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LGC Casual Day Helps DS Action

On December 7th, Partner Jay Specht, on behalf of LGC, was happy to present a donation of \$1,497.00 to Sharla Hank, President of DS Action. DS Action is a local charity which seeks to identify and meet the needs of individuals with Down syndrome, and for the past few months, LGC employees have made weekly donations in exchange for casual dress each Friday. The recent donation represented just six weeks of contributions by LGC employees, and based on the jeans and polos that populate the office each Friday, more donations are sure to follow. For more information on DS Action, please visit www.dsaction.com.



Partner Jay Specht presents Sharla Hank, President of DS Action, with a donation of \$1,497.00.

The Future of Attorney Fee Agreements in Challenging Economic Times



Tom Lincoln, Partner

Clients are always looking for ways to reduce, or at least control, attorney fees; always have and always will. Over the past 5 years or so, due to the economic climate, there has been even more of a push for different ways to structure fee agreements other than the traditional “pay by the hour” fee agreement. These so called Alternative Fee Arrangements (ARAs) can be very beneficial for both clients and attorneys if they are structured properly and ethical issues are taken into consideration. Of course, no matter how well drafted a fee agreement is, there is no better protection for a client than working with an attorney/firm that is honest and has integrity.

There are many types of ARAs: flat fee arrangements, flat fee plus incentives, hourly plus incentives, etc. Currently, the flat fee agreement seems to be the most popular. A flat fee agreement is one in which the client and the attorney agree on a set amount to be charged for a particular legal service. Flat fees are far from new. They have always been used by attorneys in criminal law. In civil law, however, their use has been somewhat cyclical. Early on in this country, flat fees were almost exclusively used for legal services. It would not have been uncommon for Abraham Lincoln to charge a flat fee for his services. That changed in the 1900’s when “pay by the hour” fee agreements became popular. Now, the flat fee seems to be making a comeback.

According to rules of professional conduct for lawyers, a flat fee should fairly take into account the complexity of the case and the amount of time that the task is reasonably projected to take. In other words, the fee should be fair under the circumstances. So, while the attorney and client are theoretically motivated to either get paid more for doing less (attorney) or pay less and receive more (client), the attorney must not let such motivations interfere with the ethical mandate. *(continued on page 3)*

Successful Applications of Crawford v. Weather Shield for Developers & Subcontractors

By LGC Senior Associate Lisa Mersereau

Crawford v. Weather Shield Mfg. Inc. is now more than a year old, so how has it affected construction defect litigation? As counsel for developers and subcontractors, we have witnessed Crawford's impact on cases. Crawford held that a (sub)contractor ("subcontractor") who promises to defend a developer/general contractor ("developer") against claims founded upon the subcontractor's work must provide a defense to the developer when the developer is sued for alleged problems with such work, even if it is later determined the subcontractor did not act negligently. LGC has implemented varying strategies on behalf of developers and subcontractors in the context of Crawford. Below are just a few of these:

FOR THE DEVELOPER:

Tender Immediately. Immediately tender the defense of the developer to all appropriate subcontractors, citing the relevant contract language. Send follow-up tenders every 30-45 days to non-responders. Follow-up tenders help lay the groundwork for a motion for summary adjudication on the issue of a subcontractor's duty to defend, should it become necessary (see below).

Propose a Joint Defense. Send out a joint defense agreement proposal which entails each subcontractor paying one equal share of developer's defense. A conference call can be set up to confirm the details.

Be Responsive. Many subcontractor attorneys will respond to the tender with a demand for an accounting of defense fees and costs which the developer has had to pay out of pocket. LGC has found that the best approach is often to simply provide such information without hesitation, with appropriate redactions of confidential and privileged information.

File a Motion for Summary Adjudication. Consider a Motion for Summary Adjudication of the duty to defend. Such motions are often most productive when the motion is scheduled to be heard after a critical mediation.

Make Crawford Demands. Each subcontractor should receive a Crawford demand along with an indemnity demand. There are many different ways to calculate the Crawford demand, including a share of out of pocket expenses, the total of all out of pocket expenses, and others.

Get Results for Developers. In LGC's experience, the "Crawford effect" has been an ability to maximize indemnity contributions particularly when a Crawford motion is pending. Prior to Crawford, developers had more difficulty negotiating payment of defense fees and costs from subcontractors. Crawford has provided counsel for developers more tools to help achieve the benefit of the bargain entered into with subcontracts containing Type I indemnity.

FOR THE SUBCONTRACTOR:

Evaluate Contract Language. Review contract language to determine if you have agreed to defend the developer. Look for ways to differentiate from Crawford.

Respond to Tenders. Respond and obtain any information/documentation available from developer's counsel. Request proof that out of pocket expenses have, in fact, been incurred by the developer (as opposed to its insurers). If the developer's defense is being fully funded by insurance monies (i.e. there is no deductible or Self-Insured Retention), then argue no further duty to defend exists.

Do Discovery: Promptly send out discovery on the Crawford issues, including contract terms, amounts incurred by the developer for defense fees and costs, and back up information (i.e., bills) to establish the same.

Joint Defense Agreement. If a Crawford duty exists, negotiate the terms of a joint defense agreement. For example, counsel for a subcontractor with only a minor role in construction should try to negotiate terms based on a percentage of the cost of repair allocated to that subcontractor.

Pay Attention to Additional Insured Issues. Although subcontractor counsel is not responsible for resolving additional insured issues, that does not mean these issues should be ignored. Attorneys should know whether an additional insured obligation exists, and whether any payments have been made, as this often impacts developer's willingness to settle.

Be Prepared for a Crawford Motion. Be prepared to differentiate the indemnity terms from Crawford, to argue developer has not incurred out of pocket expenses, and perhaps check the judge's rulings in similar cases.

Get Results for Subcontractors. Being prepared by following the above suggestions is often helpful in minimizing or eliminating a Crawford contribution. Please contact Senior Associate Lisa Mersereau with questions.



Jason Julius
San Diego Office

Associate Spotlight: Jason Julius

Jason Julius, from Palmdale, California, has been with LGC since 2007. He graduated Cum Laude from Cal Western School of Law in 2007. While attending California Western, Jason was an active member of the Entertainment & Sports Law Society, and interned with Upper Deck and Cal-Trans. Before attending Cal Western, Jason attended Cal Poly San Luis Obispo, where he graduated with a degree in Business Administration. Jason's practice focuses on construction defect and employment law.

He enjoys basketball, golf, and hanging out with his wife, Carrie, and new daughter, Allison.

LGC Associate Named Finalist for 'Outstanding Young Attorney'

Congratulations to associate Susan Minamizono who was recently named an 'Outstanding Young Attorney' by the San Diego Daily Transcript. The Award is a culmination of a peer nominating process that asked San Diego County lawyers to name the best young attorneys in San Diego County who are hardworking, detail-oriented, knowledgeable, ethical, enthusiastic, professional, and committed to furthering the interests of justice in society. Congratulations, Susan!

We Appreciate Your Referrals

We would like to thank our many clients who continue to refer colleagues, friends, and family to our offices for legal services. We take pride in knowing that you have confidence in our ability to provide legal representation.

THANK YOU!

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You're already dealing with the economy.



Don't add compliance issues into the mix.

Now is the time to make sure you're in compliance with your annual corporate requirements, shareholder meetings, board of directors meetings, and corporate filings before it's too late. Contact attorney Jill Dickerson at 619-233-1150 or jdickerson@lgclawoffice.com today for a consultation.

Future of Attorney Fee Agreements – (continued from page 1)

Moreover, there are certain disclosure requirements that must be made by an attorney when using ARAs. For example, it is arguable that if an attorney had entered into a flat fee agreement with an insurance company to represent an insured, the attorney must disclose that fact to the client and get the client's consent to that arrangement.

It is important that attorneys and clients have open and honest discussions regarding attorney fees. These discussions should include different fee arrangements, but attorneys and clients need to be careful when entering into any fee agreement, and pay attention not only to business issues but also to ethical issues. If you have any questions relating to attorney fee agreements, please contact Partner Tom Lincoln.



New Mental Health Parity Law Requires Equal Benefits

Beginning January 1, 2010 a new federal law expands the requirements for mental health and substance abuse disorder benefits. The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act requires that employers with more than fifty (50) employees have equal financial requirements, treatment limitations, and out-of-network coverage for medical and surgical benefits as well as mental health and substance abuse disorder benefits. For example, if an employer's plan requires a \$30 copayment for medical and surgical benefits, the copayment for mental benefits must be \$30 or less. Additionally, the new law prohibits treatment limitations (e.g. one therapy session per week) that apply only to mental health or substance use disorder benefits.

Under the new law, if a plan requires that mental health or substance abuse disorder benefits be "medically necessary," the plan administrator must disclose, upon request, the criteria for a medical necessity determination. Further, the plan administrator must provide the reasons for any denial of coverage. Exemptions to the law exist for employers with less than fifty (50) employees or for employers who would see their total cost of coverage increase by more than two percent in the first year or one percent in each subsequent year. In order to qualify for the cost exemption, the employer must comply with the Act's requirements for at least six (6) months of the first year, and a qualified and licensed actuary must make a determination about increases in costs under the employer's plan. Contact Partner Teresa Beck with questions.

LGC Gets Results

LGC Arizona Obtains Dismissal for Client in Wrongful Death Case:

In a recent Arizona case, LGC represented a night club owner with respect to alleged liability arising out of an accidental shooting resulting in the Plaintiff's death. Prior to filing an answer, LGC undertook a thorough investigation of the claim, including review of security camera video, review of police reports and witness statements, and interviews of witnesses, and discovered the court did not possess subject matter jurisdiction over the claim pursuant to A.R.S. 22-906(a) – "the Exclusive Remedy Rule." LGC filed a Motion to Dismiss, and Plaintiff agreed to voluntarily dismiss the matter before the hearing on the motion. As the night club owner's insurance carrier had already filed a declaratory relief action contesting coverage for Plaintiff's action, the result allowed the insurer to dismiss its lawsuit against the night club owner, saving substantial litigation expenses. Contact Partner Mark Collinworth with questions.

LGC California Compels Production of Plaintiff's Tax Returns in Class Action Case before CA Court of Appeal and CA Supreme Court -

LGC is proud to report that our California office recently prevailed on a motion to compel the production of the Plaintiff's tax returns in a class action case in which Plaintiff claims she incurred self-employment taxes when she was allegedly improperly designated by LGC's client as an independent contractor rather than an employee. A motion for class certification has not yet been filed. Plaintiff's petition to the California Court of Appeal and the California Supreme Court were summarily rejected. Contact Partner Teresa Beck with questions.

LGC Nevada Spreads Holiday Cheer

This past holiday season LGC Nevada was able to spread goodwill and holiday cheer for several needy families in the Las Vegas area. Through generous donations and hard work, the office was able to provide Thanksgiving dinners to four families. Additionally, LGC Vegas was able to provide holiday gifts for two local families; ensuring the families' nine children would have a joyous and cheerful holiday season. Congratulations to LGC Vegas for their hard work and generosity!



Rocco Daniel Yoon

Born: 11/19/09

Baby News!

We are proud to announce the arrival of the two newest members of the LGC family, Rocco Yoon and Allison Julius! Rocco Daniel Yoon was born on November 19th to Associate Monica Yoon and her husband, Daniel. Allison Marie Julius arrived on November 27th to proud parents, Associate Jason Julius and his wife Carrie. Both the moms and newborns are doing well. LGC extends a hearty congratulations to the first-time parents and their beautiful babies!



Allison Marie Julius

Born: 11/27/09

Credits:

Editor:
Teresa Beck,
Partner

Assistant:
Jordan
Nager,
Law Clerk

Lisa M. Mersereau*
 Jill S. Dickerson*
 Christian W. Schmittthener*
 Paul H. James*
 Monica J. Yoon*
 Anthony P. Gaeta*
 Christopher A. Turtzo*
 Darcie A. Frountfeiter*
 Aithyni K. Rucker*
 Jason J. Julius*
 Gene E. Royce* †
 James M. Barrington*
 Adrienne E. Johns*
 Karen E. Gesund*
 Susan S. Minamizono*
 Katie C. McCurdy*
 Harry J. Rosenthal*
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 Ryan S. Peterson*
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LGC Quarterly

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