

# WORKERS' INDEPENDENT CONTRACTOR STATUS

## Not Always Favorable to the Hirer

James P. Watson

Usually we assume that in case of injury to a worker the owner or hirer of labor is better off if the injured person is treated as an independent contractor. Only employees enjoy the benefit of workers' compensation coverage; an independent contractor's injuries, with limited exceptions, are entirely the independent worker's responsibility.

The employer will not be forced to defend a worker's compensation claim if the worker is truly an independent contractor and will thus escape a charge against its compensation insurance account. (The rule is abrogated when the work giving rise to the injury is subject to the so-called peculiar risk doctrine.) However, a new and important court of appeals decision shows that the rule does not always work to the advantage of a general contractor confronted with the injury claim of a lower-tier contractor.

The appellate court decision in *Tverberg v. Fillner Construction*, issued December 8, 2008, held that a claim may be made against the general contractor when the parties agree that the injured party, not directly engaged by the general contractor, is an independent contractor and thus not covered by the general contractor's workers' compensation insurance or the insurance of any lower-tier subcontractor.

Fillner Construction was the general contractor on a gas station construction project. Fillner hired a second firm to oversee the construction of a station canopy; that firm, in turn, hired Perry Construction to install the canopy.

Perry hired Jeffrey Tverberg, an independent contractor, actually to erect the canopy. While engaged in the erection, Tverberg fell in a hole at the site and sustained injuries. Tverberg sued Fillner and Perry on theories of negligence and premises liability. Fillner moved for summary judgment, arguing that Tverberg's status as an independent contractor relieved Fillner of any obligation to exercise care in connection with Tverberg's jobsite work.

The trial court, citing the 2006 appellate court decision in *Michael v. Denbeste Transportation, Inc.*, granted judgment for Fillner. The court of appeals reversed, specifically rejecting the *Michael* decision.

The appellate court found the absence of workers' compensation coverage for Tverberg to be decisive. Acknowledging the Supreme Court's holding in *Privette v. Superior Court*, which bars recovery by an injured worker when an alternative remedy exists because of workers' compensation coverage, the court of appeals found the absence of such coverage eliminated the rationale for the *Privette* rule.



According to the court, *Privette* was intended to eliminate the potential for double recovery that exists when both workers' compensation and tort recoveries are available for the same injury. Since there was no workers' compensation coverage available for Tverberg, no possibility for double recovery existed.

The court noted that a different result might be appropriate if Tverberg had had access to California's uninsured employers fund; since Tverberg was an independent contractor, no such coverage was available.

This case stands as a warning to general contractors about potential liability exposure that may occur if their subcontractors engage independent contractors, instead of employees, to perform construction work. It is critical for the general contractor to know



the status of each link in the chain of lower-tier parties working on the construction jobsite. Failure to do so can result in untoward financial consequences for the general contractor.

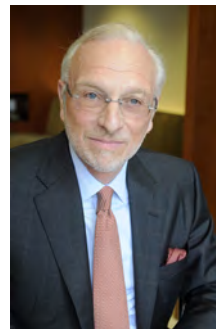
The appellate court's decision is certain to be the subject of additional legal attack, since it directly conflicts with *Michael*. Supreme Court review is a strong possibility.

*James P. Watson is an attorney with the Law Offices of James P. Watson in San Francisco, where he specializes in civil litigation, management labor relations and construction law. He has argued two cases before the U.S. Supreme Court and has handled numerous cases before trial courts and appellate courts throughout California. He may be reached at jamesw@skwsf.com.*

## INDEX OF ADVERTISERS

- 2 AHERN INSURANCE
- IFC BARCELINO
- 44 CALIFORNIA WESTERN SCHOOL OF LAW
- 63 DAVIS WRIGHT TREMAINE LLP
- 1 FENWICK & WEST LLP
- 52 FORENSIC EXPERT WITNESS ASSOCIATION
- 59 GUY KORNBLUM & ASSOCIATES
- 32 HANSEN BRIDGETT LLP
- 52 HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
- 38 REVOLUTION PREP
- 57 ROECA HAAS HAGER LLP
- 52 SCHOENBERG FAMILY LAW GROUP P.C.
- 44 THOMSON REUTERS
- 62 WINSTON & STRAWN LLP

## GUY KORNBLUM & ASSOCIATES ATTORNEYS



Guy O. Kornblum

In today's economy, it is even more important to evaluate matters that are already in dispute or litigation. Whether it is an insurance matter, personal injury, wrongful death, tax shelter, annuity fraud or a business matter, we are trained in the alternatives for dispute resolution. That is what we do.

Our first conference is without charge. We work on a contingency or billable basis and are available to discuss various fee agreements that will make the process and our services affordable for you.

**Guy Kornblum & Associates**  
1388 Sutter Street, Suite 820, San Francisco, CA 94109  
(415) 440-7800 | [www.kornblumlaw.com](http://www.kornblumlaw.com)

Insurance & Bad Faith, including: Life • Health & Disability • Uninsured and Underinsured Motorist Claims • Property & Casualty Claims • Directors & Officers Liability Insurance • Errors & Omissions Coverage • Employment Practices Liability Coverage • Medical & Legal Malpractice • Personal Injury • Wrongful Death • Commercial & Real Estate Litigation