THE UPDATE

SAN DIEGO
DEFENSE LAWYERS

SPRING 2010

In this Issue

The Bottom Line

Case title: Marcus Benning v. Wawanesa General Ins. Co.

Case Number: 37-2008-0088585-CU-BC-CTL

Judge: Steven R. Denton

Plaintiff's counsel: Montie Day Esq, The Day Law Offices, Henerson, Nv.

Defendant's counsel: Alexandra Selfridge, Kenneth Greenfield, Law Offices of Kenneth N. Greenfield

Type of case: Insurance Bad Faith

Settlement Demand: $190,000 increased to $325,000 prior to trial

Settlement Offer: $100,000

Trial type: Jury

Trial length: 10 days

Verdict: $24,000

The Bottom Line

Case Title: Sirdot vs. County of San Diego

Case Number: MH 97 432

Judge: Honorable Kerry Wells

Plaintiff's Counsel: Lidia Gacia

Defendant's Counsel: Constantine D. Buzunis

Type of Incident/Causes of Action: Conservatorship

Settlement Demand: Termination of Conservatorship

Settlement Offer: None

Trial Type: Jury

Trial Length: 3 days

Verdict: Defense

The Bottom Line

Case Title: Rock & Roll Religion, et al. v. CELS Enterprises, et al.

Case Number: CV09-5258 R (PLAX)

Judge: Manuel Real

Plaintiff's Counsel: Shawn A. McMillan and Stephen D. Daner

Defendant's Counsel: Rod Berman

Type of Incident/Causes of Action: Trademark Infringement Settlement Demand: $100,000 plus agreement to refrain from use of disputed marks

Settlement Offer: Dismissal with a waiver of costs

Trial Type: Summary Judgment

CELS sent a demand letter demanding that Rock & Roll refrain from using its "English Laundry" marks. In response Rock & Roll filed a declaratory relief action in the Southern District of CA, seeking a judicial determination that the English Laundry marks did not infringe on any CELS mark (Chinese Laundry). The case was transferred to the Central District and a Counterclaim was filed by CELS alleging trademark infringement. After a series of successful 12(b)(6) motions, the court converted the last motion to one for summary judgment. After extensive briefing summary judgment was granted in favor of Rock & Roll, and judgment was entered. Rock & Roll was determined to be the prevailing

PRESIDENT'S MESSAGE

Our goals at SDDL are really very simple. One of those goals is to obtain the necessary CLE credits that the State Bar requires you to obtain. We do that in two ways: first, through our Brown Bag lunches and second, through our Quarterly Evening Seminars.

The Brown Bag lunches are held on the second Tuesday of each month at noon at 530 "B" Street. The eleventh floor conference room is provided to us courtesy of Peterson Reporting. We try to do two "things" to give you a better CLE experience. First, we try to provide great speakers on interesting topics. Second, we provide FOOD!

We have a "measuring stick" that we use to determine if we have provided our members with an interesting speaker and topic: 40. If we have 40 or more people attend, we feel that we've done a good job of providing our members with this service. Halfway through 2010, (excluding that "horrible weather" day of our January Brown Bag) we've averaged substantially over 40 attendees at the luncheons.

Our Quarterly Evening Seminar is designed a little differently. Rather than being an hour long, these sessions are two hours long. At these seminars we try to focus on "those hard to get" CLE credits (like elimination of bias, substance abuse, ethics, etc.). The topics, as such, are a little "drier" and many people don't want to stay downtown, or come downtown, after work; preferring to just get home.

For the evening seminars, which occur quarterly, we generally get 20-25 people. We also provide food and drink. For the first two quarters, the attendance figures have been between 20-25 people.

As with any organization, we are looking for ways to improve "our product" and "meet our customers' needs". Your need is interesting programs. Our products are the Brown Bag lunches and Evening Seminars. If you have any thoughts or ideas for topics, speakers or just generally how to improve our "product", then this is a good time to let us at SDDL know, as shortly we will be planning out next years schedule and topics. Drop me or Pat Mendes (our CLE Czar") a line with your ideas. Come and join us next month for a brown bag seminar. Thanks. "B"

UPCOMING BROWN BAG SEMINARS

Peterson Reporting | 530 "B" Street, Suite 350, San Diego, CA 92101
From Noon till 1 P.M. (lunch included)

7/13/2010	**Substance Abuse: Dealing With The Stresses of The Practice of Law in Other Ways**
8/10/2010	**Deposing Experts: Cross-Examination or Just Locking Into Opinions?**
9/14/2010	**Appeals, Writs and Other Things that Drive You Crazy**
10/12/2010	**Successful Settlement Strategies in Complex Multi-party Cases**
11/9/2010	**Dealing with 'The Jerk' in Deposition**
12/14/2010	**Writing the Effective Brief**

SDDL
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SAN DIEGO DEFENSE LAWYERS

JOIN SDDL FOR $75

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Attend brown bag lunch seminars and evening seminars
with free food as one of the many benefits each month
(you will obtain at least 6 MCLE credits, including substance abuse)

This discounted membership is from July 1, 2010 through December 31, 2010
We look forward to having you join this organization
To join, visit our website www.sddl.org and download a membership application

BROWN BAG PROGRAMS

Brown Bag Lunch Series
Effective Mediation Strategies

By Ben Howard
Neil Dymott Frank McFall & Trexler

On April 13, 2010 the SDDL Brown Bag lunch topic was "Effective Mediation Strategies," presented by Doug Glass, Esq. of Glass Mediations. Throughout Mr. Glass's humorous stories of past mediations gone good and bad, he sprinkled in a few strategies for maximizing a mediation's usefulness:

First, if you are not familiar with the mediator, don't hesitate to call him or her in advance of the session to learn the mediator's lay of the land. The mediator may pass along useful information about previous mediations involving the same dispute.

Second, do not prepare confidential briefs unless you must. Your job is to persuade the opposing party why the case should be settled at or close to your offer. If you do not provide a brief to the opposing party, you are taking away one of your tools. If you have information you believe the other side is not (or should not be) privy to, redact it from the brief sent to opposing counsel.

Third, brief early and brief concisely. The mediator is most likely to read the first brief he or she receives, which may set the tone for the mediation. Further, the size of the brief (is this a rehashed Motion for Summary Judgment?) may get in the way of the important issues. A brief brought along to the mediation, that neither the opposing party nor the mediator has seen, will offer you little benefit.

President, Brian Rawers and Doug Glass

Doug Glass humorously sharing effective mediation tips

Fourth, do not mediate too early in the case. Some attorneys believe mediating early saves money, but too often nothing is resolved because both sides believe facts beneficial to their respective positions are yet to be found. Do not mediate until those facts crucial to your case have been discovered.

Last, never forget your credibility and reputation are just as important in mediation as they are in court. Selective omissions or over-the-top puffery might net you a short term gain, but will hurt you in the long run.

More information about Doug Glass and his mediation practice can be found at www.glassmediations.com.

Brown Bag Evening Seminar
"*Hanif*: What Happened and Where Are We Now?"

By Mark Peterson
Tyson & Mendes

You are a stellar defense attorney who tirelessly looks for ways to protect your clients (and, ahem, their insurance carriers) from paying any more than absolutely necessary to resolve cases. You discover the plaintiff in one of your personal injury cases has private medical insurance that satisfies all of the plaintiff's medical bills for only 30% of the originally "billed" amount. In other words, 70% of the medical bills are essentially waived by the healthcare providers. The discount is the result of a contractual agreement between the healthcare provider and the plaintiff's insurer to accept the reduced amount as payment in full. Well, you ask yourself, does my client have to pay the other 70% of medical bills the plaintiff never incurred, no one paid, and no one remains liable to pay? That was the question addressed at the Brown Bag lunch seminar on March 9, 2010.

The full house heard attorneys Bob Tyson and Mark Petersen of Tyson & Mendes, LLP address the status of the so-called "*Hanif*" issue and their experience with a recent appellate decision that impacted this ever-evolving area of the law. The recent decision--*Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal.App.4th 686 ("*Howell*")—appeared to put an end to *Hanif* and its progeny, which had permitted personal injury defendants to avoid paying the waived portion of medical bills described above. Fortunately, the California Supreme Court granted review of *Howell* the very day after the seminar. As a result, *Howell* cannot be cited by plaintiffs to recover the waived portion of medical bills and the *Hanif* line of cases helpful to defendants remain intact, for now.

Mr. Petersen provided a background of *Howell*, in which the Fourth District Appellate Court applied the collateral source to the waived portion of medical bills in personal injury actions. By doing so, the *Howell* court ruled plaintiffs may recover (as economic damages) the portion of medical bills waived, or written off, by healthcare providers which result from agreements between healthcare providers and plaintiffs' private medical insurers. *Howell* refers to this recoverable amount as the "negotiated rate differential." *Howell* held such amounts were "incurred" by the plaintiff in that case pursuant to the perfunctory contract she signed upon admission to the hospital, which obligated her to pay for the medical bills related to her care. The *Howell* court then applied the collateral source rule as outlined in *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1 to conclude plaintiffs may recover the amounts written off, or waived, by their healthcare providers.

The appellate decision in *Howell* reversed the trial court order Tyson & Mendes had obtained in a post-verdict motion to reduce the past medical specials award by $130,000, the amount waived by various healthcare providers of plaintiff *Howell*.

In doing so, the Fourth Appellate District dismissed the preceding authority of *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298. These cases provided personal injury defendants the legal ammunition needed to avoid paying the phantom medical bills for which no one was otherwise liable.

Addressing *Hanif*, the *Howell* Court distinguished its facts. The court noted *Hanif* involved Medi-Cal benefits rather than private medical insurance and the plaintiff was a minor, incapable of entering a financial responsibility agreement with the hospital.

Howell's treatment of *Nishihama* was more problematic. The *Nishihama* plaintiff had private medical insurance which had satisfied plaintiff's medical bills for a reduced amount pursuant to an agreement between the hospital and plaintiff's insurer. *Nishihama* had facts similar to the facts in *Howell*. Notwithstanding, the *Howell* court simply "disagreed" with the reasoning of *Nishihama*, declaring it should have been decided under the collateral source rule.

Supreme Court Grants Review

Tyson & Mendes petitioned the Supreme Court for review of the *Howell* decision. On March 10, 2010 review was granted. Therefore, *Howell* can

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party and now seeks to recover its costs of approximately $18,000, and attorney's fees of $279,000.

Submitted by Shawn A. McMillan, of The Law Offices of Shawn A. McMillan

The Bottom Line

Case Title: Rodriguez v. Placencia

Case Number: 37-2009-00082708-CU-PA-CTL

Judge: Hon. Richard E. L. Strauss

Plaintiff's Counsel: Curtis R. Quay, San Diego Injury Law Center

Defendant's Counsel: Philip H. Cohen, Bonnie R. Moss & Associates

Type of Incident/Causes of Action: Auto accident

Settlement Demand: None made until closing at which time counsel suggested approximately $60,000 ($30,000 per plaintiff)

Settlement Offer: $5,000.00 by CCP section 998 for each plaintiff.

Trial Type: Jury Trial

Trial Length: 4 days

Verdict: Defense

The Bottom Line

Case Title: Lilly Boyd v. 21st Century Insurance

Case No.: 37-2008-00094904-CU-IC-CTL

Judge: Hon. Steven R. Denton

Plaintiff's Counsel: Robert Shoecraft and Devon Shoecraft, Shoecraft & Burton

Defendant's Counsel: Robert E. Gallagher, Jr. and Beth Manover Mercaldo, White, Oliver & Amundson

Type of Incident/Causes of Action: Breach of contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress and reformation. Plaintiff's teenage daughter was named excluded driver on plaintiff's 21st Century policy. Plaintiff claimed that after her daughter turned 18, and began living out of state, that she tried to remove the named driver exclusion from her policy through 21st's customer care website. In August, 2006, when plaintiff attempted to remove the named driver exclusion, the website prevented her from accomplishing her goal, and she was directed to contact customer care. Plaintiff claimed that she spoke with a customer care representative in the Texas call center, and was told "no problem" the exclusion will be removed. Following this phone call plaintiff received a revised policy declaration reflecting that her daughter was still listed as an excluded driver. On October 27, 2006, plaintiff's daughter was involved in at fault traffic collision. Plaintiff sent a letter, certified mail, return receipt requested to 21st Century bearing a date of October 15, 2006, but not received in 21st Century Woodland Hills office until October 31, 2006. Plaintiff could not produce proof of mailing on October 15, 2006.

21st Century took the position that since the daughter was the subject of a named driver exclusion, and had never been rated as a driver, that

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not be cited as authority by plaintiffs to recover the waived portions of their medical bills. Application of the collateral source rule to this portion of claimed medical damages is not set in stone. It is anticipated the Supreme Court decision will be issued in 2011.

The defense bar can continue to cite *Hanif*, *Nishihama* and other related cases to seek reductions of medical specials based upon discounts provided to private health insurers of plaintiffs. Attendees were encouraged to continue discovery of insurance payment information related to plaintiffs. Authentication of medical bill discounts is also required (i.e., depositions of appropriate personnel, including healthcare providers, billing companies and insurers). It is important to get acknowledgment from such witnesses that nothing more is due or owing from the plaintiff for medical bills. Defense counsel should also obtain copies of the contracts between the healthcare providers and medical insurers, the contracts between plaintiffs and medical provider (i.e., insurance policy), and the agreements between the plaintiffs and healthcare providers. These will assist in convincing the trial court the defense should be entitled to reduction for the non-incurred medical bills.

Medical Expense Recovery: The Amount Billed or the Amount Paid?

By Randy Gustafson
Lincoln, Gustafson & Cercos

Assume the following: plaintiff seeks recovery of $60,000 in gross medical bills for diagnosis and treatment of a knee injury. Provider agreements between plaintiff's health insurer and health care providers reduce the gross charges to $20,000 which the insurer has paid in full. The defendant asserts the $20,000 paid is the reasonable value of medical services incurred, while the plaintiff asserts admission of the $20,000 paid by an insurer violates the collateral source rule. Who's right?

A 1988 California appellate opinion has, until recently, been successfully used by California defendants to admit evidence of the amount paid as the measure of reasonable medical expense. (*Hanif v. Housing Authority of Yolo County* (1988) 246 Cal. Rptr. 192). A 2009 California appellate opinion in a different district disagreed and ruled that evidence of the amount paid by insurance is a collateral source benefit and therefore inadmissible (*Howell v. Hamilton Meats Provisions* (2009) 179 Cal. App. 686). The California Supreme Court recently accepted the matter for review, but will not rule for at least a year.

The collateral source rule, as developed through case law, prohibits evidence that the plaintiff's damages have been reduced by insurance. In regard to insured medical expenses, defendants are not arguing to exclude evidence of the amount paid (which is likely subject to lien by the medical insurer) and thus are not seeking a reduction of true compensatory damages. Instead, defendants are asserting that recovery of "list price" charges that were never owed and will never be paid is a windfall which encourages litigation by inflating special damages which in turn influences the jury award of general damages. A liability case with $20,000 in admitted medical specials may lead to a total award under $60,000, while a case with $60,000 in admitted medical specials never will. Plaintiffs complain that evidence of the paid amount allows a windfall to the defendant where the plaintiff took the responsible step of maintaining insurance. The lines are drawn, with interest groups on both sides of the issue expected to file briefs.

It is difficult to predict how the California Supreme Court will rule. Courts in Nevada and Arizona routinely exclude evidence of the amount paid by insurance while allowing evidence of the full cash price as the reasonable value of services rendered. The defendants are not allowed to introduce evidence of the different pricing structures as such evidence would involve an impermissible inference of available insurance. The defense medical experts typically charge similar cash rates and thus cannot offer criticism of the amounts billed. It would not be surprising to see the California courts take the same paths as Nevada and Arizona and leave any reform of the collateral source rule to the legislature. In the meantime, we can expect inconsistent rulings at the trial court level and renewed focus on negotiating insurance liens.

Statutory Offers To Compromise: A Double-Edged Sword

By Alan E. Greenberg
Wood, Smith, Henning & Berman

A statutory offer to compromise provides defendants with advantages and disadvantages relative to a standard settlement offer. The major advantage to a defendant is the consequences that a plaintiff faces if he or she rejects the offer and goes to trial or arbitration and fails to achieve a more favorable result. The consequences are the cost-shifting provisions of Section 998(c)(1), in which post-offer costs that a defendant normally pays are instead paid by the plaintiff if the plaintiff fails to achieve a better result. A defendant's disadvantages in making a statutory offer to compromise include limits on when an offer to compromise may be made, the terms that may be included, and the parties that may be included in a release.

An "offer to allow judgment to be taken" includes an offer for dismissal with prejudice because such a dismissal is "tantamount" to a judgment. *On-Line Power, Inc. v. Mazur* (2007) 149 Cal. App. 4th 1070, 1085. See also, *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal. App. 4th 1017, 1055; *Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal. App. 4th 458, 471 [offer for costs waiver in exchange for dismissal with prejudice held to be a valid offer under §998].

The §998 procedure is effective as a settlement incentive tactic. Because of the monetary "penalties" at stake, which will be discussed below, the offeree party has a strong incentive to seriously consider statutory compromise offers. "[T]he clear purpose of section 998…is to encourage the settlement of lawsuits prior to trial." *T.M. Cobb, Inc. v. Superior Court* (1984) 36 Cal. 3d 273, 280.

Statutory offers to compromise may also be useful to defendants where attorney fees are awardable to the "prevailing party" under statute or contract. If plaintiff recovers less at trial than defendant's §998 pretrial offer, defendant may be regarded as the "prevailing party" and entitled to its postoffer fees.

For purposes of triggering the statutory "penalties", all terms and conditions of a §998 offer must be sufficiently certain so as to render them capable of being valued. Otherwise, it may be impossible to ascertain whether an offeree who rejected the offer obtained a "more favorable judgment" at trial. Therefore, although the offer need not be confined to a fixed monetary sum, all terms and conditions must be stated with precision. See *Seever v. Copley Press, Inc.* (2006) 141 Cal. App. 4th 1550, 1561 [offer of $200,001 plus payment of plaintiff's "statutory costs, including attorneys' fees, incurred to date of this offer in the amount determined by the Court according to proof" held to be sufficiently certain]; *Elite Show Services, Inc. v. Staffpro, Inc.* (2004) 119 Cal. App. 4th 263, 268-269 [an offer stating a willingness to pay "reasonable attorney fees and costs", but failing to specify in what amount, is nevertheless sufficiently certain to be valid; applicable statues and court rules may be followed in determining the amount of attorney fees and costs awardable].

An offer does not qualify under §998 if it seeks to dispose of claims beyond those at issue in the pending lawsuit because there is no way to determine whether a judgment in the pending action is "more favorable" than the value of those claims. *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App. 4th 117, 121 [offer conditioned on release of "all claims" invalid where claimant had at least one claim not part of the present lawsuit]. The implication of the *Chen* case is that the inclusion of a Civil Code §1542 waiver as part of a §998 offer would render the offer invalid as a statutory offer to compromise. Similarly, a §998 offer can not require as a condition of acceptance a release containing a confidentiality provision because "…the value to a particular plaintiff of public vindication (or conversely, the negative value of confidentiality) is so highly subjective and elusive that no court can determine its monetary worth." *Barella v. Exchange Bank* (2000) 84 Cal. App. 4th 793, 801.

Conclusion

A properly made statutory offer to compromise can give a defendant significant advantages over a standard settlement. A §998 offer can shift post-offer costs to the plaintiff should the plaintiff fail to obtain a "more favorable" result at trial. On the other hand, a properly made §998 offer subjects defendants to significant disadvantages relative to non-statutory settlement offers. Under §998, a defendant cannot obtain a release of "all claims", including presumably a §1542 waiver, cannot prevent future actions by the plaintiff that are not covered in the pending litigation, cannot obtain a release of non-litigants such as a defendant's insurers and attorneys, and cannot obtain a confidentiality provision.

In short, a §998 offer is a "double-edged sword" so it needs to be used with care. A defendant may find that a statutory offer to compromise, when accepted, is nothing more than the resolution of a single battle of an ongoing war with a claimant in which claims involving additional issues and additional parties will still remain to be fought.

Court Holds Witness Interviews Not Privileged Work Product

By Teresa Beck
Lincoln, Gustafson & Cercos

A California appellate court has recently held that recorded or written witness statements taken by attorneys are not privileged work product. Overruling *Nacht & Lewis Architects v. Superior Court* (1996) 47 Cal.App.4th 214, the divided court in Fresno's 5th district held that held the "weight of authority" states that written and recorded statements taken by attorneys are not work product, but are, rather, "classic" evidentiary material.

Justice Betty Dawson, writing for the majority in *Coito v. Superior Court* (2010) 10 C.D.O.S. 2697, scathingly criticized the fourteen year-old *Nacht & Lewis* as "cursory", noting "It contains no analysis to support [its] language and fails entirely to acknowledge the long line of contrary precedent." The majority noted that these statements can be admissible in court as prior inconsistent statements, prior consistent statements, or past recollections recorded, yet "if the statements are not subject to discovery, the party denied access to them will have no opportunity to prepare for their use."

The dissent had no strong feelings for *Nacht & Lewis* either, noting its "per se rule of absolute protection goes too far." The dissent felt that witness statements recorded by attorneys constitute "qualified" work product, which is undiscoverable unless a court determines that denial of the statement unfairly prejudices the party seeking it. The dissent also noted that the California Supreme Court had not weighed in on the issue and urged it to do so.

Whether the high court agrees to review the issue is uncertain, but if *Coito* is any indication, it would be well served to do so, given the majority and the dissent's dissatisfaction with the current law.

underwriting guidelines prohibited plaintiff from deleting the named driver exclusion on the website. The customer care representative from Texas testified at trial that following the conversation with plaintiff in August, 2006, that the named driver exclusion was not removed, as plaintiff refused to provide her daughter's drivers license number, an underwriting requirement where a driver has been excluded from a policy for underwriting reasons. Underwriters from 21st Century also confirmed the underwriting requirements. Plaintiff argued that 21st Century waived its underwriting rules when the Texas customer care representative told plaintiff "no problem". 21st Century argued that there was no waiver of the named driver exclusion by the words or conduct of the customer care representative, that the policy language was clear and unambiguous that the policy could only be changed, modified or altered by a writing issued by 21st Century and plaintiff could not establish reliance on any representation by the Texas customer care representative, as plaintiff knew that the exclusion was still in force and effect when she visited the 21st Century website on or about October 15, 2006.

Settlement Demand: $75,000

Settlement Offer: $10,000

Trial Type: Jury

Trial Length: 9 days

Verdict: Defense

The Bottom Line

CASE TITLE: Minyon Hamilton, LaVida Johnson, Angela Hairston, Cheryl Burch, Paul Griffin, Michael Johnson, Colleen Knight, and Sidney Johnson, individually and as Successors in Interest to and for Margaret Griffin vs. Raymond Harper Summers, M.D., Alvarado Hospital, Alvarado Hospital, LLC., Dr. Tremblay, Dr. Sathya P. Pokala.

Case No.: 37-2008-00084918-CU-MM-CTL

Judge: The Honorable Timothy B. Taylor

Plaintiffs' Counsel: Joel G. Selik, Esq.

Defense Counsel: Andrew R. Chivinski, Esq. Neil, Dymott, Frank, Mcfall & Trexler Aplc

Type Of Action: Desecration and mutilation of a corpse, battery on a corpse, wrongful autopsy/autopsy without authorization, unauthorized removal, hiding and disposal of body parts, intentional infliction of emotional distress.

Settlement Demand: Pre-Trial: $275,000.00
During Trial: $65,000.00

Settlement Offer: Waiver of costs was offered to plaintiffs in exchange for a full dismissal, with prejudice.

Type Of Trial: Jury

Trial Length: 7 Days

Verdict: Defense

UNDERSTANDING THE FEDERAL MEDICAL CARE RECOVERY ACT

By Ranjan A. Lahiri
Wood, Smith, Henning & Berman LLP

San Diego has a proud tradition of supporting members of the military and its local economy is bolstered by the vast number of military personnel and their families who call San Diego home. With the large number of military personnel living and working in San Diego, it is inevitable that soon or later a defense lawyer will become involved in a case in which a serviceman or woman or a family member is claiming personal injuries arising from the tort of another.

The issue of medical liens and how they are asserted and paid are important issues for any defense lawyer who handles personal injury cases. With the large number of military personnel and military families located in the area, it is important for defense lawyers to understand what rights the United States Government has to recover for medical services paid to service men and women and their families.

Under the Federal Medical Care Recovery Act ("FMCRA"), 42 U.S.C. Sections 2651 through 2653, the United States has the ability to recover any medical expenses paid by it to a member of the military or a military family in connection with tortious conduct of a third-party. The United States can either intervene in a lawsuit or assert an independent action against a defendant and its insurer to recover the reasonable value of medical expenses paid to a tort victim. The United States can also grant a plaintiff the express authority to file suit and recover the costs of medical care and treatment for the benefit of the U.S. Government. However, absent such authority, a settlement or verdict will not operate to release the United States' ability to recover the costs of medical care and treatment from a defendant or its insurer. This presents a substantial risk for a defendant and/or its insurer and it is important for defense counsel to understand the impact of the FMCRA and how to handle a claim that falls under its purview.

I. Recovery under 42 U.S.C.A. Section 2651

42 U.S.C.A Section 2651 grants the United States a right to recover the reasonable value of care and treatment furnished to a person injured as a result of tortious conduct of another. 42 U.S.C.A. Section 2651(a). The United States is also authorized to recover the total amount of pay that accrues to a service member who is unable to perform duties as a result of injury or disease. 42 U.S.C.A Section 2651(b).

The Government's right of recovery arises only if the party causing the injury is tortiously liable to the victim under state law. See *U. S. v. Neal* (1978) 443 F.Supp. 1307; *Howard v. Lockheed-Georgia Co.* (1974) 372 F.Supp. 854, 858. Moreover, the Government's right to recover is not automatic and is dependent on a defendant being found legally liable for an injury. "The primary purpose of the Act was to enable the United States, for the benefit of its taxpayers, to recover the fair and reasonable value of expenditures required by law which, prior to the passage of the Medical Care Recovery Act, had operated as a 'windfall' to the injured party under the expanded decisions permitting recoveries pursuant to the collateral source doctrine." *U.S. v. Jones* (1967) 264 F.Supp. 11, 15.

The United States may maintain its lien for medical services against a defendant independently of the plaintiff or it may intervene or join in any action brought by the injured party. *Babcock v. Maple Leaf, Inc.* (1976) 424 F.Supp. 428, 431. The United States also does not have to obtain an assignment of a tort claim from the injured person or provide notice of assignment to the tortfeasor to protect its right to assert a later independent action. See *U. S. v. York* (1968) 398 F.2d 582. As the language of the enforcement provision of Section 2651 is permissive rather than mandatory, courts have found that it "clearly was the intent of Congress to create a right of action in the government independent of the action of the injured party." This independent right of action should be construed as permitting the government to assert its claim in any of a wide variety of possible procedural alternatives. *Leatherman v. Pollard Trucking Co.* (1978) 482 F.Supp. 351, 353 -354. Furthermore, it is well settled that the head of the department or agency that furnished the care and treatment to the injured person may choose the means by which that department seeks recovery of its expenses.

Unless the United States has agreed to waive its lien, a plaintiff is entitled to recover an amount equal to his past medical expenses from the United States in this action. See *Standefer v. U.S.* (1975) 511 F.2d 101, 106-107. The FMCRA allows the government to recover an amount equal to the "reasonable value" of its medical expenses furnished to a serviceperson, at rates established by the Bureau of Budget. See *Petersen v. Head Const. Co.* (1973) 367 F.Supp. 1072. However, the government may not be entitled to reimbursement for the full amount of its claim for medical treatment given to a veteran where the government passively allowed the veteran to bear all the risks and costs of pursuing litigation against third-party

tortfeasor. See *Cockerham v. Garvin* (1985) 768 F.2d 784.

The United States may recover for medical and hospital care furnished to a plaintiff asserting tort liability against a third person by either subrogation, by intervening or joining in any action brought by injured person or by instituting such an action itself or in conjunction with injured or deceased person. See *Conley v. Maattala* (1969) 303 F.Supp. 484. The right of the United States to pursue an independent action to recover from tortfeasor for reasonable care and treatment is also not subject to any state statute of limitations under the doctrine of sovereign immunity. See *U. S. v. Gera* (1969) 409 F.2d 117.

In order to recover monies paid for medical expenses, the United States can either assert an independent claim against a tortfeasor or authorize a plaintiff to assert the government's claims in plaintiff's own action. If the United States authorizes a plaintiff to assert a claim on its behalf, court's have generally allowed the claim to proceed without including the United States as a party. *Leatherman v. Pollard Trucking Co.* (1978) 482 F.Supp. 351, 353 -354. The rationale is that the United States, by granting such authority, will be bound by the judgment entered and that the possibility of inconsistent obligations will be avoided. *(Id.) See also, Conley v. Maattala* (1969) 303 F.Supp. 484 (it was not required that United States be made party to action by injured member of armed services against estate of alleged tortfeasor in order for injured member to recover for sole use and benefit of United States the value of medical care and treatment furnished and to be furnished by United States where Department of the Army had authorized attorneys for injured member to assert claim of United States as an item of special damages).

However, if a plaintiff does not have authority to recover monies on behalf of the United States and there is a judgment or a settlement in favor of the plaintiff, the United States is not bound by any terms of that judgment or settlement and can still proceed against the defendant or its insurer to recover the reasonable value of medical services. The United States has no express statutory right under the FMCRA to recover from a beneficiary who receives payment from a third party. See *In re Dow Corning Corp.* (2002) 280 F.3d 648, *rehearing and request for rehearing en banc denied, certiorari denied*, 123 S.Ct. 85, 537 U.S. 816, 154 L.Ed.2d 21, on remand 287 B.R. 396.

Plaintiffs also do not have the power to release or contract away the right of the United States to recover the reasonable cost of medical furnished. See *U.S. v. Greene* (1967) 266 F. Supp. 976. "'All courts which have considered the question have agreed that the statute gives the United States an independent right of recovery against the tortfeasor...' Thus, the government's right is not extinguished by the injured person's settlement and release with the tortfeasor. Indeed, the government's right against the tortfeasor under the Recovery Act is not defeated even by certain restrictions that might bar the injured person's own recovery. There is thus no necessity for the United States to look to the injured party's settlement for compensation." *Holbrook v. Andersen Corp.* (1993) 996 F.2d 1339, 1341 (internal citations omitted).

Where a third party is found to have even implied notice that an injured party received government-provided medical treatment for injuries, the injured party's release does not affect the government so as to prevent it from recovering these costs from a third-party. See *U.S. v. Theriaque* (1987) 674 F.Supp. 395, 397. For example, a written release settling a plaintiff's claims for personal injuries did not preclude the United States from recovering costs for medical care and treatment against a defendant and its insurer where the interrogatory answers in preparation for the plaintiff's suit against defendant showed that the defendant and its insurer had actual notice that the plaintiff had received medical services as a veteran's hospital. *(Id.)*

II. Practice Pointers

In light of the fact that the United States can assert an independent action against a defendant or its insurer to recover monies paid in medical expenses, it is important for a defense lawyer to properly evaluate whether FMCRA is implicated in a particular case. More importantly, since a settlement with a plaintiff is not binding on the United States, it is important for a defense lawyer to ensure that he or she acts to protect the interests of the client and/or its insurer so as to avoid having to make potentially duplicative payments.

In many instances, a plaintiff will state in his or her complaint that he or she has been authorized to recover monies pursuant to FMCRA. In *Leatherman v. Pollard Trucking Co., supra*, the court found that the following language asserted in a complaint was sufficient to deny a motion to join the U.S. Government as a party to a personal injury action: "As a result of said injuries, the plaintiff has received (or in the future will continue to receive) medical and hospital care and treatment furnished by the United States of American under the provisions of 42 U.S.C. 2651-2653, and with its express consent, asserts a claim for the reasonable value of said (past and future) care and treatment." The court found that joining the United States would be unnecessary because "[t]he government will be bound by the judgment entered in plaintiff's suit and the possibility of inconsistent obligations will be avoided." (*Id*. at page 354.)

However, the mere fact that a plaintiff has cited this language in its complaint is no guarantee that a plaintiff actually has the requisite authority to recover these monies. The defense lawyer should make sure that it verifies that a plaintiff has obtained the requisite authority. The best way to do this is to contact the local Medical Care Recovery Unit of the branch of the military in which the plaintiff serves. This information is generally available through the websites of the JAG for each branch of the military. If a claim has been filed, the Medical Care Recovery Unit should be able to verify that a claim exists and confirm that they have entered into an Attorney Participation Agreement ("APA") with the plaintiff or their counsel. Another way to accomplish this is to simply request the authorization information from plaintiff's counsel, either informally or by means of written discovery.

The APA generally provides that the participating attorney has agreed to act to protect the interests of the U.S. Government in recovering any medical expenses that are owed. The APA also provides that the participating attorney has the authority to compromise the claim in its best judgment. In the event of a settlement or judgment, any division of monies between the United States and the plaintiff is handled between them, and does not involve defense counsel.

If the Medical Care Recovery Unit does not have a record of a claim, there are two options that a defense lawyer can pursue. The first is to have the Medical Care Recovery Unit open up a claim file and contact the plaintiff's counsel to enter into an APA. If there is no claim on file and the Medical Care Recovery Unit is either unwilling or unable to open up a claim, it is imperative that defense counsel move to join the United States Government as a party to the litigation. Absent an APA, this is only way for the defense to ensure that the U.S. Government is bound by any settlement or judgment and to cut off the United States' ability to pursue a later action to recover the medical expenses from a defendant or its insurance carrier.

In the event that a plaintiff has not received authorization to proceed with his or her claim for medical care and treatment costs on behalf of the United States, defense counsel should make sure that the United States Government is a party to any settlement discussions that take place. Defense counsel should also make sure that the United States is properly put on notice of the claim and take steps to join the United States in the claim. Doing so is the best means of ensuring that, if a plaintiff receives any money either through settlement or a verdict, a defendant and its insurer are not left open to another action by the United States.

The Bottom Line

Case Title: Simpson v. Fidaleo, M.D.

Case Number: 37-2009-00083689 CU-PO-CTL

Judge: Honorable John S. Meyer

Plaintiff's Counsel: William Berman and Ken Sigelman

Defense Counsel: Clark Hudson and David Burke of Neil Dymott, et.al.

Type of Incident/Causes of Action: Medical Malpractice, Anoxic Event - 45 year old female left in a permanent vegetative state following a medication overdose.

Settlement Demand: $17 Million.

Settlement Offer: $1 Million offered as a 998, renewed during mediation, and offered a final time at the start of trial.

Trial Type: Jury

Trial Length: Four Weeks

Verdict: Defense (9-3)

Appellate Update

Statute of Limitations in Legal Malpractice

By Jeffry A. Miller
Lewis Brisbois Bisgaard & Smith

The Second Appellate District (Los Angeles) had another interesting opinion. On April 5, 2010, the Court of Appeal in *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559 reversed in part the trial court's order sustaining a demurrer on a legal malpractice claim. The appellate court held that the statute of limitations under Code of Civil Procedure section 340.6 is tolled under section 351 when the defendant is out of state. This opinion effectively expands the tolling exceptions that apply to an attorney malpractice claim.

In *Jocer*, the plaintiff lost a trade secret lawsuit against a former employee and subsequently was successfully sued for malicious prosecution by that employee. Thereafter, plaintiff filed a lawsuit against its attorney for legal malpractice and against the attorney and his law firm for indemnity for the judgment and fee awards in the underlying lawsuits. The trial court granted defendants' demurrer to the complaint, finding that it was time-barred by the statute of limitations under section 340.6. Despite plaintiff's argument that the statute of limitations was tolled, the trial court concluded that section 351 -- which tolls the statute of limitations when a defendant is out of state -- did not apply to section 340.6's statute of limitations.

On appeal, the appellate court disagreed. The court held that although the four tolling exceptions under section 340.6 are the exclusive means to toll the statute of limitations for legal malpractice, the fourth exception encompassed section 351 and other tolling provisions. The fourth tolling provision provides that the period for bringing a legal malpractice claim is tolled for any time that the plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action. The court in *Jocer* relied on a Supreme Court decision, *Bledstein v. Superior Court* (1984) 162 Cal.App.3d 152, which held that sections 351 and 352, among others, "concern legal and physical impediments to a plaintiff's ability to institute a suit," and therefore fall within the definition of the fourth tolling provision.

The court ultimately affirmed the demurrer on the legal malpractice cause of action on another ground, but the opinion still creates an expansion of the tolling exceptions in a legal malpractice claim. The court held that the general tolling provisions found in Code of Civil Procedure chapter 4, title 2, part 2 (sections 350-363) fall within the fourth tolling provision under section 340.6. Therefore, the time period for filing a legal malpractice lawsuit may also be tolled by the plaintiff's disability, minority, or insanity (section 352), the plaintiff's imprisonment (section 352.1), or the existence of a prohibitive injunction (section 356).

The *Jocer* opinion highlights the need to look beyond section 340.6 in some circumstances to determine whether the statute of limitations has run on a legal malpractice cause of action. Be sure to remember *Jocer* if a plaintiff attempts to argue that the statute of limitations is tolled.

Mediation Confidentiality?

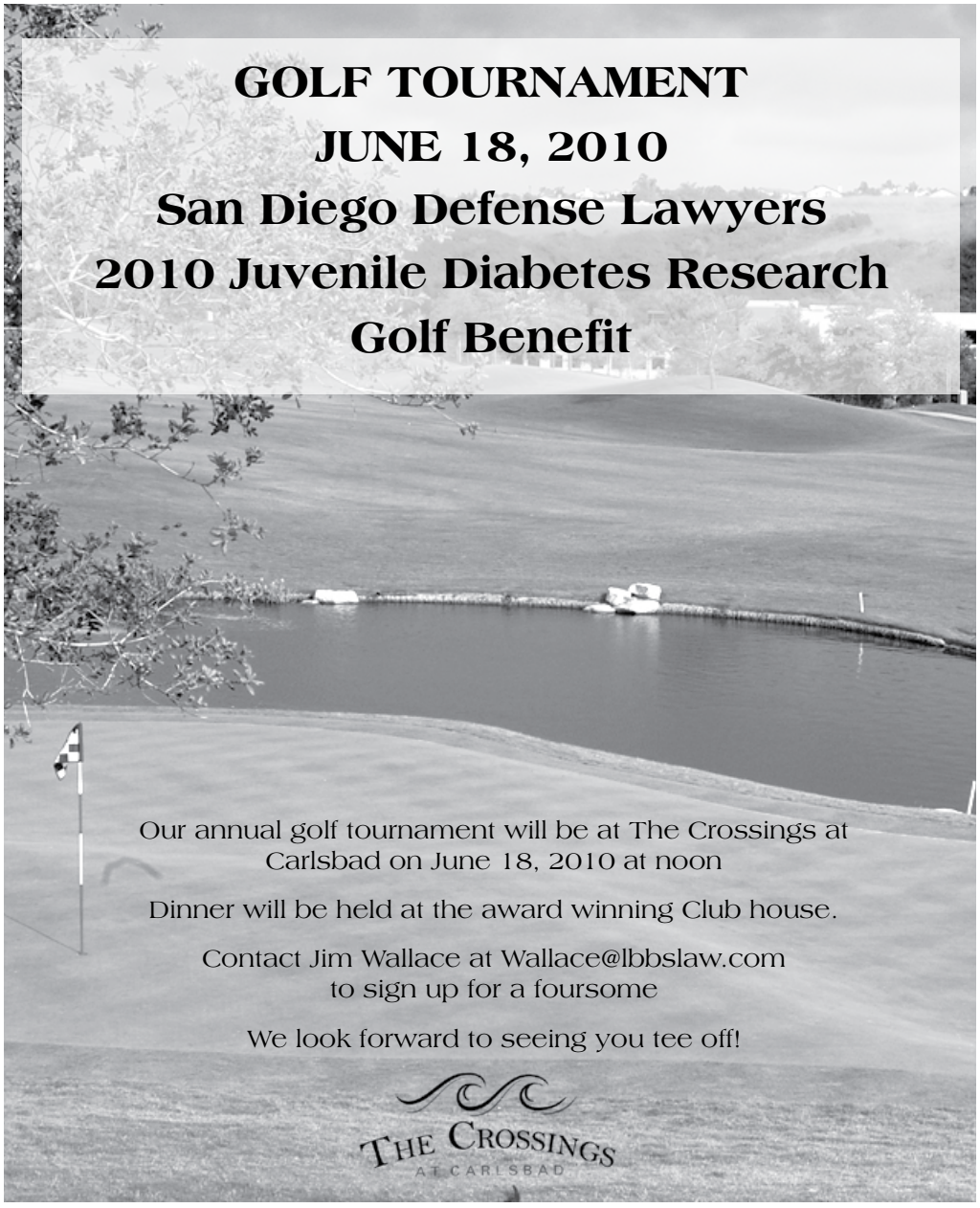
Recently, the Second Appellate District (Los Angeles) issued an opinion discussing the scope of confidentiality for communications made in relation to mediation, commonly given the misnomer of the "mediation privilege." In *Porter v. Wyner* (2010) 183 Cal.App.4th 949 the Court of Appeal reversed the trial court's order granting defendants' motion for new trial on the basis of its belief that confidential communications were erroneously admitted at trial. The Court of Appeal reversed, holding that mediation confidentiality does not apply to communications between litigants and their own attorneys incidental to a mediation.

Plaintiffs, the Porters, hired defendants to represent them in a lawsuit against a school district. Following mediation, the parties settled. During the mediation discussions, defendants promised to pay the Porters a portion of the proposed settlement proceeds allotted to attorney fees. When they failed to do so, the Porters sued to recover the proceeds. At trial, evidence was introduced of the discussion between defendants and the Porters regarding the promises made at the time of the mediation. After the jury returned a verdict in favor of the Porters, the defendants moved for a new trial, arguing that the admission of the communications constituted an irregularity in the proceedings. The trial court agreed and ordered a new trial.

On appeal, the Court of Appeal held that mediation confidentiality did not apply to discussions between a party and its own attorneys. The court explained that "[t]he confidentiality aspect which protects and shrouds the mediation process should not be extended to protect anything other than a frank, candid and open exchange regarding events in the past by and between disputants. It was not meant to subsume a secondary and ancillary set of communications by and between a client and his own counsel, irrespective of whether such communications took place in the presence of the mediator or not." The court further held that such confidentiality would interfere with and undermine the attorney-client relationship and the resulting privileges attendant to that relationship.

Justice Flier dissented, arguing that the majority's opinion cast too broad of a rule. Justice Flier reasoned that the communications in question were directly related to the mediation and should be protected. According to Justice Flier, any exception to mediation confidentiality should be created by the Legislature, not the courts.

Courts have generally been hesitant to narrowly construe the mediation confidentiality statutes. It will be interesting to see if the Supreme Court decides to consider this issue by reviewing this opinion if a petition for review is filed.



★ Member News ★

R. Robert Punta Joins The Law Firm Of Balestreri Pendleton & Potocki

Balestreri Pendleton & Potocki is pleased to announce that Rob Punta has joined the firm as an associate. Prior to joining the firm, Mr. Punta had several years of experience both in the public and private sectors. He brought with him his diverse experience in civil litigation on issues such as labor law, condemnation, boundary disputes, wrongful death and personal injury actions. Mr. Punta is now engaging in the firm's litigation practice in a broad range of matters related to construction and real property.

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THE UPDATE is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers.

We welcome the submission of articles by our members on topics of general interest to our membership. Please submit material to:

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