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Four LGC Partners Named To *Super Lawyers Magazine*

LGC is pleased to announce that four of its partners, [Tom Lincoln](#), [Ted Cercos](#), [Teresa Beck](#), and [Chris Schmitthenner](#), were all included in the 2017 list of top San Diego lawyers in *Super Lawyers Magazine*.

Super Lawyers selects the top lawyers throughout the country in 70 different practice areas using the *Super Lawyers* multi-step process. First, attorneys are nominated for recognition, typically by other attorneys in their geographical area who have seen the nominees in action. The attorney-led research staff at *Super Lawyers* also identifies and nominates attorneys based on awards and recognitions received.

All nominees then go through a vetting process of *Super Lawyers* staff, who use 12 indicators of peer recognition and professional achievement including awards, honors, verdicts, and experience. Nominees are also evaluated and rated by other attorneys in their particular practice areas.

After the nomination and review process is completed, nominees are grouped by firm size. Nominees with the highest point totals from each category are selected for inclusion in *Super Lawyers*. Only 5% of lawyers in any given state are selected.

Tom Lincoln, Ted Cercos, and Teresa Beck were all selected to the list of top civil litigation attorneys in San Diego. This is the ninth straight year that Tom has been selected.

Chris Schmitthenner, meanwhile, was selected by *Super Lawyers Magazine* to its list of Rising Stars for the third straight year. He was selected in the category of civil litigation.

The annual Rising Stars list is a distinction given to the top 2.5% of lawyers under 40 years old. Honorees are selected through the same *Super Lawyers* selection process, including peer nominations, evaluation, and peer review by a panel of lawyers within the honoree's practice area.

Tom, Ted, Teresa, and Chris are all partners in LGC's San Diego office. Tom Lincoln handles a wide range of civil litigation and business matters and is a member of the prestigious American Board of Trial Advocates.

Ted Cercos handles a variety of construction and personal injury cases, and works closely with long-term clients in developing quality assurance programs and refining risk-management practices

Teresa Beck practices in the areas of employment law, general defense of a wide variety of civil litigation matters, and construction-related matters.

Chris Schmitthenner's practice focuses mostly on personal injury, insurance coverage, and bad faith cases. He also represents contractors, engineers, and design professionals.

Congratulations to Tom, Ted, Teresa, and Chris.

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Enforceability Of SB 800 Pre-Litigation Procedures

Ever since the Court of Appeal's decision in *Liberty Mutual Ins. Co v. Brookfield Crystal Cove LLC*, there has been an ongoing fight in California in construction defect matters over the applicability of SB 800 (the so-called Right to Repair Act) in cases where the plaintiffs only allege common law claims instead of violations of the Act. The latest battle in that fight came in the Court of Appeal's decision last month in [Elliott Homes, Inc. v. Sacramento County Superior Court](#).

In the case, owners of 17 single-family homes filed a Complaint alleging strict products liability, strict components product liability, and negligence against Elliott Homes, Inc. ("Elliott"), the builder of the homes. Elliott moved to stay the litigation until the real parties in interest complied with the pre-litigation procedure set forth in Act (Civil Code §895, *et seq.*).

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Using Small Estate Administration To Avoid Probate

California probate law provides simplified procedures for settling an estate with limited assets, referred to as a "small estate." In an appropriate situation, you can use a small estate affidavit to transfer personal property and real property to the proper beneficiaries of an estate without having to open a formal probate proceeding with the court.

Using a small estate affidavit is optional. Under California law, formal probate proceedings can be opened for any estate regardless of its value. Although using a small estate affidavit is typically less expensive and time consuming than formal probate, circumstances may dictate that a supervised administration of the estate by the probate court is needed. Such circumstances include an estate likely to involve a contentious dispute among beneficiaries or an estate that must deal with disputed creditor claims.

There are two small estate procedures that are commonly used: (1) an affidavit procedure for collection or transfer of personal property (Probate Code §13100 *et seq.*), and (2) an affidavit procedure for real property of small value (Probate Code §13200 *et seq.*). While these procedures can be less costly than a full probate procedure, they rely on a third party holder of assets (e.g. a bank, title company, etc.) to

accept the affidavit. Even though there are penalties in place for third parties who refuse to accept properly executed and supported affidavits, this can get tricky as administrative hurdles and red tape may be encountered.

Basic Requirements To Use Small Estate Affidavit

To use a small estate affidavit to settle an estate, the estate must meet certain legal requirements regarding the maximum value of the estate's assets and the type of property to be transferred.

As of January of 2012, an estate with assets valued at \$150,000 or less, excluding certain types of assets, is considered a small estate under California law.

In determining the estate's value, both personal and real property is included, such as bank accounts, brokerage accounts, stock, bonds, mutual funds, other investments, and real property valued at up to \$50,000.

However some assets are not included in calculating the value, such as joint tenancy assets; trust assets; IRAs, 401K accounts, and similar pension accounts; life insurance; death benefits; registered

vehicles; pay from service with the armed forces; salary from any source not paid before date of death up to \$15,000; pay on death (POD) accounts; and accounts with a named beneficiary. The value of the asset is determined at the date of death, even if the affidavit or declaration is signed years later.

How To Use A Small Estate Affidavit

California law requires at least 40 days to elapse from the date of the decedent's death and no pending probate proceedings for the estate before you can use a small estate affidavit to acquire an estate asset to which you are entitled. The contents of the affidavit must conform to the requirements set forth in Probate Code §13101 and the affidavit must be signed under penalty of perjury and notarized in most instances.

The person signing the affidavit is declaring that the property should be distributed to the proper beneficiaries either pursuant to a will or pursuant to California's intestacy laws. If the distribution is unclear, an affidavit procedure may not be advisable.

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Samantha Panosyan

LGC Welcomes New Associate To S.D. Office

LGC's San Diego office is pleased to welcome Samantha Panosyan as its newest associate. A former summer clerk with the firm, Samantha began working as an associate after being admitted to the California bar in December of 2016.

Samantha earned her J.D. from the University of San

Diego School of Law in 2016, and her B.A. from California State University, Northridge in 2012.

While in law school, Samantha served as a Comment Editor for the *San Diego Journal of Climate and Energy Law* and had her article addressing insurance companies' roles in climate

change law and policy reform published in the journal. She also served as a teaching assistant for Advanced Legal Writing and externed at the U.S. District Court for the Southern District of California.

Samantha's work focuses primarily on personal injury and general civil litigation.

Enforceability Of SB 800 Pre-Litigation Procedures

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The homeowners opposed the motion, arguing that because they had only alleged common law causes of action, as opposed to violations of the Act, the pre-litigation procedures in the Act did not apply to them.

The trial court agreed with the homeowners and denied the motion, explaining that under the *Brookfield Crystal Cove* case, “the pre-litigation procedures are mandatory where homeowners plead statutory SB 800 causes of action, [but] there is no similar mandate where they plead only common law causes of action encompassing actual damage.” Elliott petitioned the Third Appellate District Court of Appeal for a writ of mandate, and the Court ultimately reversed the trial court’s decision and directed the trial court to enter an order staying the litigation pending completion of the pre-litigation procedures required by the Act.

In reaching its decision, the Court of Appeal concluded that the homeowners were required to comply with the Act’s requirements, including the pre-litigation procedures, even though they had not alleged a statutory violation under the Act. The Court determined that the homeowners’ claims fell within the scope of the Act because the

Complaint alleged residential construction defects in components or functions for which standards have been established in the Act. In particular, the homeowners alleged deficiencies in waterproofing defects, window and door defects, framing defects, roofing defects, and sheet metal defects, amongst others, all of which are covered under the standards set forth in Civil Code section 896.

The Court disagreed with the reasoning in the *Brookfield Crystal Cove* case, which was the basis of the trial court’s decision. The Court noted that the *Brookfield Crystal Cove* decision “relied on the ‘general rule’ that statutes should not be interpreted to alter or abrogate the common law unless its language clearly and unambiguously evidences an intention to do so.” However, Section 896, as well as Civil Code sections 897, 931, 943, and 944, “clearly and unequivocally express the legislative intent that the Act apply to ‘any action seeking recovery of damages arising out of, or related to deficiencies in . . . residential construction’”

The Court further held that “where the complaint alleges deficiencies in construction that constitute violations of the standards set out in Chapter 2 of

the Act, the claims are subject to the Act and the homeowner must comply with the pre-litigation procedure, regardless of the theory of liability asserted in the complaint.”

Thus, the Court concluded that common law causes of action related to construction deficiencies at single-family homes, like those asserted by the homeowners in this case, were “not among the claims excepted from the Act.” Further, because the homeowners did not provide notice to Elliott of their claims or otherwise comply with the statutory pre-litigation procedures, Elliott was entitled to a stay of the action until the statutory pre-litigation process had been completed.

This is a significant case for developers and builders of single-family homes encompassed by SB 800. Under this precedent, homeowners will no longer be able to avoid the standards and procedures of SB 800 simply by pleading around the Act.

For more information about the case and its significance, please contact Partner [Chris Schmitthener](#) in LGC's San Diego office.

LGC Prevails On Motion To Transfer Venue

Partner [Paul James](#) and associate [Danica Brustkern](#) prevailed on a motion to transfer venue of a case from California to North Carolina. LGC’s client was a North Carolina company that was sued by an insurer seeking to recover benefits paid in a personal injury action in Pennsylvania against a purchaser of the client’s product.

The insurer filed suit in Los Angeles and argued that LGC’s client was subject to an

agreement with the California-based purchaser to litigate disputes in California. Paul and Danica, however, argued that the forum selection clause was unenforceable and that factors of citizenship and convenience mandated a transfer of venue.

Ultimately, the Court agreed with LGC and transferred venue to North Carolina. Congratulations to Paul and Danica.

Click [here](#) to see the favorable ruling obtained by LGC.

Using Small Estate Administration To Avoid Probate

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How to Avoid Common Problems

One of the most common hurdles with these affidavit procedures is that the third parties holding the assets have different requirements, sometimes in addition to the legal requirements. If you are dealing with an estate administration, the best thing to do is contact the third party account holder before preparing the affidavit to make sure you know exactly what they need.

In planning before death, there are some additional options to consider. Some accounts allow you to name a pay-on-death beneficiary. If the account is not held in trust, this option could be simpler for your heirs and beneficiaries.

For more information on these and other estate planning issues, contact [Darcie Colihan](#) in LGC's San Diego office.



Darcie Colihan

New Appellate Case Clarifies Liability Of Material Suppliers Under SB 800

In the new decision of [Acqua Vista Homeowners Association v. MWI, Inc.](#), California's Fourth District Court of Appeal clarified the level of proof necessary to establish liability against product manufacturers and material suppliers under SB 800 (Civil Code §895, *et seq.*)

The case involved a construction defect action filed by the HOA of a high-rise condominium building in downtown San Diego. The HOA sued, among other parties, WMI, Inc., the supplier of pipe used throughout the building. The HOA alleged that WMI supplied "defective cast iron pipe manufactured in China." The HOA proceeded to trial against WMI solely based on violations of the standards of SB 800, not based on a theory of strict liability.

During trial, WMI filed a motion for a directed verdict on the grounds that the HOA had failed to present evidence of any violations of SB 800 due to the negligence or breach of contract of WMI. The trial court denied the motion, concluding that evidence of negligence or breach of contract was not required as long as a violation of SB 800 standards was established. Ultimately, the jury found in favor of the HOA and awarded nearly \$24 million against WMI. WMI filed a motion for JNOV based in part on the same grounds as its prior directed verdict motion, which was again denied.

WMI appealed the ruling on its motion for JNOV and the Court of Appeal agreed, reversing the verdict and ordering the trial court to instead enter a verdict in favor of WMI.

The primary issue faced by the Court was the language of Civil Code section 936, which provides, in relevant part: "Each and every provision of the other chapters of this title apply to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that the general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals caused, in whole or in part, a violation of a particular standard **as the result of a negligent act or omission or a breach of contract**"

However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply."

The HOA argued that, under the last sentence, there was no requirement to show negligence or breach of contract on the part of a materials supplier if it were a claim for which strict liability would apply. The Court disagreed, ruling that "[w]hile the final sentence of section 936 is not a model of textual clarity . . . standard techniques of statutory interpretation make clear that this sentence merely provides that the negligence standard applicable to claims brought against material suppliers under the Act does not apply to common law claims for strict liability against such suppliers." The Court further concluded that because it was undisputed that the HOA's claim was brought under the Act, it was required to prove that MWI "caused, in whole or in part, a violation of a particular standard as the result of a negligent act or omission or a breach of contract."

For more information about the case and its impact, contact Partner [Chris Schmitthenner](#) in LGC's San Diego office.

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