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LGC Obtains Defense Verdict At Trial In Indemnity Action

Partner Ted Cercos and associate Amanda Bremseth obtained a complete defense verdict for their subcontractor client after a three-day bench trial in San Diego Superior Court, prevailing against claims for equitable indemnity and contribution related to a construction accident.

The case endured a lengthy procedural history prior to trial. The case initially arose out of a personal injury claim brought by a sprinkler subcontractor's employee who was injured when he fell through an unbarricaded opening while working at a construction project.

The employee sued the general contractor of the project for negligence and premises liability, and the general contractor in turn cross-complained against the demolition subcontractor responsible for creating and barricading the opening through which the employee fell. The demolition subcontractor's insurer intervened on behalf of its insured, which had gone out of business after the project was completed. The insurer then brought claims for equitable indemnity and contribution against LGC's client, a door subcontractor, as well as another subcontractor responsible for the project's drywall.

The injured employee ultimately settled his claims with the demolition subcontractor's insurer, and the general contractor prevailed on summary judgment, leaving only the intervening insurer's claims against LGC's client and the drywall subcontractor for equitable indemnity and contribution. The intervening insurer sought full reimbursement from the two defendants for the amount of the settlement with the injured employee on the theory that defendants had negligently caused the barricade to the opening to be removed, causing the employee's accident.

Both defendants disputed liability and the case proceeded to trial. The main issues at trial were whether either defendant negligently removed the barricade to the opening, or whether either defendant had a duty to install a new barricade in the absence of the original barricade.

One key issue prior to the start of trial was whether the doctrine of *res ipsa loquitur* should be applied to shift the burden of proof from the claimant to defendants. The intervening insurer claimed *res ipsa loquitur* was applicable and thus defendants, not the claimant, should be responsible for proving who removed the barricade prior to the accident.

The insurer claimed there was no evidence of any other contractors working in the area other than the two defendants prior to the accident. As a result, the claimant argued that *res ipsa loquitur* was invoked because the defendants were in control of the instrumentality that caused the injury and should bear the burden of proof.

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Impact Of ACA On Claims For Future Medical Costs

Nearly six years ago in the landmark case of *Howell v. Hamilton Meats*, the California Supreme Court held that when a medical provider accepts less than its amount billed as full payment for treatment, a plaintiff claiming personal injuries against a third party is only entitled to recover the amount accepted by the provider, not the entire amount billed. Since that decision, litigants have battled over many issues left unresolved by that decision, including evidentiary issues and the impact on claims for future medical costs.

In April, the First District Court of Appeal issued a significant decision that provides further guidance on the impact of *Howell* on future medical costs in the case of *Cuevas v. Contra Costa County*. The Court concluded that a defendant may introduce evidence of reduced amounts medical providers may accept for future care, along with evidence of benefits that will be available under the Affordable Care Act.

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Understanding Spendthrift Trusts And Their Limitations

A spendthrift trust is a trust that provides that the beneficiary's interest cannot be alienated before it is distributed to the beneficiary. Creditors of the beneficiary generally cannot reach trust assets while those assets are in the hands of the trustee, even if they have secured a judgment against the beneficiary. Rather, creditors must wait until the trustee makes distributions to the beneficiary. The law permits such trusts because, as one Court described, donors have "the right to choose the object of [their] bounty" and to protect their gifts from the donees' creditors.

A spendthrift trust is a trust that, if prepared properly, can limit the beneficiary's ability to waste trust funds and also protect trust assets from some of the beneficiary's creditors. It is set up so that the trustee has complete control over how the trust funds are spent for the benefit of the beneficiary.

A spendthrift clause in a trust can guard against most creditors' attachment of the beneficiary's interest in the trust income or principal. There are exceptions for some creditors, such as those with claims for spousal or child support and those with restitution judgments.

After any amount of principal has become due and payable, a creditor can petition to have the trustee pay directly to the creditor a sum up to the full amount of that distribution, unless the trust specifically directs that the distribution shall be made for the beneficiary's support or education and the beneficiary in fact is determined to need such distributions for those purposes.

If no such distribution is pending or if the distribution is not adequate to satisfy a judgment, a general creditor can petition to levy up to 25 percent of the payments expected to be made to the beneficiary, reduced by the amount other creditors have already obtained and subject to the support needs of the beneficiary and any dependents.

Creditor shelter limitations were recently clarified by the California Supreme Court in the case of *Carmack v. Reynolds*. In Carmack, the Court determined that a bankruptcy trustee, standing as a hypothetical judgment creditor, can reach a beneficiary's interest in a trust that pays entirely out of principal in two ways.

First, it may reach up to the full amount of any distributions of principal that are currently due and payable to the beneficiary, unless the trust instrument specifies that those distributions are for the beneficiary's support or education and the beneficiary needs those distributions for either purpose. Second, and separately, the bankruptcy trustee can reach up to 25% of any anticipated payments made to, or for the benefit of, the beneficiary, reduced to the extent necessary by the support needs of the beneficiary and any dependents.

The significance of the *Carmack* decision is that certain creditors can in fact recover from a beneficiary's interest in both principal and income, including amounts not yet paid to the beneficiary.

However, the benefits intended by the legislature are nonetheless available; the key is drafting a proper spendthrift provision to ensure those benefits are captured if the circumstances are right. If done properly, a spendthrift trust will protect those beneficiaries that need protection.

Distributions from either principal or income will be protected if they are directed to be paid for the support or education of the beneficiary, and those payments are in fact needed for such purposes.

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LGC Welcomes New Associate To S.D. Office

Yousaf Jafri

LGC's San Diego office is pleased to welcome Yousaf Jafri as its newest associate. A former summer clerk with the firm, Yousaf is joining LGC after being admitted to the California bar this month.

Yousaf earned his J.D. from the University of San Diego School of Law in 2016, and his B.S. in biological services and B.A. in political science from UCSD in 2013.

While in law school, Yousaf served as an Executive Editor of the *USD International Law Journal* and externed at the U.S. District Court for the Central District of California. He also served as a low income tax payer advocate at the USD Federal Income Tax Clinic and was a member of the Phi Delta Phi International Legal Honor Society.

Yousaf's work focuses primarily on labor and employment, personal injury, construction defect, and contract disputes.

Impact Of ACA On Claims For Future Medical Costs

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Cueva was a medical malpractice case against a doctor employed by the County of Contra Costa. The doctor was managing the pregnancy of Plaintiff's mother when Plaintiff suffered a hypoxic brain injury after being delivered at 37 weeks.

Due to his injuries, Plaintiff has a very low verbal IQ, serious language difficulties and behavioral problems, and has been diagnosed with cerebral palsy. In the future, he will be able to feed, dress, and bathe himself, but will be dependent on others for his personal care and safety for the rest of his life.

Plaintiff, through his guardian ad litem, filed an action against Contra Costa County and other defendants alleging medical malpractice as to Plaintiff and negligent infliction of emotional distress as to Plaintiff's mother.

The life care plans of the Plaintiff and Defendant experts were central to the case. Plaintiff's expert provided opinions of the cost for future necessary medical services, based on a database of amounts typically billed by providers. The Plaintiff's expert's opinions did not consider negotiated discounts available under insurance procured through the Affordable Care Act ("ACA").

Defendant's expert, meanwhile, prepared several different life care plans. One plan was estimated based on Plaintiff procuring insurance through ACA.

At trial, Plaintiff filed several motions in limine, including one to exclude any evidence of possible future medical benefits available through ACA-mandated insurance. The trial court granted Plaintiff's motion, noting that there was no reasonable certainty the ACA would remain in place. The trial proceeded and the jury ultimately awarded Plaintiff over $9.5 million.

Defendant appealed several issues, including whether evidence of future medical costs with ACA-mandated insurance should have been admitted.

The Court of Appeal agreed with Defendant, noting that Defendant had offered evidence by an ACA expert that the ACA was reasonably certain to continue well into the future and that Plaintiff would be able to procure insurance through the ACA notwithstanding his disability. This was sufficient to at least submit the opinions to the jury, which could consider whether ACA would continue to be available in the future.

Further, the Court noted that, under *Howell* and its progeny, the amounts that healthcare providers typically accepted from insurance for services is highly probative of value of the future medical services. Thus, Defendant should have been entitled to offer evidence of the market value of future benefits, which includes reductions based on insurance.

This case is significant for personal injury cases far beyond the medical malpractice arena. Under the Court's reasoning, defendants in all personal injury cases in California should be entitled to present evidence of discounted provider rates available through insurance that can be procured under the ACA. Particularly in catastrophic injury cases, defense life care plans can and should calculate future life care costs based on insurance available under the ACA, and retain ACA experts as needed. As noted by the Court, however, the burden will be on defendants to show the ACA will continue to be available.

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

New San Diego Courthouse Set To Open

The San Diego Superior Court has announced that the long-anticipated new downtown courthouse will officially open in the next 60 days. The new courthouse, located at 1100 Union Street, will replace the "old" central courthouse that mostly venued criminal cases, but also hosted civil trials if the assigned civil department was already engaged with another trial.

The new 22-story courthouse was originally scheduled to open at the beginning of 2017, but was delayed. The transfer will begin at the end of May, but will likely take several weeks.

Eventually, all of the old criminal departments will be shifted into the new courthouse. However, the small claims and unlawful detainer departments will be relocated to the Hall of Justice, where civil matters are typically heard.

Click here for more information about the transfer to the new courthouse.

Understanding Spendthrift Trusts And Their Limitations

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Darcie Colihan

As a result, the circumstances of a beneficiary (which can and will likely change over time) will play a significant role, but the trust language will offer the benefit of protections if the circumstances are right.

Further, whether payments are directed to be made from income or principal can also affect and limit or expand the reach of the beneficiary's creditors. Thus, a spendthrift trust can still be beneficial and accomplish a testator's goals of protecting a particular beneficiary's gift, if it is drafted properly.

If your trust has a spendthrift provision or clause that sets up spendthrift sub-trusts for certain beneficiaries, it would be a good idea to have an attorney review the trust to ensure the language will accomplish your goals to the greatest degree possible.

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

LGC Obtains Defense Verdict At Trial In Indemnity Action

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Both defendants opposed the insurer's motion, arguing the accident occurred on an active construction site and who had control of the site was undetermined.

The court agreed with the defendants and determined the doctrine of *res ipsa loquitur* did not apply. The court found there was insufficient evidence to allow the burden of proof to shift from the claimant to defendants because the issue of who had control of the construction area at the time of the accident was an open question and an issue for the trier of fact. Thus, the case proceeded with the insurer bearing the burden of proving who had removed the barricade prior to the accident.

Another key issue prior to trial was whether the intervening insurer was entitled to a jury trial in light of the causes of action for equitable indemnity and contribution. The claimant argued the "gist" of the action was legal in nature, which gave rise to a right to a jury trial.

LGC argued that the claims for equitable indemnity and contribution were equitable in nature because the claimant's only right of action against defendants was through the application of equitable doctrines because there was no contract between the parties. Moreover, LGC argued that the precedent of *A.C. Company v. Security Pacific National Bank* (1985) 173 Cal.App.3d 462, was controlling. In *A.C. Company*, the Court found that the plaintiff, who asserted equitable claims against the defendants, was not entitled to a jury trial because equitable issues were for the trial judge to decide, not a jury.

The trial court agreed with LGC's argument that the claims did not warrant a right to a jury trial, and the case proceeded to trial as a bench trial.

The parties presented their evidence, including numerous percipient and expert witnesses. Ultimately, the court ruled that the intervening insurer failed to prove that any actions or omissions by LGC's client or the other subcontractor were a substantial factor in causing the accident. The court found LGC's standard of care expert to be the most persuasive in showing that the original barricade location chosen by the demolition contractor was unreasonable in light of the active construction work going on in the area.

In addition, the court found that the claimant failed to show that either defendant had any duty to install a new barricade, or that either defendant had breached any duty. As a result, the court ruled that neither defendant had any obligation to contribute to the settlement paid by the insurer and found entirely in favor of the defendants.

Congratulations to Ted and Amanda on their victory.