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ISSUE 36 | A QUARTERLY PUBLICATION | January 2016

Editor: Chris Schmitthenner, Partner

NLRB Ruling Substantially Alters Joint Employer Definition

On August 27, 2015, the National Labor Relations Board ("NLRB") handed down a significant ruling that altered its longstanding definition of a joint employer, which previously mimicked the standards in California.

In *Browning-Ferris Industries of California, Inc.*, the NLRB ruled that Browning-Ferris, a waste management company that used the staffing services of Leadpoint Business Services ("Leadpoint"), was a joint employer of Leadpoint's employees. Leadpoint provided temporary employees to Browning-Ferris' waste management facility. Leadpoint hired and discharged all its employees, handled all discipline, and set wages. However, Browning-Ferris mandated that Leadpoint's employees could not earn a higher wage than their own, and had the option to request a Leadpoint employee cease work at their facility. Asserting that it was adopting a standard based on common law principles of control, including assessing "industrial realities," the NLRB held that Browning-Ferris and Leadpoint were joint employers.

Previously, two entities were joint-employers only when both entities exerted such direct and significant control over the same employees that they co-determined matters governing the essential terms and conditions of employment (e.g. right to hire, terminate, discipline, supervise and direct). Now, the determination of whether a putative employer is a joint employer employs a two-part test. The initial inquiry focuses on whether there is a common-law employment relationship with the employees in question. If a common-law employment relationship is found, the analysis then turns to whether the putative joint employer "possesses sufficient control over employees' essential terms and conditions of employment."

Notably, this control does not need to be direct or immediate. The NLRB found that Browning-Ferris's *indirect* control over the means and manners of Leadpoint's work and terms of employment were sufficient to find Browning-Ferris to be a joint employee. An entity may be found to be a joint-employer if it had *potential* control over those employees' manner and means of work, even if it did not exercise it.

In the wake of *Browning-Ferris*, companies that use staffing agencies or similar temporary workers may be held to be joint-employers of those employees and potentially subject to collective bargaining or other requirements of the National Labor Relations Act. The broader implications may be greater. As the *Browning-Ferris* dissent noted, "there is no limiting principle in the [decision's] open-ended multifactor standard."

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Impact Of Efficient Proximate Cause Doctrine

A recent holding by a California Court of Appeal highlights the significance of California's efficient proximate cause doctrine on evaluating coverage.

The case, [Vardanyan v. AMCO Ins. Co.](), arose out of a claim under a homeowner's insurance policy. Plaintiff, who owned a rental house covered by an insurance policy issued by AMCO, submitted a claim due to water damage and mold in his home. An adjuster investigated and confirmed the floors in some rooms were sinking, possibly due to a water leak, and there was mold in every room.

A structural engineer likewise inspected the site and found multiple leaks in the roof, water damage throughout the house, sunken floors in multiple rooms, and evidence of a past termite infestation. The engineer determined the damage was caused by poor original construction along with the various sources of moisture (roof leaks, leaking toilets, faucets, and pipes), and termite damage.

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Empty Trusts And The Importance Of Funding Living Trusts

One of the most common mistakes people make in setting up their estate plan is not properly funding their trusts, resulting in empty trusts with good intentions.

In order for a trust to be valid in California it must be "funded." It is not enough that the trustor (the creator of the trust) sign the trust documents. The trustor must also transfer title or ownership of the property he or she wants to be subject to the trust into the trust. This will ensure that the trustor's property is governed by the terms of the trust. We see this most often when trustors use online document preparing services to prepare their trusts. Those services do not counsel the trustors properly, if at all, on the important funding steps that must be taken once the trust is signed.

How To Fund A Living Trust

The specific method for transferring property into your trust will depend on the type of property. If the asset is something that you have title to, you will have to transfer title of the asset into the trust. For example, real property must be titled in the name of the trust. In California, a quit claim deed is filed transferring title to the property to the acting trustee of the trust (which is usually the trustor during his or her lifetime). This will allow the trustee to have control over the property and will subject the disposition of the property to the terms of the trust.

Some assets do not carry legal title, including personal property or intangible interests, such as intellectual property, royalties, or ownership interests in partnerships or LLCs. Because there is no title to these types of assets, you will have to transfer your rights to the trustee. Each of these types of assets have slightly different procedures and requirements for transferring your rights.

Further, there are slightly different procedures for funding trusts with assets to which you are a beneficiary. These include retirement accounts, life insurance, pension plans, and health saving accounts. In order to transfer these assets into the trust, you will need to name the trust as the beneficiary of the account/policy/plan. Each institution may have different required forms and procedures for accomplishing this. Sometimes this process can result in a sticky web of administrative pit falls and road blocks, and often a simple letter or call from your attorney can help navigate this process.

Whether you even want all of your assets to be subject to the terms of your trust is something that you should consider carefully as well. Sometimes it is beneficial to your estate plan to either leave the asset outside your trust or, if available, to name beneficiaries of certain assets directly rather than having the asset pass through the trust upon your death.

Maintaining Your Trust

Another common cause of an empty trust is the failure to maintain and update your trust. Perhaps you signed your trust in 1996 and properly funded the trust with all the assets you owned at that time, then tucked your trust away in a fire safe never to be thought about again. Odds are that in the 20 years that have passed, you have sold all if not most of those assets and purchased new ones. More than likely, however, you did not take steps to fund your trust with all of your newly acquired assets.

Do not end up with an empty trust. Make sure your trust is properly and fully funded as desired. For more information about living trusts or any other trusts and estates issues, contact Darcie Colihan in LGC's San Diego office.

LGC Welcomes New Associate To S.D. Office

Danica Brustkern

LGC's San Diego office is pleased to welcome Danica Brustkern as its newest associate. A former summer clerk with the firm, Danica began working as an associate after being admitted to the California bar in December of 2015.

Danica earned her J.D. from the University of San Diego School of Law in 2015, and her B.A., *cum laude*, from the University of Washington in 2012.

While in law school, Danica externed at the U.S. District Court for the Southern District of California, participated in the USD Alumni Moot Court Competition, and served on the executive board of USD's chapter of the Phi Delta Phi International Legal Honor Society. Danica also won the 2015 American Bar Association Section of Real Property, Trust & Estate Law writing competition.

Danica's work focuses primarily on personal injury and construction matters.

Impact Of Efficient Proximate Cause Doctrine

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The policy at issue, under its section entitled "Other Coverage 9," insured against "risk of direct physical loss to covered property involving collapse of any part of a building caused only by one or more of the following [perils]," including hidden decay, hidden insect damage, and weight of contents, equipment, or people. The "General Exclusions" section of the policy contained exclusions for damage caused by seepage or leakage of water from a plumbing system, mold, wet or dry rot, settling of foundations, water damage, and faulty or defective design, repair, construction, or maintenance.

The insurer denied coverage, citing multiple policy exclusions, including several of the "General Exclusions." Plaintiff filed suit for breach of contract and bad faith. The evidence presented at trial indicated that there were multiple causes of the damage to the house.

Plaintiff contended that, pursuant to California's efficient proximate cause doctrine, the policy provided coverage for collapse if the predominant cause of the collapse was a peril covered by the policy, such as hidden decay or insect damage, despite any other peril that contributed to the loss. Thus, Plaintiff requested that the trial court give an instruction stating as much.

Defendant, however, proposed a special jury instruction that placed the burden on Plaintiff to prove the collapse of the house was caused only by one or more of the perils listed in the "Other Coverage 9" section, and that if the cause of the collapse involved any peril other than those listed, there would be no coverage. Defendant contended that the use of the word "only" in "Other Coverage 9" meant that a collapse is a covered loss only if a peril listed contributed to the collapse.

Ultimately, the Court agreed it would give a jury instruction substantially similar to the one proposed by Defendant. Because there was no dispute that the damage to the house was partially caused by perils other than those listed in "Other Coverage 9," Defendant moved for a directed verdict, which the trial court granted.

Plaintiff appealed and raised several issues, the most significant of which was the propriety of the trial court's jury instruction. The Court of Appeal agreed with Plaintiff, finding the instruction was improper based on California's efficient proximate cause doctrine, and thus reversed the judgment.

The efficient proximate cause doctrine provides, "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause." As explained by the Court, the predominant cause is the cause that "sets the others in motion."

The Court determined that Defendant's construction of the policy would exclude coverage any time a peril not listed in "Other Coverage 9" contributed to the loss, however minor the contribution. As noted by the Court, "Even if the collapse was predominantly caused by a listed peril, such as hidden decay or hidden insect damage, if a peril not listed in Other Coverage 9 contributed to it in some minor way, coverage would be excluded." Thus, Defendant's interpretation, and the jury instruction Defendant requested, ran afoul of the efficient proximate cause doctrine.

This case highlights the significance of the efficient proximate cause doctrine, which must be considered by insurers whenever multiple perils contribute to a claim. For more information, please contact LGC partner Chris Schmitthenner.

LGC Partners To Put On "Reptile" Webinar

On February 11, LGC partners Teresa Beck and Jill Chilcoat will be putting on a webinar entitled, "Is the Reptile Real? Dissecting 2015 Reptile Verdicts." The webinar will analyze verdicts from 2015 where the plaintiffs' attorneys reportedly used the so-called "reptile" theory, a common practice among plaintiff attorneys to tailor a case to case to trigger jurors' primitive instincts of safety and security.

The webinar will analyze the facts and results of selected cases, and evaluate the impact, if any, of the reptile tactics on the results. The webinar is free and attendees will receive one hour of continuing education credit.

For more information or to sign up for the webinar, click here to e-mail Teresa Beck.

Click here to e-mail Teresa Beck for more information or to register.

NLRB Ruling Impacts Joint Employer Definition

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The franchise industry appears a particular area where the new joint-employer standard could apply, even though the *Browning-Ferris* decision stated it was not addressing the franchise-franchisee relationship. In addition, this expansive joint employer standard could gain a foothold in other arenas, including OSHA, Title VII, and even vicarious tort liability.

Employers will need to keep a close eye on their current business practices to eliminate the risk of being found to be joint employers.

For more information on this rapidly evolving decision and its potential impact on your business, please contact Jordan Nager in LGC's San Diego office.

New Appellate Case Expands Primary Assumption Of The Risk Doctrine

Under the primary assumption of the risk doctrine, a property owner has no duty to protect a plaintiff against risks that are inherent in a sporting or recreational activity if the activity involves an inherent risk of injury to voluntary participants and the risk cannot be eliminated without altering the fundamental nature of the activity. Traditionally, the doctrine has been applied to sporting activities. For example, being injured by a tackle in a football game is an inherent risk of the sport.

Over the last few years, however, the Courts of Appeal in California have expanded this traditional scope by applying the primary assumption of the risk doctrine to strictly "recreational" activities, in addition to sporting activities. For instance, three years ago the Court of Appeal held that the doctrine applied to risks inherent in using bumper cars. California's Fourth District Court of Appeal has now continued this trend in the new case of *Griffin v. The Haunted Hotel, Inc.*, finding that the primary assumption of the risk doctrine applied in a case in which the plaintiff was injured while participating in a Halloween-themed haunted trail walk.

In *Griffin*, the plaintiff purchased a ticket to experience The Haunted Trail, an outdoor haunted house type of attraction where actors jump out of dark spaces holding prop knives, axes, and chainsaws. After passing what he believed was the exit, the plaintiff was unexpectedly confronted by an actor wielding a gas-powered chainsaw (with the chain removed). The actor approached the plaintiff, frightened him, and chased the plaintiff when he ran away. The plaintiff fell while fleeing and injured his wrist. He sued The Haunted Hotel, Inc., which operated The Haunted Trail, alleging negligence and assault.

The Court opined that the purpose of The Haunted Trail was to scare people, and the risk that someone would become scared and react by running away could not be eliminated without changing the basic character of the activity. The risk was therefore found to be inherent in the fundamental nature of The Haunted Trail. There was also no evidence that the defendant unreasonably increased the risk of injury beyond those inherent risks or acted recklessly.

In addition, the Court rejected the plaintiff's argument that the primary assumption of risk doctrine did not apply because the plaintiff believed he had exited The Haunted Trail when the final scare occurred. It was undisputed that the Haunted Hotel controlled the area where the final scare occurred and the Court held that the boundaries of the attraction were defined by The Haunted Hotel, not its patrons. The Court therefore granted summary judgment in favor of The Haunted Hotel.

This case reinforces the continued protection of property owners against suits arising from risks inherent in sporting and recreational activities occurring on the owners' properties.

For more information about the case or the impact of the primary assumption of the risk doctrine, contact Rich Reese in LGC's San Diego office.

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