



LINCOLN
GUSTAFSON
& CERCOS, LLP

EXPERIENCE. INTEGRITY. RESULTS.

ISSUE 49

A QUARTERLY PUBLICATION

July 2019

Editor: Chris Schmitthenner, Partner

LGC Associate Voted Young Lawyer Of The Year

LGC is proud to announce that [Caroline Reilly](#), an associate in LGC’s Las Vegas office, was voted the 2019 Young Lawyer of the Year by Las Vegas Defense Lawyers.

Las Vegas Defense Lawyers is an organization of lawyers engaged in the defense of civil litigants. Founded in 2012, the organization focuses on fostering mutual education and the exchange of ideas with fellow defense counsel in the City of Las Vegas and Clark County, providing balanced defense perspectives in matters of civil defense, promoting cooperation and civility among fellow counsel, improving the public perception of civil defense attorneys through service and education to the community, establishing and maintaining standards of professional conduct, and seeking to benefit the public by giving a voice to the defense perspective.

With over 200 members, which continues

to grow, each year the Las Vegas Defense Lawyers has honored a member of the civil defense community with a Lawyer of the Year Award, which is provided during an annual event in front of members of the civil defense community, judges, and Las Vegas community members who hold governmental positions.

In 2019, the Las Vegas Defense Lawyers added a new honor for a Young Lawyer of the Year, recognizing that those lawyers who have been in practice five years or fewer often go unnoticed or are not awarded for their commitment to the practice of law and service to the community.

In the inaugural year of the award, several young lawyers throughout Clark County were nominated. After vetting, discussion, and voting, Las Vegas Defense Lawyers ultimately awarded the first-ever Young Lawyer of the Year Award to LGC associate Caroline Reilly, based not only

on her outstanding work practicing law, but also her commitment to community service.

Ms. Reilly has been an associate in LGC’s Las Vegas office since June 2018. She graduated *cum laude* from the University of Nevada, Las Vegas, William S. Boyd School of Law, and focuses her practice primarily on personal injury matters and general civil litigation.

She is often one of the first attorneys in the office and last to leave, taking great care to handle each of her files meticulously and strongly advocate for her clients. Outside of work, she volunteers her time for various charities. Her hard work and dedication to the law are evident, and LGC is proud to have her as an associate.

Congratulations to Caroline on her well-deserved award.

LGC Prevails On Motion For Summary Judgment

INSIDE THIS ISSUE:

Exploring California’s
New Decanting Act

2

New Decision On Prevailing
Wage Requirements

2

LGC Prevails On
Demurrer In Premises
Liability Action

4

Partner [Chris Schmitthenner](#) prevailed on a Motion for Summary Judgment in a long-standing insurance coverage dispute that spanned three years and two separate lawsuits, resulting in a complete victory on all claims for LGC’s client.

The case arose out of an underlying construction project and resulting lawsuit. Ward-Schurr, Inc., a real estate company that specializes in purchasing and flipping properties, hired Gregorio Cowo dba Dr. Lou’s Construction to perform an extensive remodel of a triplex property purchased by Ward-Schurr.

During the course of the project, Ward-Schurr allegedly discovered portions of the work that were substandard or not in compliance with code requirements. Ward-Schurr also allegedly discovered that Cowo was ordering excessive materials through Ward-Schurr’s credit account and then returning materials to Home Depot for a gift card or store credit for Cowo’s own use.

As a result, Plaintiff fired Cowo from the project and filed suit, asserting claims for fraud, negligence, and breach of contract.

(Continued on Page 3)

Exploring California's New Decanting Act

While the title suggests it is about wine, California's new Decanting Act actually addresses a trustee's ability to decant a trust. Similar to wine decanting, trust decanting is a method by which a trustee may remove or modify trust provisions from an irrevocable trust by pouring, or distributing, the trust assets from an old trust into a new trust.

Uniform Trust Decanting Act

In September of 2018, the California Legislature enacted the Uniform Trust Decanting Act (Probate Code § 19501 *et seq.*). Decanting power is the ability of a trustee or fiduciary to distribute property from an irrevocable trust to one or more second trusts or to modify the terms of the first trust without the consent of the beneficiaries of the first trust or approval of the court. This is a significant change because, prior to enactment of the Act, a court proceeding or the consent of all trust beneficiaries was necessary to modify the provisions of an irrevocable trust in California, absent language providing otherwise.

Trustee Discretion

The more discretion the trustee has over the principal distributions, the more options the trustee has for modifying the trust through

the decanting process. The provisions regarding what can be modified through decanting depend on whether the trustee has limited distributive discretion or expanded distributive discretion (a trustee that has discretion to distribute trust principal that is not limited to a specific standard for support or otherwise).

A trustee with limited distributive discretion may exercise the decanting power to modify administrative provisions of the trust, but may not materially change the dispositive provisions of the trust. A trustee with expanded distributive power, on the other hand, may exercise the decanting power to modify both the administrative provisions and certain dispositive provisions of the trust. For example, a trustee with expanded distributive power could use the decanting power to eliminate a beneficiary (but not add one), change the standard for distributions, grant a power of appointment, or extend the duration of the trust.

Thus, decanting will most likely occur where a trustee has complete discretionary authority to distribute assets to one or more beneficiaries. Most trusts, however, do not have truly discretionary standards and instead provide for the health, education, maintenance, and support of

the beneficiary (i.e. limited distributive discretion).

Limitations And Notice

There are, of course, limitations restricting the trustee's ability to modify trust provisions. The decanting powers cannot be exercised in a way that would negate the tax benefits of the first trust, and there are additional limitations when a trust contains charitable interest provisions.

The Act has very stringent notice requirements. Specifically, before exercising the decanting power, a trustee must give at least 60 days' notice to (1) the settlor, (2) each qualified beneficiary, (3) each holder of a presently exercisable power of appointment, (4) each person with a current right to remove or replace the trustee, (5) each trustee of the first and new trust(s), and (6) the California Attorney general (where the first trust contains charitable interests). There are specific requirements for the notice, including language notifying the recipients of their rights to object to the decanting.

(Continued on Page 3)

New Decision On Prevailing Wage Requirements

The Nevada Supreme Court recently issued a new ruling regarding prevailing wages on public works projects.

The case, [Bombardier Transportation \(Holdings\) USA, Inc. v Nevada Labor Commissioner](#), involved whether work on the automated transportation system at the airport was

“repair” work or “maintenance” work.

The Nevada Labor Commissioner found that twenty percent of the work involved “repair” rather than “maintenance,” and thus was subject to the prevailing wage. The Nevada Supreme Court affirmed the decision, finding that portion of the

work for “repairs” was subject to prevailing wages.

Entities in the construction and maintenance industry should pay particular attention to this decision and recognize that even though they may have a public contract for “maintenance,” work that is repair work is subject to prevailing wage requirements.



LGC Prevails On Motion For Summary Judgment

(cont. from page 1)

Cowo was insured through a policy of commercial general liability insurance issued by Preferred Contractors Insurance Company. Cowo tendered his defense and indemnity to PCIC, but PCIC denied the claim, finding that the claim solely involved Cowo's poor workmanship, fraud, and failure to abide by his contract. Thus, PCIC concluded the claim did not involve "property damage" as defined in the policy and declined to defend Cowo.

After PCIC's denial, Cowo did not defend himself in the lawsuit. Ward-Schurr's counsel, knowing that PCIC had denied coverage based on lack of "property damage," prepared and submitted a default judgment and statement of damages stating that Ward-Schurr suffered \$1.7 million in "property damage." The Court approved the default and entered judgment against Cowo and in favor of Ward-Schurr for \$1.7 million.

Ward-Schurr then filed its first lawsuit

against PCIC, asserting a single cause of action under Insurance Code section 11580. Section 11580 permits a judgment creditor to bring a direct action against any liability insurer of the judgment debtor and to collect on that judgment subject to the limits and exclusions of the policy.

LGC filed a Motion for Summary Judgment on behalf of PCIC, arguing that Plaintiff's Section 11580 claim failed as a matter of law because the judgment did not include any covered "property damage," notwithstanding Ward-Schurr's counsel's use of the term "property damage" in the judgment. LGC particularly noted that, under *Schaefer/Karpf Productions v. CNA Ins. Co.*, PCIC was not bound by Ward-Schurr's use of the term "property damage" in the judgment.

Ward-Schurr, realizing that PCIC was not going to be bound by Ward-Schurr's attempt to create "property

damage" by way of the language of the judgment, dismissed the first lawsuit days before the Motion for Summary Judgment was to be heard.

Unbeknownst to PCIC, however, Ward-Schurr had obtained an assignment of Cowo's rights against PCIC, and thus filed a second lawsuit against PCIC, this time asserting cause of action for bad faith, breach of contract, declaratory relief, and unfair business practices. PCIC initially obtained a dismissal of the bad faith cause of action via demurrer on statute of limitations grounds, and subsequently obtained a dismissal of the unfair business practices claim because such claims are not assignable and thus Ward-Schurr had no standing to assert that claim. The case then proceeded on the remaining causes of action, and PCIC and Ward-Schurr ultimately each filed Motions for Summary Judgment.

(Continued on Page 4)

Exploring California's New Decanting Act

(cont. from page 2)

The official notice of decanting is particularly complex as it pertains to future born children. California does not have a virtual representation statute detailing that a person's interest can be outlined as virtual to his or her unborn children's interests. As a result, notifying minors about decanting or accepting a minor's consent regarding the notice is not a straightforward process. To properly decant, a guardian has to be appointed when children are involved because a simple notification to the parents in the case of minors is not sufficient and can be contested. When minors are involved, the court must be petitioned to assign a guardian and these additional tasks can be time-consuming and costly.

Moving Forward

The Act was intended to be, and in many ways is, an

improvement from prior complex California law relating to trust modifications. There are several limitations and requirements (only some of which are identified above) that will make the process only available for a select few trustees and trusts.

A trust instrument can, however, specifically opt out of the statute, or at least some of the more stringent requirements. As a result, there are important drafting considerations to take into account when creating a trust – considerations that should be thoroughly discussed with counsel.

For more information about the Act and other estate planning tools, contact [Darcie Colihan](#) in LGC's San Diego office.

LGC Prevails On Motion For Summary Judgment

(cont. from page 3)



Chris Schmitthenner

Ward-Schurr argued that PCIC had a duty to defend Cowo because the underlying complaint potentially involved covered property damage, and that by not defending PCIC was liable for the resulting default judgment. Ward-Schurr particularly relied on *Armstrong World Industries v. Aenta Casualty & Surety Co.* and *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* to argue that repairing work that is not code compliant constitutes “property damage.”

LGC, meanwhile, argued that there was no potential for a covered claim in the underlying complaint. LGC argued that subsequent precedent in *Regional Steel Corp. v. Liberty*

Surplus Ins. Corp. conclusively held that repairing defective work that allegedly did not comply with applicable plans or codes does not constitute “property damage.” In fact, *Regional Steel* specifically found that *Armstrong* and *Shade Foods* were limited to cases of hazardous materials (e.g. removal of asbestos).

Ultimately, the Court agreed with LGC and [granted](#) PCIC’s Motion for Summary judgment. A judgment will now be entered in PCIC’s favor, and PCIC will pursue all prevailing party costs against Ward-Schurr.

Congratulations to Chris on his victory.

LGC Prevails On Demurrer In Premises Liability Action

LGC associate [Jessica Rowland](#) successfully argued a demurrer and motion to strike Plaintiff’s First Amended Complaint in a highly contested personal injury case, securing a judgment of dismissal and a pending award of costs.

The case involved a resident of a property who was injured when an allegedly defective electric garage door system closed on his foot, injuring him. LGC’s client was the former owner of the property, previously selling the property to Plaintiff’s adult son six weeks prior to the accident. During the sale, Plaintiff obtained extensive inspections of the property, and gave final acceptance of the condition of the property prior to the close of escrow. There were significant issues as to whether Plaintiff incorrectly operated the electric door system.

Very early in the case, LGC produced evidence showing that LGC’s client did not own the property at the time of the accident and thus could not be held liable for the accident on premises liability or negligence theories. Despite this evidence, Plaintiff persisted in his claims against LGC’s client.

As a result, LGC filed a Motion for Summary Judgment as to Plaintiff’s claims. Plaintiff, however, subsequently sought to amend his Complaint. In opposing Plaintiff’s Motion for Leave to Amend, LGC raised numerous legal deficiencies in Plaintiff’s claims. Given the strong public policy in favor of permitting amendments, the Court permitted Plaintiff leave to amend, but LGC’s opposition succeeded in priming the Court on the legal deficiencies in the claim.

Ultimately, when Plaintiff filed the First Amended Complaint, LGC challenged the pleading via a demurrer and motion to strike.

Specifically, LGC argued that Plaintiff’s claims were improperly based on a premises liability theory. Such a theory failed as a matter of law because, at the time of the accident, LGC’s client neither owned nor controlled the subject property. Plaintiff’s operative Complaint failed to identify any alternative theories of liability against LGC’s client, despite Plaintiff being aware of these legal deficiencies at the outset of the case.

Based on LGC’s well-reasoned arguments, the Court granted LGC’s demurrer and dismissed the claims against LGC’s client. LGC’s client will now be entitled to an award of prevailing party costs.

Congratulations to Jessica on her hard-fought victory.

**LINCOLN, GUSTAFSON,
& CERCOS, LLP**

Experience. Integrity. Results.
California | Nevada | Arizona

www.lgclawoffice.com