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Editor: Chris Schmitthenner, Partner

LGC Partner Prevails On Key Trial Motions

In the midst of two weeks of pre-trial motions in a construction defect case with a trial estimate of six months, LGC Partner Chuck Egan prevailed on critical motions that resulted in his client's removal from the case in whole before jury selection. The claim against LGC's client exceeded one million dollars.

The case involved alleged construction defects in a downtown San Diego condominium high-rise building. The Plaintiff homeowner's association claimed in excess of $100 million in damages for defects relating to windows, plumbing, mechanical, and architectural issues, with liability premised on both the Right to Repair Act (SB 800, Civil Code §§ 895-945.5) and common law remedies of negligence, strict liability, and products liability.

LGC's client manufactured, powder coated, and installed balcony railings on several hundred exterior decks, as well as ground-level gates and fencing. Interestingly, both the Plaintiff and Defendant general contractor had significant costs of repair for the client's work, with the Plaintiff calling for removal and re-coating of all balcony railings and the general contractor proposing complete replacement of all ground-level work due to areas of corrosion.

LGC filed several pre-trial motions. The first sought to preclude the Plaintiff's expert from testifying about "future failures" of the powder coat that were "just a matter of time." LGC argued that the testimony was speculative and that the threat of future harm is not actionable.

The second sought to exclude the expert's testimony that the powder coat should have a twenty-year maintenance-free useful life. Mr. Egan argued that those opinions were contrary to the client's warranty language and SB 800.

The third motion asked the Court to exclude any evidence of defects in the client's work under SB 800 because the Plaintiff failed to make a timely claim under the five-year warranty provided by the client.

The trial judge agreed with LGC as to all three contentions, and granted all three of these critical motions in limine

The result is a reflection of the critical importance of understanding the requirements and effect of SB 800 provisions as they apply to specific defects and preparing a defense under the provisions during discovery. In this case, two sections of the statute (Civil Code § 896) could have applied to the client's work, but each provided that the Plaintiff was required to make a claim within the timeframe of the warranty provided by the subcontractor/manufacturer.

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LGC Prevails On MSJ In Coverage Action

Partner Teresa Beck and associate Rich Reese recently won a motion for summary judgment on behalf of an insurer in a coverage dispute.

The lawsuit arose out of a motor vehicle accident that was caused by the client's insured. The insured, a sole proprietor who did business under a fictitious business name, claimed he was improperly denied coverage for claims made against him in two separate lawsuits relating to the automobile accident that occurred while the Plaintiff was using his vehicle for business purposes.

When the accident occurred, the Plaintiff was driving a vehicle that was not listed on his business automobile liability policy, but he claimed the subject vehicle was covered under the provision of his policy that provided coverage for rental vehicles.

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Transfer On Death Deeds: The Newest California Procedure

Effective January 1, 2016, there is now another option in California that allows real property to be transferred upon a person's death, thereby avoiding probate. New Assembly Bill 139 establishes a procedure to transfer real property upon death through a revocable transfer on death deed ("TOD deed"). The deed allows a person to leave their real property to a designated person ("beneficiary") without having to set up a living trust.

The beneficiary named on a TOD deed does not have any rights to the real property when the owner is alive. Additionally, creditors of the named beneficiary cannot place any liens on the property. While the owner is living, the owner has the right to sell or encumber the property. The property is also subject to the owner's creditors as it would be otherwise.

Criteria For TOD Deed

The TOD deed allows an owner of residential real property to name one or more beneficiaries to receive the property when the owner dies, thus bypassing the need to probate the estate. There are specific criteria that a person must meet, however, in order for the TOD deed option to be available.

First, the real property must be a single-family home or condominium unit, or a multi-unit residence of not more than four residential dwelling units, or be a single-family residence on no more than 40 acres of agricultural land. Second, a TOD deed must be signed and dated before a notary public. Third, the TOD deed must be recorded within 60 days or less from the date it is signed.

TOD Deed Is Revocable

A validly executed and timely recorded TOD deed is revocable during the grantor/owner's lifetime. There are three ways the grantor/owner can revoke a TOD deed: (1) the owner can record a formal notice of revocation; (2) a new TOD deed may be recorded; or (3) the real property can be transferred to someone else prior to the transferor's death.

If an owner records multiple TOD deeds on one real property, the deed with the most recent recording date will be the one in effect.

The Downsides

There are a number of potential downsides and limitations one must consider before pursuing this new procedure.

The first downside is that if the owner co-owns the subject real property as joint tenants or community property with right of survivorship, the owner's share will automatically transfer to the co-owner(s) upon death. The TOD deed has no effect, unless used for the last surviving co-owner. Co-owners may consider signing separate TOD deeds if they both want the same beneficiaries after they both die. A better solution, however, would be to set up a living trust.

Second, if the owner becomes incapacitated there may be no one with authority to revoke the TOD deed should that be necessary or appropriate under the circumstances (i.e. a change in family circumstances or the need to qualify the person for Medicaid assistance). To revoke the TOD deed, there would need to be a proper power of attorney prepared and agent appointed with specific powers to revoke the TOD deed.

Third, because the transfer through a TOD deed is to a specific beneficiary, problems can arise if the named beneficiary is no longer living.

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LGC Attorney Recognized On Top 100 List

Karissa Mack

LGC Associate Karissa Mack will be featured in the International Top 100 Lawyers 2017 Fall Edition magazine.

The magazine is dedicated to recognizing those attorneys who exemplify hard work and dedication through an exemplar career, educational attainment, and admiration within the community.

Born and raised in southern Oregon, Karissa earned her Bachelor's Degree from Oregon State University in Political Science. She then obtained her Juris Doctorate from Whittier Law School, with a concentration in Business Law and a Certificate in Intellectual Property. Currently, Karissa's practice focuses on civil litigation, construction law, premises liability, and general business counseling.

Congratulations to Karissa on her selection.

LGC Prevails On MSJ In Coverage Action

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The Plaintiff argued that he, as an individual, "rented" the subject vehicle to his sole proprietorship. The Plaintiff's insurer disagreed and denied coverage. The Plaintiff, in turn, sued the insurer for breach of contract and breach of the covenant of good faith and fair dealing.

In bringing a Motion for Summary Judgment as to the Plaintiff's claims, LGC argued that the "rental" of a vehicle from the Plaintiff to his sole proprietorship was not a legally valid transaction. This argument was based on the grounds that a sole proprietor does not create a separate business entity simply by doing business under a fictitious business name. The sole proprietor and the business are therefore regarded as the same entity in the eyes of the law.

It is also well established that a contract requires at least two separate, independent minds. No person, natural or corporate, can legally make a contract with himself or herself. With only one entity involved, a contract becomes a nullity. LGC therefore argued that the purported "rental" agreement between the Plaintiff and his own sole proprietorship – assuming such an agreement actually existed – was a legal nullity.

LGC also cited to case law that indicated the purported "rental" did not qualify as a valid rental under the Appellate Courts' interpretations of the term as it is used in insurance policies. Courts in California have generally opined that the transfer of the use and possession of property is an essential characteristic of a rental. Because only one legal entity was involved in the Plaintiff's purported rental transaction, there was no transfer of use or possession of the property. LGC was therefore able to establish that the transaction did not qualify as a legally valid rental.

The Court granted LGC's motion for summary judgment. In doing so, the Court agreed with LGC that Plaintiff and his "dba" were not separate entities, and thus no valid contract could be created between the two. Further, the Court agreed that, even if there were a valid contract, the vehicle could not qualify as a "hired auto" under California law, and thus there was no lease such that could create coverage under the policy.

Congratulations to Teresa and Rich on their victory.

Transfer On Death Deeds: The New California Procedure

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A more comprehensive estate plan, such as a trust or will, can provide the transferor the ability to plan in the alternative for such circumstances.

A fourth downside is that if the TOD deed is not recorded within the statutory deadline (60 days after it is signed) the TOD deed becomes invalid. Life is full of unexpected circumstances, and situations can arise where an executed TOD deed is not timely recorded and the grantor/owner dies before he or she can remedy the situation. In that circumstance, the property would likely fall into unintended probate proceedings following the owner's death.

Finally, an owner wanting to name his or her minor child as a beneficiary on a TOD deed must consider the limitations that the minor (and his or her guardian) will face. While a minor can own real property, there are state laws that restrict a minor from entering into contracts relating to real property. This would limit or restrict the minor's ability to sell or encumber the property as may be necessary under the particular circumstances. Transactions involving a minor's interests in real property are best held in and administered through a trust.

There are circumstances where a TOD deed may be a good and viable option for an owner as part of his or her estate planning goals. However, if you are considering using a TOD deed as part of, or in lieu of, a more comprehensive estate plan you should discuss it with an attorney to help you understand your options and the risks.

For more information about TOD deeds or any other estate planning issues, contact Darcie Colihan in LGC's San Diego office.

LGC Partner Prevails On Key Trial Motions

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Chuck Egan

Having knocked out the SB 800 claims, the Plaintiff was left only with damages recoverable under negligence or products liability theories. Given that those causes of action require proof that the defendant's work caused resultant physical harm to another component of the building, the case against the client was effectively over because the Plaintiff had no meaningful damages to claim. The lack of a warranty claim and absence of resultant damage was confirmed during discovery.

As a direct result of these rulings, which were devastating to the Plaintiff's case, Mr. Egan was able to negotiate a de minimis settlement with the Plaintiff during a break in trial. That settlement resulted in a complete scope-of-work and issue release for the client, which in turn removed any argument from the general contractor or developer that they were entitled to any defense fees or indemnity from the client going forward.

In the end, Mr. Egan not only eliminated what was alleged to be a one million dollar claim against his client, but also helped his client avoid the cost of a six-month trial.

For additional information about the case and strategies for defending SB 800 and other construction defect claims, contact Partner Chuck Egan at LGC's San Diego office.

New Law Expands Labor Commissioner's Authority In CA

The California Labor Commissioner, otherwise known as the Division of Labor Standards and Enforcement ("the DLSE"), oversees and enforces California's Labor Code. Specifically, the Labor Commissioner inspects workplaces for wage-and-hour violations, adjudicates wage claims, and investigates retaliation complaints.

Existing law requires a discrimination complaint investigator to investigate, and submit a report on, each complaint to the Labor Commissioner. The Labor Commissioner may hold an investigative hearing regarding the report if, after reviewing the report, it determines a hearing is necessary. However, on October 3, 2017, Governor Jerry Brown vastly expanded the Labor Commissioner's power by approving Senate Bill 306 ("SB 306").

SB 306 now authorizes the Labor Commissioner to investigate an employer when it merely "suspects" retaliation or discrimination "during the course of adjudicating a wage claim, or during a field inspection pursuant to Section 90.5, or in instances of suspected immigration-related threats" – all without an employee filing a complaint for retaliation.

The new law also allows the Labor Commissioner to seek injunctive relief (prohibiting an employer from terminating an employee, or requiring the employee be reinstated, pending resolution of a claim) before the Labor Commissioner has completed an investigation that retaliation in fact exists. Previously, the law granted the Labor Commissioner authority to seek injunctive relief after it had investigated a claim of retaliation and decided a violation exists. Now, a court is required to order injunctive relief on the Labor Commissioner's showing that "reasonable cause exists to believe that an employee has been discharged or subject to adverse action for raising a claim of retaliation or asserting rights under any law under the jurisdiction of the Labor Commissioner."

Once an order from a court is obtained, refusing to comply is costly. Employers can be subject to penalties of up to $20,000 and if the Labor Commissioner prevails, an employer is liable for the Labor Commissioner's attorneys' fees.

These expanded powers could have a significant impact on an employer's exposure. It is critical for businesses to have counsel involved as soon as the employer becomes aware of any investigation by the DLSE.

For more information about the law and its impact, contact Yousaf Jafri in LGC's San Diego office.

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