the job site. Rather, a delivery person for the rental company presented this document upon delivery of the rented equipment for signature, a form that was only meant to be an acknowledgment of delivery. The delivery person did not present the back page of the rental agreement, did not identify any of the provisions within the document, and did not determine whether the person signing for the equipment had the authority to bind the company. In fact, the document was presented to a union laborer out in the field rather than any supervisor. The indemnity provision was also in very small font on the back of the document and was not conspicuous as required by law.

The Court agreed with LGC and granted its motion for summary judgment, holding that the express indemnity provision did not create an independent duty to allow the rental company to circumvent the employer's NIIA immunity. The court also agreed with LGC that the provision was unconscionable and, therefore, void. The Court's decision is significant given the precedent of *American Fed. Sav. Bank v. County of Washoe*, 106 Nev. 869 (1990), which narrowly permits third-party express indemnity claims against an employer, notwithstanding the immunity afforded under the NIIA, if an independent duty can be shown.

The Court's decision is a significant victory for employers whose employees are injured on the job and pursue a third-party injury action. It provides the employer with some additional protection to prevent exposure beyond the bounds of the NIIA.

Congratulations to Loren and Karissa.

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# Appellate Decision Confirms SB 800 Limitations

In *Burch v. Superior Court*, the Court reiterated earlier decisions that the Right to Repair Act (SB 800) is not the exclusive remedy for plaintiffs with construction defects that resulted in property damage. Additionally, the Court held that a contractor can be held liable for breaching a duty of care and an implied warranty to a prospective purchaser with whom the contractor has no contractual agreement.

In the case, a general contractor constructed a single-family home pursuant to a contract with a developer. The home was built, marketed to the general public, and eventually sold by the developer to the plaintiff. The plaintiff then filed a construction defect lawsuit, including claims for negligence and breach of warranty against the general contractor.

The contractor filed for summary adjudication, asserting that the Right to Repair Act was the exclusive remedy for construction defects and corresponding damages, and arguing that the negligence and implied warranty claims failed because there was no contract between the contractor and the plaintiff.

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# California, Nevada Adopt Time Limitations For Depositions

In a change meant to mirror limitations already present in the Federal Rules of Civil Procedure, both California and Nevada have amended their procedural rules to impose time limits on depositions.

In Nevada, the Nevada Supreme Court issued an order on February 25, 2014, amending Rule 30 of the Rules of Civil Procedure. Under the amendment, a deposition is limited to one day of seven hours, unless otherwise stipulated or ordered by the court. A court must permit additional time, however, if needed to fairly examine the witness or if the witness, attorneys, or other circumstances impede or delay the examination.

Similarly, last year California amended Section 2025.290 of the Code of Civil Procedure to impose a limit of seven total hours of examination by all counsel, excluding questioning from the witness's counsel, absent a court order. Unlike the Nevada rule, however, the California statute has a number of exceptions.

Under the terms of the California statute, the seven-hour limitation does not apply to expert depositions or the deposition of an individual designated as the "person most qualified" to appear on behalf of a corporation or other entity. The California limitation likewise does not apply to employment cases or cases that have been designated by the Court as complex, and does not apply to a party that first appeared in the case after a deposition was already completed.

These rules have a number of important nuances, which could become significant in construction defect cases and significant injury cases. First and foremost, both the Nevada and California rules only apply absent a stipulation or court order to the contrary. Discovery in construction defect cases in both states is often governed by Case Management Orders (CMOs) issued by the courts, which could expand or even eliminate otherwise applicable time limits for depositions. Thus, parties in construction defect casts would be well-served to address the issue when creating CMOs.

Second, the seven-hour limit of the California rule only applies to the amount of "deposition examination." In other words, the limit only includes time actually on the record questioning the deponent, not time for breaks. The Nevada rule does not expressly provide this clarification, but it seems likely to be interpreted in the same way as the California rule.

Finally, both the Nevada and California rules apply absent a stipulation to the contrary. Clearly, there are situations where, given the complexity of the claims (such as a significant injury action) or the number of parties (such as a construction defect action) where a witness's deposition cannot reasonably be completed in seven hours. In such a situation, counsel would be well-served to meet and confer on the record to attempt to reach such a stipulation prior to resorting to a motion.

# LGC Announces New LV Managing Partner

LGC is pleased to announce that Loren Young has assumed the role of managing partner of LGC's Las Vegas office.

Originally from Utah, Loren attended Weber State University, where he earned a Bachelor of Science degree in business logistics. He went on to attend Washburn University School of Law, where he earned his Juris Doctorate with Dean's Honors and was a member of the *Washburn Law Journal*.

Loren started working at LGC in 2001. Through his impressive work and professionalism, he became a partner at LGC in 2007. He continues to represent clients in a broad spectrum of general liability cases. Loren also serves as president of Las Vegas Defense Lawyers.

In announcing Loren's new role, founding partner Tom Lincoln wrote, "Loren is a well-respected and experienced attorney whose ethics and professionalism are of the highest order. Not only is he an excellent lawyer, he is also active in the community. With Loren, we will continue to provide the best legal services to our clients."

In his new role, Loren will be responsible for the management of LGC's diverse group of 13 Nevada attorneys. Under his leadership, LGC will continue to provide the highest quality of representation to its Nevada clients and beyond.

Congratulations to Loren on his new position.

# Discovery Verifications Of Out-Of-Business Entities

In responding to discovery requests in California, a party is required to provide a verification, signed under oath, that the responses are accurate. Attorneys are frequently presented with the conundrum of how to verify discovery verifications on behalf of an out-of-business entity. These out-of-business entities can take many forms: bankrupt, suspended, dissolved, or active but with no employees.

This issue generally arises when an insurance company steps in to defend an out-of-business entity in a lawsuit. That entity may be suspended by the Secretary of State or simply still listed as active but actually has no employees. In the case of a bankrupt entity, the insurance company may be defending because the plaintiff has obtained leave to pursue insurance assets. Even in the case of a dissolved entity, California law provides that a dissolved entity still exists to the extent of its undistributed assets, including insurance.

Whatever the specific situation, the issue is the same: How does an attorney obtain a discovery verification when there is no employee to sign?

Often, it was custom and practice for an attorney to provide responses to the discovery to the best of his or her knowledge, and not provide a verification. The new decision in *Melendrez v. Superior Court*, however, indicates this custom will no longer be sufficient under the discovery rules.

In the case, a bankrupt corporation purportedly remained in existence solely to pass through lawsuits for insurance to defend. There were no officers or employees.

The plaintiff took the position that the attorney should verify the discovery responses. However, doing so would constitute a limited waiver of the attorney-client privilege "during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response." The attorney argued that, because there were no officers or employees of the corporation, there was no one to waive that privilege such to permit counsel to sign the verification.

On appeal, the court concluded that, under the circumstances of the case, the privilege had passed to the insurer. As a result, the insurance company could make the decision to either permit the attorney to sign the verification (and created a limited privilege waiver), find another qualified person to sign the verifications, or accept the consequences of non-compliance with discovery.

While in *Melendrez* the decision regarding verifying discovery ultimately fell to the insurance company, that will not always be the case depending on the status of the corporation. A dissolved corporation, for instance, continues to exist for the limited purposes of winding up. In that situation, the individual authorized to act for the corporation during the wind-up would be the one to decide whether to waive the privilege or accept the discovery consequences. The key in these situations is determining who holds the corporation's attorney-client privilege.

While different circumstances may create varied results, what is clear is that the practice of an attorney preparing responses for a defunct entity without a verification is over. When facing the situation of representing such an entity, counsel and the insurance company should address the issue of verifications early, and prepare accordingly.

# LGC Relocates Its San Diego Office

LGC is pleased to announce that, as of April 1, 2014, its San Diego office has relocated to 550 West "C" Street, Suite 1400, San Diego, California, 92101.

LGC's beautiful new San Diego office is in the heart of San Diego's legal community, just a few blocks from the federal and state courthouses and next to San Diego's major court reporting firms.

The move was bittersweet for LGC, which had been located for over 25 years at 225 Broadway in San Diego. Ultimately, though, LGC felt the move was necessary to be in a position to best serve its clients.

With a new long-term lease, LGC has committed itself to being here for its clients well into the future.

**LGC's New San Diego Location**:

550 West "C" Street
Suite 1400
San Diego, CA 92101

For a map, click here.

## LGC Launches New Website

LGC is excited to announce the launch of its newly formatted website at www.lgclawoffice.com. At our new website, clients can learn more about our firm and our diverse practice areas. Visitors can also view or sign up to receive our newsletter, as well as check out our newsletter archives. The new website even has a newsroom blog, through which LGC will keep its clients up-to-date with significant legal events, changes in the law, and LGC news and events.

If you have any questions about the website, please contact LGC Partner Chris Schmitthenner.

## Kathleen Lutke Retires After 23 Years

On March 25, LGC bid farewell to one of its longest-tenured employees. Kathleen Lutke, who worked in the accounting and billing department at LGC, retired after 23 years with the firm.

Clients who have called LGC over the years with billing questions have no doubt had occasion to speak with Kathleen and hear her distinctive Irish accent. Those who had the privilege to work with her saw her hard work and dedication. In her newly found free time, Kathleen plans to spend more time traveling, particularly back to Ireland.

LGC congratulates Kathleen on her more than two decades of hard work with the firm, and we wish her nothing but the best in her retirement.

## New Appellate Case Clarifies Attorney-Client Privilege In HOA Context

In the new California case of *Seahaus La Jolla Owners Association v. Superior Court*, the Court of Appeals held that a homeowner's association (HOA) did not waive its attorney-client privilege when the HOA's counsel held litigation update meetings with individual non-party homeowners.

In the case, the individual homeowners were not the clients of the HOA's counsel, and had filed a companion action for construction defects in their own private units. The defendants argued that the HOA waived its attorney-client privilege with respect to any litigation strategies shared at the update meetings with the non-client homeowners. The HOA argued the communications were privileged because the statutory "common interest exception to waiver" applied to the communications with the individual homeowners.

In siding with the HOA, the Court found that the common interest doctrine protects the attorney-client privilege when two parties have a shared interest in securing legal advice related to the same matter and communicate to advance that shared interest. The Court emphasized that the HOA had a statutory and contractual duty to keep the individual homeowners informed about the litigation. Thus, the HOA was attempting to protect the condominium's common areas and the interests of the other stakeholders by discussing the litigation with the individual homeowners. The Court also found that the HOA and the individual homeowners had common interests due to the two closely related construction defect lawsuits. Accordingly, the Court ruled that the communications concerning the litigation at the update meetings were privileged.

## SB 800 Appellate Decision

(cont. from page 1)

In denying the motion, the Court reiterated its holding from *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove, LLC*, a case noted in our October 2013 newsletter, which held that where construction defects cause actual damage, a plaintiff is entitled to pursue both SB 800 and common law claims.

The Court also ruled that, notwithstanding the lack of contract, the contractor owed a duty of care to the plaintiff because the harm to a prospective buyer from a construction defect was foreseeable, and excusing a contractor from liability to a prospective purchaser would be contrary to the established policy of preventing future harm from deficient construction.

Finally, the Court held that, even without a written contract with the builder, the plaintiff could assert a breach of warranty claim based on the plaintiff's argument that he was a third-party beneficiary to the contract between the developer and the general contractor.