LGC | LINCOLN GUSTAFSON & CERCOS, LLP

EXPERIENCE. INTEGRITY. RESULTS.

ISSUE 39 | A QUARTERLY PUBLICATION | October 2016

Editor: Chris Schmitthenner, Partner

LGC Prevails In Defense Of Subrogation Action

Partner Jill Chilcoat and Associate Patrick Klingborg obtained a dismissal for their subcontractor client one week before trial in a hotly contested case initiated by an insurer seeking to recover amounts paid toward a developer's defense fees and costs in an underlying construction defect lawsuit.

The insurer contended that each of the subcontractor defendants contracted to defend the developer against the underlying construction defect lawsuit. The insurer further contended that the subcontractor defendants breached that contractual obligation by failing to defend the developer and, as a result, the insurer paid for the developer's defense. The insurer sued for contractual subrogation, seeking reimbursement from the subcontractors for the entire amount the insurer paid to defend the developer.

The subcontractors argued the insurer expressly waived any right to seek subrogation by way of an endorsement added to the insurer's policy, which incorporated broad language from the subcontract between the developer and the insurer's named insured, stating the insured must waive subrogation for any payment of any loss to which the insurance applied. LGC filed a motion to bifurcate this issue for trial, such that this waiver of subrogation defense would be tried first and, if successful, would dispose of the entire case in defendants' favor.

The subcontractors also argued that any duty they may have had to defend the developer was expressly limited by the language of the subcontract, which stated the subcontractor was only required to defend claims arising out of, resulting from, or relating to the subcontractor's work at the project. LGC's subcontractor client had only worked on four of 36 homes in the underlying construction defect litigation, two of which were dismissed.

Nonetheless, the insurer contended that, under the holding of *Valley Crest Landscape Development Inc. v. Mission Pools of Escondido,* (2015) 238 Cal.App.4th 468, the subcontractors were jointly and severally liable for the entire amount of fees paid by the insurer, regardless of any subcontractor's scope of work, such that any subcontractor could be held liable for 100% of the amount paid by the insurer to defend the developer.

LGC responded that *Valley Crest* was factually distinguishable because *Valley Crest* involved only a single plaintiff with an indivisible personal injury, as opposed to the underlying construction defect lawsuit in this case, where multiple claimants sought recovery for numerous types of property damage at different locations.

(Continued on Page 4)

INSIDE THIS ISSUE:

Admissibility Of Medical Financing Agreements

California hospitals are required to maintain public uniform schedules of the amounts they charge for given services or items. However, hospitals often agree with insurers to accept lesser amounts as full payment. As a result, only uninsured, self-paying U.S. patients are typically billed the full amount listed on a hospital's schedule of costs.

In light of the high costs charged to uninsured patients, medical finance companies have emerged to buy the liens providers obtain against personal injury judgments as a means of financing medical expenses for the uninsured.

Medical finance companies are not insurance companies. They typically become involved in situations where plaintiffs sustain injuries in accidents caused by third parties and need medical treatment, but have no health insurance.

(Continued on Page 3)

Planning For Incapacity: Advanced Health Care Directives

The need for an estate plan is a well-known fact by now, but just because you previously prepared some of the documents that make up an estate plan does not mean that you have all of the protections that you need. Once you have a power of attorney, Advance Healthcare Directive (AHCD), or even a living will, it is important to be vigilant about keeping them updated and ensuring that they are available to those who will need to consult them.

AHCD, Living Will, And Durable Power Of Attorney For Healthcare

The AHCD combines two common tools for medical planning: the durable power of attorney for healthcare and the living will. A power of attorney allows you to designate an agent who may make financial and/or healthcare decisions for you. A durable power of attorney for health care (DPAHC) is a specific type of power of attorney that allows you to appoint someone else to act as your agent and, if you choose, your alternative agent. A living will, on the other hand, is an expression of the medical care that you would like to receive in the event that you are incapacitated. The AHCD is now considered to be the accepted "living will" in California.

While a statutory AHCD is not the only document you may use to plan for incapacitation and other similar planning documents remain valid, the AHCD is worth considering. The fact that the AHCD covers both a power of attorney and a living will makes it a convenient option to use when planning for a circumstance where you are unable to make your own healthcare decisions.

Without valid directives and powers of attorney, the person who is appointed as your agent may not be the person you would have chosen, and could end up imposing medical decisions contrary to what you would have wanted.

Keep Your Directives And Powers Of Attorney Updated

It is important to ensure that your AHCD reflects your current wishes. For example, you may have designated an agent who no longer lives nearby, or there may be someone else in your life now who you feel would be a better agent than the person you previously designated. Perhaps your wishes for medical care or life-sustaining treatment may have changed.

It is important to revise your AHCD or other such planning document as needed.

How To Use And Maintain Your Directives And Powers of Attorney

Finally, it is crucial to make your agent aware of your AHCD, ensure that he or she accepts the designation as your agent, and is provided with a copy. Healthcare providers and institutions where you receive care also need to be able to access information regarding your agent and healthcare directions, so it is a good idea to give them a copy and keep your own copy of your AHCD somewhere easy to find. You may also want to consider carrying a card that indicates you have an AHCD and lists your agent's contact information in your wallet. Registering your AHCD with the Secretary of State is another way to ensure that a medical provider will be able to find it, if necessary.

Having an AHCD or similar planning document provides peace of mind and allows you to have a say in circumstances where you would otherwise be unable to control your treatment. Make sure yours are valid and updated as necessary.

For more information on these and other estate planning issues, contact Darcie Colihan or Danica Brustkern in LGC's San Diego office.

LGC Partner Nominated For Award

Teresa Beck

LGC Partner Teresa Beck is a finalist for the San Diego Business Journal's Women Who Mean Business Award.

The award, handed out each year by the San Diego Business Journal, recognizes dynamic women business leaders and role models who have contributed to San Diego businesses in significant ways.

The award winners will be announced at a luncheon on Wednesday, November 9, at the Town and Country Resort & Convention Center. Other finalists include female leaders at notable San Diego businesses like Tri-City Medical Center and Northrop Grumman Corporation.

Teresa Beck is a Partner in LGC's San Diego office. Her practice focuses on employment law, civil litigation, construction law, insurance coverage, and general business counseling.

Admissibility Of Medical Finance Agreements

(cont. from page 1)

Prior to treatment, the medical provider asks the medical finance company to evaluate the case to determine whether it is willing to purchase the medical account after the rendition of services. The medical finance company then contacts the plaintiff's attorney and gathers information about the case to ascertain whether the plaintiff's claim against the tortfeasor is worth an investment. If the claim meets the medical finance company's standards, the company notifies the provider that it is willing to purchase the account and the lien rights.

The medical finance company and the medical provider have their own agreement that governs their rights and obligations. The contract usually stipulates that the finance company will purchase the bill for about fifty cents on the dollar. Before the plaintiff receives services, the plaintiff and his attorney execute a consensual lien in favor of the medical provider. After services are rendered, the medical provider notifies the parties to the lawsuit of its medical lien.

The medical finance company does not negotiate with the plaintiff or the medical provider regarding how much the provider charges for medical services. Those sums are based on the standard fee schedule registered with the state.

In recent years, disputes have arisen in personal injury cases regarding the discoverability and admissibility of these medical finance agreements. These disputes have become more prominent since the California Supreme Court's decision in *Howell v. Hamilton Meats & Provisions, Inc.*, which held an insured plaintiff can recover only the reduced amount the hospital agreed to accept from the plaintiff's insurer. Courts, however, have held that *Howell* does not cap a plaintiff's damages to the amount a medical finance company pays health care providers for their accounts receivable and medical liens.

In the recent case of *Moore v. Mercer*, California's Third District Court of Appeal addressed the more specific issue of the admissibility of evidence of an injured plaintiff's medical liens and the sale of those liens to a medical finance company.

In *Moore*, Defendant argued that the reduced amount Plaintiff's healthcare providers accepted in full payment from the medical finance company was relevant to prove the reasonable value of the medical services rendered. Plaintiff argued that the evidence was not discoverable and should be excluded under Evidence Code section 352 because its admission would necessitate the trial of innumerable collateral issues.

The Appellate Court found that the amount a third party was willing to pay for an account receivable or lien may depend on a wide variety of factors bearing no relevance to the reasonable value of the services when rendered.

However, the Court stopped short of ruling that such agreements are admissible as a matter of law. Among other things, such agreements might reveal what the provider considered to be the value of the services, or reveal that the plaintiff did not remain obligated to pay the full billed amount.

As a result, it will be left to a trial court's discretion to determine whether the probative value of medical finance agreements is outweighed by the prejudice or the undue consumption of time such evidence may take.

For more information about the case and its significance, please contact Rich Reese in LGC's San Diego office.

LGC Sponsors Autism Society Of San Diego Gala

LGC was a proud sponsor of the Autism Society of San Diego's 50th Anniversary Gala on October 22, 2016, celebrating a remarkable 50 years of serving all persons affected by autism throughout San Diego County.

LGC Partner Paul James serves as Treasurer and member of the Board of Directors of the Autism Society of San Diego.

The Autism Society is a non-profit organization dedicated to improving the lives of all those affected by autism.

LGC has a tradition of active community involvement with multiple charitable organizations in the San Diego community. Click here to visit LGC's website to learn more about LGC's community involvement.

Click here to learn more about LGC's community involvement.

LGC Prevails In Defense Of Subrogation Action

(cont. from page 1)

Jill Chilcoat

The improper extension of *Valley Crest* would, in essence, require subcontractors to pay a developer's defense fees and costs for defense of homes upon which the subcontractor never performed any work and for defense of defects wholly unrelated to the subcontractor's scope of work.

Ultimately, the insurer opted to dismiss LGC's client for a waiver of costs rather than face the risk and expense of losing these arguments at trial.

These subrogation cases have increased exponentially over the past few years and often impede the ability of the parties to settle the underlying construction defect lawsuits. This case shows that thoughtful and aggressive development of client defenses can potentially eliminate exposure for contractual subrogation claims.

Congratulations to Jill and Patrick.

New Appellate Case Addresses Level Of Proof For Future Lost Income Claims

In personal injury cases, determining the extent of a plaintiff's lost future income can be difficult, particularly if the plaintiff is younger or has no significant work experience. Plaintiff attorneys will often create grand theories of what the plaintiff would have been able to do for a career in the future but for the injury.

The difficulty lies in what level of proof is necessary to substantiate such future economic damages. Case law in California has established that such future economic damages must not be speculative, but otherwise there is little guidance on the minimal showing necessary to support future economic damage claims. The recent case of Licudine v. Cedars-Sinai Medical Center, from California's Second Appellate District, attempts to set more formal thresholds for future economic damage claims.

In *Licudine*, a college Plaintiff was injured due to alleged medical negligence during gallbladder surgery. She claimed that her passion was to become a "human rights" lawyer, and that she had planned to go to law school in the future. She had been accepted to several law schools but had deferred enrollment for medical reasons, instead working as an assistant rowing coach. Her doctor testified at trial that her condition would impact her career choice and education.

Ultimately, the jury awarded Plaintiff over $700,000 in future economic damages from lost income. The trial court granted Defendants' motion for a new trial on damages, finding the jury's verdict was not supported by substantial evidence. The Court of Appeal affirmed.

The Court noted that before a jury could award damages for loss of earning capacity, the jury must (1) find that the injury to Plaintiff will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what Plaintiff would have earned without the accident and what she will earn now with the injury. In order to prove this loss of earning capacity, a jury's finding must be based on what is "reasonably probable" Plaintiff could have earned without the injury.

The Court reasoned that the sky cannot be the limit for a plaintiff's claimed future career choice. One cannot claim she would have been a best-selling author just because that is what she *wanted* to be. Rather, a jury must look to the earning capacity of the career choices that a plaintiff had a reasonable probability of achieving.

In this case, the Court found that Plaintiff had not met this threshold of establishing future lost income. Plaintiff did establish it was reasonably certain she would suffer some degree of lost earning capacity due to perpetual pain, bloating and digestive dysfunction. However, there was insufficient evidence that, absent the injury, she could have become qualified to be a lawyer. There was no evidence, for instance, of the likelihood of her graduating law school, passing the bar, or obtaining employment as a lawyer. There was also no evidence regarding what lawyers earn.

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