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NEVADA LAW BULLETIN

Definition of Spouse Revised by DOL for FMLA Purposes

By Charity F. Felts, Esq.

The new rule. The U.S. Department of Labor ("DOL") revised the Family Medical Leave Act ("FMLA") regulations defining spouse on February 25, 2015. These revisions are in response to the U.S. Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In *Windsor*, the Court determined that Section 3 of the Defense of Marriage Act, which defined marriage as a union of a man and a woman, was unconstitutional. The DOL engaged in rulemaking following the announcement in *Windsor* and, effective March 27, 2015, the place of celebration standard will be used when determining the definition of a spouse.

Under the place of celebration standard, if an employee is married in a state that recognizes same-sex marriage but resides in a state that does not recognize same-sex marriage, the employee will enjoy FMLA rights to care for his or her spouse. Similarly, marriages that were validly entered into outside of the United States will encompass the definition of spouse if the marriage could have been entered into in at least one state. The DOL has specifically changed the rules to look to the law of the place in which the marriage was entered into, as opposed to the law of the state where the employee resides.

Impacts on leave usage. This change in the definition of spouse means that employees eligible for FMLA leave will be able to take FMLA to: (1) care for their lawfully married same-sex spouse with a serious health condition; (2) take qualifying exigency leave due to a lawfully married same-sex spouse's military service; or (3) take military caregiver leave for a lawfully married same-sex spouse.

What does this mean for you? Now is the time to train leave administrators, supervisors, and anyone else involved in the leave management process so they are aware of the new definition of spouse. This will help ensure that company representatives do not discourage an employee from seeking FMLA leave. If your policies or notices specifically define the term spouse, those policies and forms should be updated.

More information about the new rule can be found on the DOL's website, **www.dol.gov/whd/fmla**. You can also contact Charity Felts, or any of ETS's employment law attorneys, to discuss this new rule and how it might impact your company. Ms. Felts can be reached at (775) 786-3930 or **cfelts@etsreno.com**.

Construction Law: The Times They Are A Changin'

By John C. Boyden, Esq.

Governor Sandoval signed into law AB 125 on February 24, 2015. This new law significantly altered the laws concerning construction defect litigation. Quoting from the famous 1960's musician, Bob Dylan, "The times, they are a changin." For practitioners engaged in this area, a detailed study of this law is a must – all twenty-six single-spaced pages. This article will merely provide highlights of a few of the rather drastic changes.

DEFINITION OF CONSTRUCTION DEFECT

In the prior law, a construction defect was defined as any violation of a building code, or any work not performed in a workmanlike manner, or any work that created an unreasonable risk of injury. AB 125 defines a defect much differently. A construction defect must now present an unreasonable risk of injury to person or property, or constitute work that causes physical damage to the residence. The key change is that a defect must cause physical damage. Many defects alleged under the prior law did not cause any damage. This new requirement will eviscerate claims previously filed by homeowners. Drywall cracks, paint overspray, unsealed piping, insulation claims, minor HVAC installation errors, or minor electrical installation errors cannot now be claimed under the new law, because generally there is no damage to the residence.

PRE-LITIGATION PROCEDURES

Another huge area modified by AB 125 involves pre-litigation procedures. Previously, homeowners only had to "diligently pursue" home warranty claims. They also had no involvement in the Chapter 40 notice or in the inspection of their house. Now, here is what homeowners must do:

1. Before filing a Chapter 40 notice (which initiates a construction defect claim), they must submit a claim to their home warranty carrier, and show proof that the carrier has denied the claim.

2. They must sign a statement and "verify" all of the defect claims they are making, and they must also identify the exact location of the defect and the damage caused thereby.

3. They must be present at the Chapter 40 inspection, and if they have an expert, he or she must also be present at the inspection, so the defects can be pointed out to the contractors involved.

TIMING TO FILE A CONSTRUCTION DEFECT CLAIM

The previous law allowed a construction defect claim to be filed as many as 10 to 12 years after a home was constructed. In the case of fraud or misrepresentation there was no statute of limitations. AB 125 crushes this position with a new bright line six-year statute of repose. No claim of any sort can now be filed more than six years after the home is completed. There is no wiggle room, and no extension for fraud or misrepresentation.

ATTORNEY'S FEES

Attorney's fees were often the sore spot for contractors and insurance carriers in handling construction defect litigation because the prior law essentially mandated the recovery of attorney's fees and costs. In every settlement there was always a discussion of the amount of the attorney's fees incurred to date and what portion of those fees and costs would be attributable to the contractor or subcontractor involved.

AB 125 eliminates the attorney's fee issue. The new law simply strikes attorney's fees as a recoverable cost. AB 125 does build in ways to recover attorney's fees, such as through Offers of Judgment, but the main method of recovering attorney's fees has been eliminated – and this alone will likely give pause to any attorney now contemplating a construction defect action as the certainty of recovering fees no longer exists.

INSURANCE COVERAGE

One interesting facet of AB 125 is the language impacting the insuring agreements between subcontractors and their carriers. This new law indicates that if there is an alleged construction defect, then this new defect "is covered by the subcontractor's commercial

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general liability policy of insurance issued by an insurer." This seems to indicate that an insurance carrier can no longer issue a reservation of rights letter to the subcontractor and can no longer present a "coverage" defense to the alleged claim.

AB 125 also goes on to say that the developer ". . . is named as additional insured under that policy of insurance." This is also an interesting issue because it means that every subcontractor insurance carrier will now have to provide a defense to the developer, as an additional insured – as a matter of law. It will be interesting to see how all of this plays out.

THE DEVIL IS IN THE DETAILS

This is merely a brief review of AB 125. The changes noted above are significant and will likely cause litigation of their own. There were many other provisions of the prior law that were also modified or eliminated and anyone impacted by construction defect litigation should study AB 125 in detail for a more thorough understanding of the law.

John C. Boyden, Esq., practices primarily in insurance defense, most often in construction defect matters. If you have any questions about construction defect litigation, please feel free to contact him at (775) 786-3930 or jboyden@etsreno.com.

SAVE THE DATE

October 22, 2015, 9:00 a.m. to 4:00 p.m.

The ETS Employment Law Seminar will be held October 22, 2015, at The Grove in South Reno. Stay tuned for more information and a finalized seminar agenda. We look forward to seeing you again in the fall.

ERICKSON, THORPE & SWAINSTON, LTD.

Erickson, Thorpe & Swainston was founded in 1969. Since that time, the Firm has efficiently and successfully represented its clients in state and federal courts in Nevada and Northern California. As experienced trial and appellate attorneys, we vigorously advocate our clients' interests while remaining committed to the principles of the highest legal ethics.

Erickson, Thorpe & Swainston offers committed support in all phases of commercial and civil litigation, including labor and employment law and associated preventative employment services. We provide the experience necessary to meet our clients' expectations for an effective, efficient and timely resolution of their conflicts and issues. Our continued success in this highly competitive market demonstrates our widely recognized ability to deliver satisfaction and positive outcome to those who give us their trust – our clients.

Answers Forthcoming in Question of Cumis Counsel in Nevada

by Paul M. Bertone, Esq.

After years of remaining an open question subject to heated debate, the Nevada Supreme Court may, in the near future, finally settle the issue of whether, and under what circumstances, Cumis counsel must be appointed. In the complex and convoluted "tri-partite" relationship between an insurance carrier, and counsel appointed by that carrier to defend the interests of its insured, whilst simultaneously reporting to, and representing the interests of the insurer, significant conflicts of interest may, and often inevitably do, arise. Any factor which may call into question the appointed defense counsel's loyalties between insurance carrier and its insured, thereby calling into question the effectiveness or zealousness of counsel in pursuing the rights of that insured, may bring into issue the need for wholly independent counsel. Many a jurisdiction has deemed that in the face of a significant conflict, an insured is actually entitled to the appointment of independent or "Cumis" counsel, named after the seminal decision issued in *San Diego Fed. Credit Union v. Cumis Ins. Society,* 162 Cal. App. 3d 358 (1984). And for over three decades, the Nevada Supreme Court has neither expressly adopted or applied the *Cumis* holding, leaving both insurers and their counsel often frustrated at being forced to anticipate undecided law.

But circumstances have fortuitously coalesced, leaving the moment ripe for a dispositive and final end to the debate. In the recent decision of *Hansen v. State Farm Mutual Auto. Ins. Co.*, 2013 WL 6086663 (D.Nev. Nov. 19, 2013), U.S. District Court Judge Mirandu Du found the time had come to force the issue. She thus certified and directed two questions to the Nevada High Court:

(1) Does Nevada law require an insurer to provide independent counsel for its insured when a conflict of interest arises between the insurer and the insured?

(2) If yes, would the Nevada Supreme Court find that a reservation of rights letter creates a per se conflict of interest?

And critically, in June of 2014, the Supreme Court accepted the certified questions and directed that briefing of the issue be conducted. That briefing, including Amicus briefing, is now complete and a decision on the issue is expected in a matter of time. Insurers are urged to keep a vigilant eye toward and in anticipation of, that eventual decision, which will certainly color future determinations as to the need for independent "Cumis" counsel.

Paul M. Bertone's practice includes insurance defense and insurance law. If you have any questions about this anticipated decision or other related inquiries, please feel free to contact him at (775) 786-3930 or pbertone@etsreno.com.

ETS NEWS

ETS is pleased to announce that Charity Felts has completed a rigorous workplace investigation training institute administered by the Association of Workplace Investigators ("AWI"). The Certificate of Completion issued by AWI demonstrates that Charity has been trained in the most current methods for conducting quality workplace investigations. Should you need assistance conducting a thorough and impartial workplace investigation, please contact Charity for more information at **cfelts@etsreno.com** or 775-786-3930.