Contra Costa Lawyer

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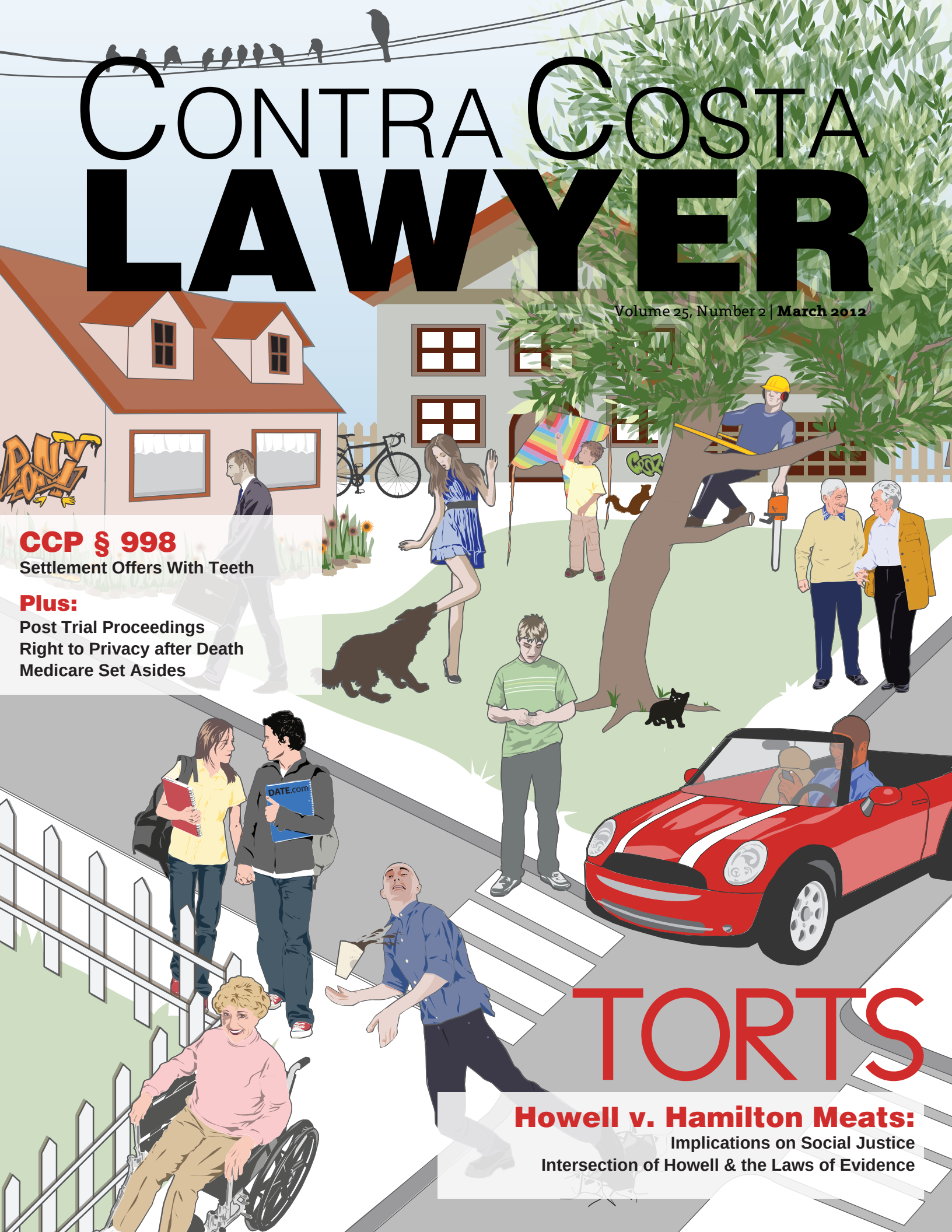

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Settlement Offers With Teeth

Plus:
Post Trial Proceedings
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TORTS

Howell v. Hamilton Meats:
Implications on Social Justice
Intersection of Howell & the Laws of Evidence

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Naming the bricks in the "Wall of Worry."

There is an old saying that financial markets climb a wall of worry. It is cited as a reason, or an excuse, for taking no action in the face of heightened risk. As I see it, these are some of the bricks in the wall right now:

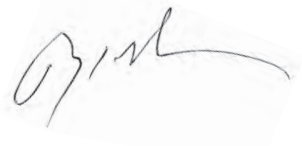
- Rating Agency Downgrades
- Bank Sector Liquidity
- Financial Deleveraging
- Slowing of Corporate Earnings
- European Credit Crisis
- Political Instability in the Middle East
- U.S. Debt Ceiling Extension
- 2012 General Election
- Expiring Bush-Era Tax Cuts
- New Healthcare Tax Liability in 2013
- Weakening US Economy
- Continuing Housing Crisis

Understanding the risks can help investors better prepare themselves for the future. To read my current analysis of these risks, please visit my website for recent issues of *Financial Outlook*, and other UBS research reports.

To discuss how we have helped clients prepare to weather these potential risks, please call for a complimentary consultation. I look forward to speaking with you.

Trusted advice, caring support, prudent financial solutions.

Best regards,



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FEATURES

DEPARTMENTS

president's message

Audrey Gee
CCCBA President

March Madness, Mayhem and Meritocracy

March 20th is the first day of Spring, also known as the Vernal Equinox. For you Latin fans out there, the word "equinox" translates to "equal night" and refers to the time when the sun crosses the true celestial equator, and day and night are of nearly equal length. Day and night are balanced to nearly 12 hours each, all over the world, and the earth's axis of rotation is perpendicular to the line connecting the centers of the earth and the sun. Take a breath. This is your time to recharge. On March 21st, daylight begins to grow longer.

With all those extra hours of daylight, aren't you just looking for more things to do? Never fear, the CCCBA is here. Our online calendar at www.cccba.org/attorney/calendar is the best place to get plugged into the latest happenings. If you want to find information specific to your practice, check out our many active sections and committees and contact their leadership to attend the next meeting. www.cccba.org/attorney/sections.

Scan this QRcode with your smart phone to visit the CCCBA calendar...

Our Inter-professional Mixers are back! Want to expand your network? Meet with other professionals such as bankers, CPA's, management consultants, CFO's, commercial real estate and insurance folks. We started this program last Spring and the events have been super successful, with over 200 people exchanging business cards, enjoying the company of their fellow professionals, and talking about the latest happenings in their industries and professions. It's a free event, so drop on by.

The Women's Section is also holding its annual wine tasting scholarship fundraiser, with a silent auction. This is always a wonderful event with local wineries that raises funds for smart, accomplished law students who have demonstrated a commitment towards the advancement of women. Come, bid high and bid often.

The IP section is hosting an evening roundtable, dealing with the USPTO and the new patent rules. Is this your practice area? Check it out and think about getting involved on the IP board.

Don't have time for an event, but want to brush up on your MCLE? Chancellor and Dean of Hastings Law School, Frank Wu, gave a thought-provoking, enlightening, and lively discussion of the importance of diversity at our January Installation Luncheon to a standing ovation, postulating that diversity should be thought of as a dynamic process, like a democracy. Watch the video on our website, under MCLE/Other Self-Study MCLE (and also qualify for elimination of bias MCLE credit).

March is a great time for getting involved with our Bar. Get out and about! Enjoy the Springtime. ♦

Audrey Gee is a founding partner of Brown Church & Gee, LLP, a business centered law firm that offers a fresh approach to legal services. Audrey brings over 16 years of experience to a practice that focuses on litigation and management side employment counseling and risk management. Audrey's litigation practice has included representation of multi-billion dollar companies in contract disputes, defending publicly traded homebuilders in complex multi-plaintiff construction claims, and handling a broad range of business, real estate, employment and intellectual property disputes.

by **Scott Sumner**
Khorrami Law Firm

The Trouble with "Tort Reform"

"Conservative" Politicians and Media Pundits deign to hate consumer lawsuits – but they shouldn't. Torts are grounded in the founding American ideals of independence, accountability and small government.

We tend to think of public figures who advocate for what they like to call "tort reform" as being conservative. We shouldn't.

Why? Because the "reforms" for which they advocate fly in the face of core principles held by conservatives and others, namely personal accountability, reducing government spending, empowering individuals and strengthening family values.

PERSONAL ACCOUNTABILITY

By making it difficult or, in some cases, impossible for consumers who have been harmed to take corporations or other wrong-doers to court, or by limiting the amount of compensation harmed consumers can receive if they do go to court, "tort reform" measures strip accountability from the equation.

That lack of accountability limits the deterrence of further wrongdoing. "Tort reform" supporters who would blanch at being considered "soft on crime" regarding criminal matters wind up winking at wrongdoing in civil matters.

REDUCE GOVERNMENT SPENDING

"Tort reform" that leads to consumers not being able to win just compensation for their harm from the parties that caused the harm means those consumers are forced to rely on government-funded health and disability programs to get by. Medicare and Medi-Cal (as well as private health plans) end up footing the bill for medical care instead of the person or company that caused the injury.

EMPOWERING INDIVIDUALS

Tort "reforms" that keep disputes out of the civil justice system take power out of the hands of citizen juries, the purest form of democracy there is. Caps on compensation for damages put decision-making in the hands of legislators instead of jurors.

"FAMILY VALUES"

Tort "Reforms" take a disproportionate toll on children, stay-at-home parents and the elderly. For instance, California's MICRA law relating to medical negligence cases caps compensation for non-economic damages but not for lost past and future wages, meaning a high-wage earner will receive greater compensation for the exact same injuries than someone who is not in the workforce.

So "conservative" is not an apt label for advocates of "tort reform." "Elitist" and "Anti-Democratic" are a better fit, because our civil justice system – with its foundation of citizen juries – is democracy at its most pure and direct. It is also the best defense of safety and liberty against the role of money and special interests in government. Our civil justice system works just fine when we trust our citizens more than special-interest-funded legislators and overpaid media personalities, and allow jurors to do their job.

Calls for "tort reform" usually come with alarms about a "litigation explosion." What goes unsaid is that any "explosion" is the result of suits that aren't being filed by consumers: business torts, intellectual property disputes and breach of contract cases, including debt collections and mortgage foreclosures.

By contrast, in California, from fiscal year 2002-03 through 2009-10 (the most recent data available), the number of personal injury, property damage and wrongful death suits seeking more than $25,000 related to motor vehicle accidents went down by more than a third. The number of such suits not related to vehicular accidents went down by almost as much.

Claims of an abundance of "frivolous" lawsuits and "runaway" juries insult our justice system by say-

ing that judges and juries can't be trusted. Again, much goes unsaid. In some cases, lawsuits are made to look foolish by distorting the underlying facts. In some cases, the suits cited as "frivolous" have been made up. Many of the suits paraded as "frivolous" were quickly dismissed and never came near a verdict or settlement. Tort "reformers" would have you make a decision on the merit of a case based on their few seconds characterizing a case, rather than the hours and days of testimony and evidence a jury heard before reaching a verdict.

One of those supposedly "frivolous" lawsuits is a case that was so badly and loudly distorted by tort "reformers" that it remains a topic of discussion today, some two decades after it was filed. That is the case involving an elderly woman who was badly burned when she spilled coffee she purchased at a McDonald's drive-thru. In an attempt to correct the many misperceptions that have been created by tort "reformers," an HBO documentary, "Hot Coffee," exposed not only the falsehoods that surround this case but other attacks on the civil justice system by the corporate lobby.

Much of what most Americans think they know about the McDonald's case is wrong. For instance, the woman who was injured, Stella Liebeck, was not driving a car when her coffee spilled; she was the passenger in a car that was stopped in a parking lot. The coffee was not just "hot" but dangerous; McDonald's corporate policy was to serve it at a temperature that could cause serious burns in seconds. Mrs. Liebeck's injuries were far from frivolous; she required skin grafts on her inner thighs and elsewhere. Her injuries were far from isolated; McDonald's had received more than 700 previous reports of injury from its coffee. And the jury's punitive damage award that made headlines was reduced by more than 80% because of legislation requiring that reduction – even though the Republican-appointed judge who also heard the evidence did not believe the jury's award should have been reduced.

Examples of "frivolous" cases are often fabricated from whole cloth and spread as examples of a civil justice system supposedly turned upside-down. You've probably had some of these forwarded to you in an e-mail. Just because you read it in an e-mail doesn't make it true, but that hasn't stopped many people from believing it anyway.

For instance, the woman who tried to sneak into a nightclub to avoid the cover charge by crawling into a bathroom window, only to fall and break two front teeth - and won an award for $12,000 and medical expenses.

Or the woman who won $780,000 from a department store where she broke an ankle after tripping – over her own toddler.

Or the man who, while driving his new Winnebago, set the cruise control and went into the back to make coffee, only to be badly injured when the driverless vehicle left the freeway and overturned – and won a verdict of nearly $2 million.

All of these cases were made up. And yet there's a good chance you know someone who "knows" each of these cases is true – and is a shining example of why we need "tort reform."

The case for "tort reform" is a case for limiting corporate liability and accountability, by stepping outside the framework of our democracy. These tort myths have been developed to hide that fact.

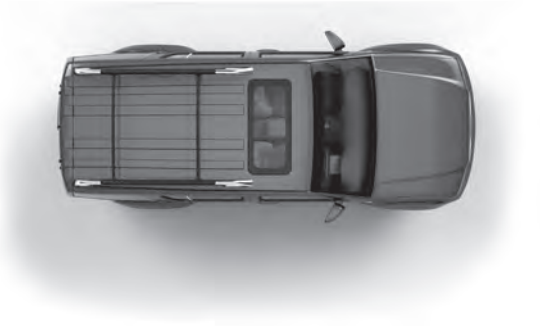
It's high time for thoughtful conservatives to reexamine what undergirds the rhetoric of corporate-sponsored politicians and media pundits when it comes to our civil courts. ♦

Scott H.Z. Sumner, Esq., Oakland, San Francisco and Walnut Creek, is now a principal in the Northern California operations of Khorrami Law Firm. Mr. Sumner was a long-time partner in the law firm of Hinton, Alfert & Sumner, representing consumers in defective products and catastrophic personal injury cases. He is known throughout the state for his legislative, educational and appellate work in matters involving presenting, obtaining and preserving medical damages awards, and handling lien and reimbursement claims from health plans, insurers and government entities.

Howell v. Hamilton Meats:

Supreme Inequity to Plaintiffs, a Message of Irresponsibility, and No Practical Guidance for Trial Judges & Attorneys

by **Scott Sumner**
Khorrami Law Firm



Last year, the California Supreme Court delivered its opinion in *Howell v. Hamilton Meats* (S179115, Filed 8/18/2011). The decision skews the civil justice system in favor of liability insurers and corporate defendants, leaving prevailing plaintiffs a lesser recovery in every case. It also fails to provide guidance to trial courts and attorneys in applying the holding in a manner consistent with the California Evidence Code. In the following two articles, Scott Sumner discusses the implications of *Howell* on social justice, as well as the intersection of *Howell* and the laws of evidence.

A Defendant's Windfall: The Implications of *Howell v. Hamilton Meats* on Social Justice

Without justice, how can the civil system be respected?

An abiding and recurrent theme of the Judicial Council, the Chief Justice of the California Supreme Court, and of the bar in general is a desire to rebuild public trust and respect for the civil justice system. The implicit call is for us all to contribute time and money to public relations education and outreach. However, no matter how well-intentioned and well-funded such efforts are, how can they succeed if they do not square up with the experiences of individuals who take part in our public justice system?

Any citizen can see the system as a juror in civil cases. Experience suggests that, while jurors usually express resentment at the inconvenience of being called, those selected to serve generally commit themselves to their task and ultimately report finding the process educational and rewarding. That is a good thing.

But to truly understand whether the system is creating a sense of fairness and justice, one must ask what litigants are experiencing. What word is getting back to the public from the stakeholders who experience the civil justice system?

As a tort litigant, the civil justice system can be experienced as plaintiff or defendant.

Tort defendants' stake in most cases is muted. Their insurer provides them an attorney, their personal exposure is effectively capped (if they are not grossly, inadequately insured), a case can be settled without their consent and without them ever being consulted. In typical negligence cases, their personal lives and their persons are not poked, prodded, challenged, or questioned. Absent rare personal liability beyond their coverage limits, one can reasonably say that things work for them as the system intends: their investment in insurance provides them with representation and protection. They get what they paid for.

To truly understand whether the system is delivering a sense of justice, one must look to common citizens harmed by unintentional (or at least unanticipated) circumstances beyond their control – out of work, forced into today's medical system, asking the responsible party to account for that harm.

So what of these tort plaintiffs? Common sense suggests that an unsuccessful plaintiff can be expected to be dissatisfied with the system.

But given the media prominence given to concepts like "runaway juries" and "jackpot justice," one would expect the prevailing plaintiff to be at least satisfied at how the system works.

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The Intersection of *Howell* and the Laws of Evidence

Past medical damages recoverable by people who carry health insurance are no longer based on the actual cost of those services, but instead are limited to the negotiated cash payments made by plaintiffs health plan, any copayments or deductibles, as well as any amounts still owing. That result plainly inures to the benefit of tortfeasor defendants, despite the fact that the negotiated rates exists solely as a function of plaintiff's investment in health insurance to indemnify himself against the full charge rates of medical providers in the event he required care, and despite the fact defendants are neither party to these collateral contracts nor intended beneficiaries of these contracts.

While trial courts must follow the holding of the *Howell* decision, in doing so, trial courts remain the gatekeepers of evidence and cannot subvert the rules of evidence – no matter how vociferously tortfeasors and their liability insurers seek to do so.

At the most basic level, any effort to equate the *Howell* Court's limitation on recovery of damages with an evidentiary advantage improperly subverts public policy precluding evidence of insurance in tort cases, and collateral benefits in particular.

Howell held that a tort plaintiff "whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial" even though those amounts are discounted rates secured through a tort plaintiff's payment of medical insurance premiums.

While the *Howell* Court said that a medical plan's cash payments are relevant to what damages are recoverable, the Court did not address the rules of evidence and other considerations that trial courts must analyze in order to implement this broad new holding:

"[W]hen a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, *assuming it satisfies other rules of evidence*, is admissible at trial." (emphasis added) *Howell* (S179115), page 29 of the filed opinion.

"Assuming it satisfies other rules of evidence." It does not. In order to admit the evidence, the contracts between an injured plaintiff's medical provider(s) and that plaintiff's medical coverage provider(s) have to be admitted into evidence. That creates two problems: first, neither litigant is a party to those contracts, raising serious foundation, prejudice, relevance, confusion and other contraindications to admission. Second, admission of such contracts would require revealing plaintiff's possession of and investment in health insurance, violating the collateral source rule, introducing further prejudice, confusion, and relevance concerns.

In order to provide tort defendants with the benefit of negotiated rate reductions secured by investments and contracts the defendants had absolutely no role in procuring, without wreaking additional prejudice and detriment on plaintiffs with health insurance, such reductions must be made outside the presence of a jury, after a verdict

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Yet prevailing tort plaintiffs are the most keenly aware of how unfair the civil justice system has become.

The stated purpose of the civil justice system is to achieve compensation for their harm, make them whole, and no more. However, over the past couple of decades, some major developments have worked decidedly against that purpose.

If you are looking for messages designed to undermine public trust and respect for the civil justice system, widespread "tort reform" rhetoric seems the most obvious choice. Calls to impose limits, caps, and restrictions on money damages, and to provide immunity to select groups and activities are designed to instill distrust and disrespect for the civil justice system, sounding a message that we cannot trust groups of citizens to weigh evidence and impose accountability in the form of money damages (even though no one seems to question the notion that juries can weigh evidence and decide criminal punishment, even whether to impose a death sentence).

"Tort reform" messages certainly find a voice in jury panels, and the message is that civil defendants are being victimized by the civil justice system and government. To the extent these messages impact civil justice, they obviously tend to reduce the incidence of plaintiff's verdicts, and the size of damages awards to prevailing plaintiffs.

More insidious, though, are developments that eat away at a prevailing plaintiff's net recovery, in ways that devalue a plaintiff's judgment and reasoning.

Most of us strive to maintain medical coverage for ourselves and our families. While for many, the premiums to maintain such coverage are not paid exclusively and directly by them, medical coverage is a significant cost of which everyone is aware.

- For as long as most of us can remember, the nature and extent of medical coverage informs our job and career choices, restricting our options, limiting our pay.
- Increasingly, working people have a large payment taken out of their paychecks to cover the premiums for medical coverage.
- In addition to what having medical coverage costs us, when we go to a doctor or hospital, most of us now face large deductibles that have to be paid up front, as well as substantial co-payment obligations even after our deductible is met.

What surprises most people is that when they bring a lawsuit against a party responsible for their injury, their medical carrier is going to take part of whatever money damages they recover – even if it means the injured plaintiff receives little or nothing for their injuries, wage loss, and their suffering.

On the one hand, when a tort plaintiff recovers money damages representing payment for medical services their health plan paid, most plaintiffs do not have a problem with the notion that the health plan be repaid from those funds in a way that respects the investment that went into obtaining that coverage. However, where the responsible party has limited liability insurance inadequate to compensate for the harm they have caused, common sense dictates that a medical plan should not take from the injured person more than that part of the limited recovery that can fairly be said to represent payment for medical services for which their health plan paid.

Most people would also agree that if a health plan is being repaid out of money damages that the injured person secured, that plan ought to share in the costs that were involved in recovering those money damages.

This common sense concept of fairness has a long history in the law and we call it "equity."

Over the past several decades, medical coverage plans have increasingly refused to share in the injured person's costs to recover money damages, while at the same time refusing to be restrained by common sense and fairness.

It should be the job of the courts to preserve equity, and balance the interests of injured people and their medical plans. Instead, the courts have stood with medical insurance companies and absolved medical plans of the dictates of equity, common sense, and fairness.

So, unlike a civil tort defendant, who gets the representation and protection they paid for from their liability insurer, tort plaintiffs are getting less than they bargained for from their medical plans, and the civil justice system condones this result.

Now the *Howell* Court has told civil plaintiffs that if they carry medical coverage, the defendant/tortfeasor that hurt them will actually owe less in damages than if the injured plaintiff did not carry medical coverage. So much for messages of responsibility.

When you have health insurance, your choices of doctors and hospitals are limited. Your health plan tells you that you have to go to medical care providers that are under contract with your health plan. Your plan does this because it uses these exclusivity contracts to negotiate steep discounts with medical providers.

Those discounts are secured with your premium dollars, but now the Supreme Court has said that a tort defendant gets the benefits of those discounts – without having to contribute anything towards the cost of the health insurance premiums that secure the discounts.

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detailing the elements of past medical damages awarded by the jury.

The *Howell* decision acknowledges that "medical providers that agree to accept discounted payments by managed care organizations or other health insurers as full payment for a patient's care do so not as a gift to the patient or insurer, but for commercial reasons and as a result of negotiations;" Furthermore, "[i]nsurers and medical providers negotiate rates in pursuit of their own business interests, and the benefits of the bargains made accrue directly to the negotiating parties."

Reduced payments pre-negotiated by agreement between a health plan and a contracted medical provider's services are terms of a written contract between the Plan and the medical provider. Such agreements are statutorily defined as "alternate rate contracts." Insurance Code 10133; 10133.6; Health & Safety Code 1373.9; Business & Professions Code 16770. The "agreement" identified by the *Howell* Court, an agreement between plaintiff's private health insurer and plaintiff's medical providers to accept "an amount less than the provider's full bill [...] as full payment for the plaintiff's care" is the content of a writing.

"The content of a writing may be proved by an otherwise admissible original" (Evid. Code 1520) or unedited reproductions/copies of the original (Evid. Code 1550) but not, generally, by oral evidence (Evid. Code 1523).

Any attempt to introduce some other evidence of the claimed "fact" that $X was "all that was paid" for a particular medical service – by, say, a medical billing or accounting department employee – is hearsay.

The assertion that $X is what was paid for a particular procedure – as opposed to a discussion as to what constitutes the reasonable value of a particular medical procedure or service – is hearsay: a statement to prove the truth of the matter asserted. (Evidence Code (EC) 1200).

An invoice or bill for services rendered is an example of hearsay, specifically implied hearsay, as to truth of the facts implied by the document: that the services were rendered; that they took place on a particular date; that the charges for the services are reasonable; etc. However, if the provider of the service testifies that the services were rendered and as to the value of the services, that evidence is not hearsay.

By contrast, even testimony of a medical provider that they "accepted $X as payment in full for a patient's care" – where $X is the pre-negotiated contractual rate agreed to with a health plan – is hearsay concerning the terms of a written contractual agreement, and is not acceptable evidence of the content of that writing. No parol evidence, no written or oral evidence, may be admitted with regard to an integrated contract. CCP 1856.

A tort defendant's only proper claim under *Howell* is to limit its obligation to pay money damages related to a plaintiff's past medical care where that care was paid under pre-negotiated contractual rates. Subverting the rules of evidence and permitting introduction of such contractual rates before juries would prejudice general damages claims and claims for future medical care.

Whether any part of plaintiff's ongoing and future medical care will be indemnified through similar pre-negotiated contractual terms is pure speculation. Even under national law set to take effect in 2014 (assuming the U.S. Supreme Court does not invalidate the pending legislation as unconstitutional), there is no requirement that health plans or Medicare pay for medical care where a patient has received money damages intended to cover the cost of that care, whether through tort or worker's compensation. Indeed, Medicare expressly requires set-asides from workers compensation damages for future medical care, and any significant recovery of damages will generally disqualify recipients from Medi-Cal/Medicaid coverage.

Although defendants, as a result of the *Howell* decision, directly benefit from a reduction in their liability for past medical damages, the reduced figures should be excluded from introduction into evidence or discussion before juries as confusing, prejudicial and improper.

Evidence of the reasonable value of medical services is relevant to a jury's evaluation of the severity of a plaintiff's injuries, to a jury's understanding the significance the medical care required to treat plaintiff, and to a jury's assessing and determining general damages. "[T]he cost of medical care often provides both attorneys and juries in tort cases with an important measure for assessing the plaintiff's general damages. *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal. 3d 1, 11. Introducing rates secured through plaintiff's collateral investment would unduly prejudice plaintiff's legal interest in general damages. And *Howell* does not suggest that collaterally reduced rates are relevant to general damages or future medical damages claims.

For juries to hear the contractually reduced rates paid by health insurance would improperly introduce a figure that results from plaintiff's collateral insurance and would cause undue confusion absent an explanation of the source of those rates. This is particularly true where the past medical services include procedures substantially similar or the same as claimed future medical services.

If the collateral contract rates for

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The Courts and civil system are squeezing medically insured plaintiffs between two competing forces: on the one side, plaintiffs' recoveries are limited precisely because they did the right thing and worked hard to maintain increasingly costly medical coverage. On the other side, the civil system sanctions giving more and more of those reduced damages away to those same medical plans, without any common sense limitation.

When a prevailing litigant experiences winning as so riddled with inequities, we are creating experienced emissaries of discontent with the civil justice system. ♦

LAWS OF EVIDENCE,
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past services are introduced before a jury, those rates will conflict with evidence of the reasonable cost of future services – two identical services, two different rates – unduly creating confusion and prejudice in the minds of jurors.

Since the introduction of the negotiated rates would itself suggest that plaintiff is covered by health insurance, and since evidence of the contracts themselves (the only proper evidence of such written terms) would conclusively establish that plaintiff is covered by health insurance, such evidence is inadmissible under the evidentiary aspect of the collateral source rule. *Hrnjak v. Graymar, Inc.*, 4 Cal. 3d 725, 732 (1971). ♦

Scott H.Z. Sumner, Esq. is a principal in the Northern California operations of Khorrami Law Firm. He is known throughout the state for his legislative, educational and appellate work in matters involving presenting, obtaining and preserving medical damages awards, and handling lien and reimbursement claims from health plans, insurers and government entities.

CCP § 998 The Nuts and Bolts of the Potent Settlement Device

Statutory offers to compromise under Code of Civil Procedure § 998 represent a powerful tool in the work belt of the California civil litigator. The statute is so commonly invoked that you need only hang around the second floor of 725 Court St. in Martinez for a short time before you will overhear hushed attorney deliberation over whether "we can beat the 998."

The statute is, in essence, a settlement offer "with teeth," allowing for dramatic cost-shifting when the verdict (or award, in arbitration cases) is more or less favorable than the § 998 offer. This advances the statute's intent: to encourage settlements. As stated in *Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 948, "[t]he purpose of section 998 is to encourage settlement by providing a strong financial disincentive to a party – whether it be a plaintiff or a defendant – who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer."

by **Nick Casper**
Casper, Meadows, Schwartz & Cook

But § 998 is also rife with potential and unforeseen pitfalls that can beset even the experienced practitioner. A thorough understanding of § 998 is imperative to avoid falling victim to an opponent's § 998, or worse: getting hoisted with your own petard by serving an invalid § 998.

HOW DOES IT WORK?

Statutory offers operate in the following manner, depending on which party issues the § 998:

If the defendant makes a § 998 offer that is rejected and the plaintiff fails to obtain a judgment that is more favorable than the offer amount, then the plaintiff is not entitled to post-offer costs AND must pay the defendant's post-offer costs. CCP § 998(c)(1).

In addition, the plaintiff may be ordered, in the discretion of the court, to pay a sum to cover the defendant's reasonably necessary expert witness fees actually incurred. This provision of CCP § 998(c)(1) provides the real hammer hanging over the head of the plaintiff, as expert witness fees can total in the thousands or tens of thousands of dollars. Furthermore, unlike litigation costs, the court's discretionary power is not limited to those expert witness fees incurred post-offer, but "in preparation for trial." *Regency Outdoor Adver., Inc. v. City of Los Angeles* (1996) 39 Cal.4th 507, 532 ("[A]wards of expert witness fees [under § 998(c)] have never been tied to when these fees were incurred relative to a compromise offer.")

In other words, even if the plaintiff obtains a plaintiff's verdict, but it is less than the § 998 offer, the net result may be a judgment to the defendant once the defendant's expert witness fees and post-offer costs are awarded. CCP § 998(e).

Conversely, when the defendant rejects the plaintiff's § 998 offer and the plaintiff obtains a more favorable judgment, the plaintiff is entitled to reasonable expert witness fees, but these are limited to those incurred post-offer. CCP § 998(d). There is no shifting of litigation costs, since the plaintiff is entitled to all of his or her customary costs as the prevailing party pursuant to CCP § 1032. In personal injury actions, plaintiffs are also entitled to 10% per annum interest on the judgment from the date of the plaintiff's § 998. Civil Code § 3291. Courts have held that cases brought under the Fair Employment and Housing Act ("FEHA") are actions for "personal injury" for purposes of § 3291. *Bihun v. AT&T Info. Sys., Inc.* (1993) 13 Cal. App.4th 976, 1004.

HOW DO I DO IT?

A § 998 offer must be made in writing and served upon the opposing party up to 10 days before the trial date; the § 998 is not filed with the court. Serving by mail adds five days, so if you are serving at the "11th Hour", be sure to hand-serve! A § 998 offer remains open for 30 days or the first day of trial, at which time the offer is deemed ▶

CCP § 998,
cont. from page 15

withdrawn by operation of law. CCP § 998(b)(2).

Overruling a string of decisions upholding oral acceptance, a § 998 must be accepted in writing and signed. CCP § 998(b). If accepted, the § 998 is filed with the court and judgment is entered accordingly, thereby ending the litigation.

The offer must be made in terms capable of valuation, i.e., a dollar amount, and the presence of non-monetary conditions in the § 998 may invalidate it altogether. Courts have held that the inclusion of a confidentiality clause (*Barella v. Exch. Bank* (2000) 84 Cal.App.4th 793) or a waiver of a litigant's potential insurance bad faith suit (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692) acted to nullify a §998. In a colorful decision, the *Valentino* court remarked that demanding that a settlement be paid in "Confederate dollars" or requiring the plaintiff to "move to another state" would similarly amount to invalid § 998 offers. Id. at 697-8.

A surprisingly common mistake by defendants is to serve a § 998 that is silent as to costs. In this case, the plaintiff can accept the § 998, then move for costs and attorney fees (where authorized) as the prevailing party. For this reason, it is advisable that a § 998 state that the offer includes, or that each party is to bear its own, fees and costs.

A § 998 offer to settle must be reasonable and made in good faith in order to be enforceable, and courts, in their discretion, may not award a party its § 998 costs if these touchstones are not met. *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134. Typically, this scenario arises with regard to the timing of the offer: if a party is not provided adequate time to assess whether the offer is reasonable, a court may decline to give effect to the cost-shifting provisions. Thus, serving a § 998 along with the summons and complaint is typically a bad idea, unless there has been significant pre-litigation sharing of information to allow the defendant to determine whether the offer is, in fact, reasonable. *Najera v. Huerta* (2011) 191 Cal.App.4th 872, 878-9. On the other hand, there is an advantage to serving the § 998 as early as practicable, particularly for plaintiffs, so as to start the clock on interest and to capture as many post-offer expert costs as possible.

DID I BEAT THE § 998?

The issue of whether a judgment is "more favorable" than the § 998 can involve some intricacies. When the defendant's § 998 is rejected, the plaintiff's post-offer costs are excluded from the calculation of whether the judgment is more favorable than the offer. CCP § 998(c)(2)(A). Courts have held that this implicitly means that the plaintiff's pre-offer costs are to be factored into the determination of whether the plaintiff "beat" the § 998 offer. *Heritage Eng'g Const., Inc. v. City of Indus.* (1998) 65 Cal.App.4th 1435, 1441. In cases where attorney fees are authorized, such as suits brought under FEHA, the plaintiff's pre-offer attorney fees are considered part of the judgment for determining whether the judgment is more favorable than the statutory offer. *Wilson v. Safeway Stores, Inc.* (1997) 52 Cal.App.4th 267, 271-2.

When the plaintiff's § 998 is rejected, the plaintiff's pre- and post-offer costs, including attorney fees where authorized, are included in calculating whether the judgment exceeds the § 998. "In this case it is the defendant who has impeded the statutory purpose by rejecting the offer, thus allowing the plaintiff to incur post-offer costs." *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 748.

The issue of whether a judgment is more favorable to a § 998 offer gives rise to the necessity of apportionment in multiple party cases. A defendant's joint § 998 to multiple plaintiffs is ineffective, as it would be impossible to determine if each plaintiff "beat" the unapportioned § 998. A defendant also may not make separate offers conditioned upon acceptance by all plaintiffs of their respective offers. *Hutchins v. Waters* (1975) 51 Cal.App.3d 69. Likewise, a plaintiff's joint § 998 to multiple defendants is void, and separate and apportioned offers cannot be conditioned upon acceptance by all defendants. The only circumstances where a plaintiff's joint § 998 offer may be enforceable are cases in which the defendants are jointly liable for all of the plaintiff's damages, such as under respondeat superior.

Although apportionment between offers is almost always advisable, parties are free to make § 998 offers to fewer than all adverse parties. There is no requirement that a § 998 resolve a case in its entirety. *Arno v. Helinet Corp.* (2005) 130 Cal.App.4th 1019, 1026.

CONCLUSION

CCP § 998 is a valuable device that can help leverage settlements through its punitive cost-shifting provisions. By forcing an opponent to face the daunting prospect of bearing one's recoverable § 998 costs, a litigant can dramatically change the settlement calculus. But one should not dive into the § 998 waters head-first, either by hastily serving or rejecting a § 998, without a thorough understanding of the statute's fundamentals and nuances. ♦

As an associate with Casper, Meadows, Schwartz & Cook since 2007, **Nick Casper** has been actively involved in litigating many of the firm's largest cases involving catastrophic injury, wrongful death, medical malpractice, employment discrimination/harassment, and civil rights violations. Nick has also taken several of the firm's cases to jury trial.

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What is your biggest headache after settling a case?

COFFEETALK!

Clients who want to cancel a settlement, or clients who refuse to sign settlement documents unless their own attorney cuts his fee, are the two biggest problems I advise attorneys on. My suggestion is first, let a day or two pass, so the client can settle down a bit. Then call and talk about what their issues are. Keep the focus on facts, law, and issues, not the attorney's feeling of hurt and betrayal. Follow up with a letter to the client about the risks and client costs to pursuing such a course of action, especially if the opposing side files a motion and the attorney becomes a witness in the motion hearing. Remember, though -- it's only business, and the attorney who keeps on the high road usually comes out ahead.

Jerome Fishkin
Fishkin & Slatter, LLP

As a mediator, the only "headache" is wondering whether the attorneys who retained me will feel comfortable doing it again!

Malcolm Sher
malcolm sher 4 mediated solutions

None. To me there is nothing better than a settlement. Hopefully it was well documented to get to the final settlement. There are times when some people just make life miserable over how a settlement document is worded. Fortunately that is rare. I do a lot of mediations, and I find that the greatest value to participants is the element of closure.

Wayne V.R. Smith
Attorney - Mediator

Going back to court on a motion to enforce the settlement.

Steven J. Kahn
Bardellini, Straw, Cavin & Bupp LLP

Listening to the client call me back a day later and complain about how he or she got a raw deal, how the other side got everything, and how we didn't do our jobs even if our client got 99 cents and the other side got 1 cent. There is no gratitude.

Merrit Weisinger
Walnut Creek Family Law Center, Inc.

Finishing it. The client always thinks that it's a done deal, but finalizing the written settlement agreement, sending notice of settlement to the Court and monitoring compliance with the settlement terms or helping the client comply always means more fees incurred while the client's mood is that it's over. It's even worse if the other party has agreed to pay attorneys' fees as part of the settlement, because the client always resents that last amount of fees incurred in finalizing the settlement for which there will be no reimbursement, unless the client wants endless iterations.

Joshua Genser
Genser & Watkins, LLP

In construction defect cases - getting the closing documents in a timely fashion. Too often, we spend months (sometimes over a year) chasing the dismissal.

Luanne Rutherford
McNamara, Ney, Beatty, Slattery, Borges & Ambacher, LLP

CONTRA COSTA COUNTY BAR ASSOCIATION

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CCCBA President **Audrey Gee** presents retiring **Judge Harlan Grossman** with a plaque honoring his service

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CCCBA President Audrey Gee

Outgoing President **Kathryn Schofield** and Past President **Ron Mullin** (2010)

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Welcome, Judge Mockler!

Judge Terri Mockler is the latest appointee to the Contra Costa County Superior Court Bench.

As a public defender for over 29 years, Mockler was exposed to people from all walks of life with many different problems. She encountered both rural and urban poverty, and took pains to understand the myriad socio-economic problems associated with poverty. In addition to the impacts of alcoholism, addiction and lack of education on her clients and their families, she witnessed the lack of access to information and resources that is rampant throughout much of American society.

Working in the criminal justice system for so many years, Mockler learned much about the human spirit, both from the viewpoint of the victim and the accused. While she struggled regularly with the misery in her cases, these difficult situations were tempered by her encounters with resilience and positive change.

These experiences have taught her much about people and life in general, and they inform her approach to justice.

As a public defender, Mockler staunchly upheld the constitutional rights of her clients, but did not see them as saints or victims. She learned to appreciate and accept different viewpoints, and has come to understand that things are rarely as simple as they seem at first blush. These two skills - appreciating different viewpoints and evaluating situations through different prisms - allowed her to understand the plight of crime victims as well as the plight of criminal defendants.

Judge Mockler believes that after nearly thirty years of experience as an advocate in the justice system, she has developed the right balance of thoughtfulness, purpose, and compassion, and looks forward to this next iteration of her professional career. ♦

When Timing is Everything

by **Christopher Lustig**
McNamara, Ney, Beatty, Slattery,
Borges & Ambacher

Willie Nelson's saying that "the early bird gets the worm, but the second mouse gets the cheese" describes the world within which attorneys must navigate, where timing can make all the difference. That is particularly true within the context of post trial proceedings.

A layperson can be forgiven for believing that post trial proceedings primarily involve housekeeping or clean-up activities. But post trial proceedings can have a significant impact on the ultimate outcome of a case. The party that lost the verdict may still have an opportunity to snatch victory from the jaws of defeat as well as lose a virtuous appeal before it even gets off the ground.

It is impossible to identify, much less cover, all the traps and contingencies that lie in wait in the post trial world, but the following list identifies some of the common pleadings and issues one ought to be aware of before deciding when and where to step.

MEMORANDUM OF COSTS

The prevailing party has 15 days from notice of entry of judgment to serve and file a verified memorandum of costs. (CRC rule 3.1700(a).) An opposing party's notice of motion to strike or tax costs must be served and filed 15 days later. (CRC rule 3.1700(b)(1).) Unlike many of the other post trial deadlines discussed below, these deadlines are not jurisdictional and may be extended by agreement or court order. Notably, for a clerk's notice of entry of judgment to trigger the 15-day deadline it must comply with CCP § 664.5. Many times, however, a clerk will mail a file-stamped copy of the judgment with something akin to a "Certificate of Mailing" which does not satisfy the "service pursuant to court order" requirement of CCP § 664.5(d) and therefore actually fails to start the 15-day clock. (See, *Van Beurden Ins. Svcs. v. Customized Worldwide Weather* (1997) 15 Cal.4th 51, 64.) The potential impact of the section 664.5 requirement weaves it way in and out of the issues discussed below.

MOTION FOR ATTORNEY FEES

The prevailing party contractually or statutorily entitled to attorney fees must serve and file a motion for attorney fees within the time for filing a notice of appeal under CRC rules 8.104 and 8.108. (CRC rule 3.1702(b)(1).) Generally, that means 60 days from notice of entry of judgment, with an additional 30 days if certain valid post-judgment motions are filed (e.g., Motion for New Trial, JNOV). The deadline for filing this motion may also be extended by stipulation or court order.

In contrast to the requirement that a clerk's notice of entry of judgment comply with CCP § 664.5 to trigger the 15-day deadline to file a Memorandum of Costs, compliance with section 664.5 is NOT required to trigger the 60-day deadlines to appeal or file a motion for attorney fees. As a result, while they may all refer to "notice of entry of judgment", different pleading deadlines may be running on different clocks depending on who served notice and when. (For further discussion see Eisenberg, Horvitz & Wiener, CAL. PRAC. GUIDE: CIVIL APPEALS & WRITS (The Rutter Group 2011), p. 3-18, § 3:38.1)

GOOD FAITH SETTLEMENT OFFSETS

Under CCP § 1032, the prevailing party is entitled to costs as a matter of right. But before the trial court determines who the "prevailing party" is, it must take into

account good faith settlement offsets. (See, *Goodman v. Lozano* (2010) 47 Cal.4th 1327.) That means that, even if the jury awarded the plaintiff a monetary recovery, the court must first deduct any good faith settlements before determining which party is entitled to costs, and possibly attorney fees. If those pretrial settlement offsets reduce the plaintiff's award to zero, the defendants may be the prevailing party under section 1032 and entitled to their costs and attorney fees.

CCP § 998 ADJUSTMENTS

Irrespective of who the prevailing party is, for purposes of section 1032, a pretrial CCP section 998 offer could have a significant impact on the ultimate outcome of the case, especially if expert costs and/or attorney fees are at stake. An attorney has to consider several moving parts in the analysis, but the impact of a well-conceived pretrial offer to compromise may undercut or overshadow a jury's verdict. Importantly, defendants get the benefit of any good faith settlements entered as of the time that the section 998 offer was outstanding. (See, Guerrero v. Rodan Termite Control, Inc. (2008) 163 Cal.App.4th 1435, 1438.) For more on section 998 offers, see Nick Casper's article on page 15.

MOTIONS FOR NEW TRIAL AND/OR JNOV

Most attorneys are familiar with these motions but they are worth mentioning because the ultimate outcome of a case, or whether a party is the appellant or respondent on appeal, may turn on a motion for new trial or JNOV. A motion for new trial asks the court to reconsider the evidence and is required in order to preserve certain issues for appeal (e.g., excessive or inadequate damages). It is also the only way to make a record of incidents or developments that took place off the record, such as jury misconduct or newly discovered evidence. A motion for JNOV asks the court to set aside the verdict where the losing party should have had a nonsuit or directed verdict. The court may not weigh the evidence or judge the credibility of witnesses and all reasonable inferences are construed in the winning party's favor.

Generally, the notice of intent to move for new trial and the motion for JNOV must be filed and served within 15 days of mailing notice of entry of judgment. (CCP §§ 659, 629.) Just as with the Memorandum of Costs, for a clerk's notice to trigger this 15-day deadline, it must comply with section 664.5's "service pursuant to court order" requirement. (See, Van Beurden, 15 Cal.4th at 64.) The 15-day deadline is jurisdictional and there is no section 1013 extension if the notice is served by mail.

TIMING IS EVERYTHING,
cont. from page 23

However, the new trial motion's points and authorities, affidavits and other supporting documents may be filed 10 days later, and that deadline may be extended by the court for good cause for up to 20 days. (CRC rule 3.1600; CCP § 659a.)

Finally, it is important to note that the court's power to rule on a motion for new trial or JNOV generally expires 60 days after mailing notice of entry of judgment. (CCP § 629, 660.) If the court fails to issue a ruling within that time period, the motion is denied by operation of law.

NOTICE OF APPEAL

The most important post trial deadline is the 60-day deadline for filing a notice of appeal. (CRC rule 8.104.) That deadline is triggered by a clerk or party's service of a notice of entry of judgment, although simply serving a file-stamped copy of the judgment is sufficient. This deadline is jurisdictional and it cannot be extended by stipulation, court order or section 1013. As discussed above, a clerk's mailing of a file-stamped copy of the judgment does NOT need to comply with CCP § 664.5 to trigger the 60-day appeal deadline. (See, Eisenberg, Horvitz & Wiener, CAL. PRAC. GUIDE: CIVIL APPEALS & WRITS (The Rutter Group 2011), 3-18, § 3:38.1.)

Rule 8.108 sets forth the very limited circumstances in which the 60-day deadline can be extended. Generally, the filing of certain valid post-trial motions (e.g., timely filed motion for new trial, motion to vacate the judgment, motion for JNOV) extends the period to challenge the judgment by another 30 days (from notice of entry of the order or denial of the motion by operation of law). Filing an invalid (e.g., late) post trial motion does NOT extend the 60-day deadline. Importantly, if a party wants to challenge a trial court's order on a post judgment motion, it must generally file a separate notice of appeal from that order; simply appealing from the judgment will not preserve challenges to separately appealable post judgment orders.

Finally, in certain circumstances, a protective cross-appeal may be advisable. For instance, if a party appeals from an order granting a new trial, the party who moved for new trial should cross-appeal from the judgment so that in the event that the order granting a new trial is reversed, there is still a challenge to the judgment. (See, *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 910.) Otherwise, if the Court of Appeal reverses the new trial order, the judgment stands.

Many of the rules discussed above have additional exceptions and nuances that must be closely examined. The differences between section 664.5 and rule 8.104 can create some confusion as to deadlines, particularly where there is interplay between the pleadings governed by the different rules. **The safest strategy is to calendar all post judgment deadlines with reference to the date that judgment was actually entered.** So, make a checklist and consult an appellate practitioner before judgment is entered, or at least consult the practice guides. Moreover, it is not enough to rely on the overburdened trial courts to set hearings and issue rulings on time. Since timing can make all the difference, attorneys must be extra vigilant to not only ensure that they meet their deadlines, but that the courts meet theirs. ♦

Christopher Lustig divides his time between appellate and general civil litigation matters at the Walnut Creek firm of McNamara, Ney, Beatty, Slattery, Borges & Ambacher in Walnut Creek. He can be contacted at christopher.lustig@mcnamaralaw.com.

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Does the Right to Privacy Survive Death?

A Strange Journey to an Answer

by **Jay Chafetz**
Law Offices of Jay Chafetz

The right to privacy is sometimes asserted in personal injury cases as a limitation on the rights of defendants to subpoena medical records. A plaintiff waives his or her privacy rights by filing a personal injury action only as to the parts of the body tendered in the lawsuit. See *Roberts v. Sup. Ct.* (1973) 9 Cal.3d 330, 337-338; Jones v. Sup. Ct. (1981) 119 Cal.App.3d 534, 546, 547, 174 Cal. Rptr. 148. Do privacy rights survive death, so that they can be raised to limit the records subpoenaed in a wrongful death case? Or, after death, is everything fair game?

Researching the answer to this question led to the discovery of a series of interesting and unusual cases, which illustrates the striking paths down which one can be transported while tracking down something more mundane. Follow along in my journey.

In *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, (yes, the Lugosi of Dracula fame) the widow and son of Bela Lugosi sued the movie studio to recover profits the studio made using the likeness of Bela Lugosi under a contract made in 1930.

The California Supreme Court held that the right to exploit a name and likeness is personal to an artist and has to be exercised by him during his lifetime. This specific ruling was later overturned by the Legislature (it added Civil Code section 3344.1 in 1984). However, the principle enunciated by the court that common law privacy rights do not survive the death of the person in whose favor they existed probably still represents the view of the court. The court cited a statement by Prosser to the effect that there is no common law right of action for a publication concerning one who is already dead.

The Seventh Circuit had previously concluded a case consistent with this principle when it held that the administratrix of the estate of Al Capone could not bring an action for unjust enrichment arising out of the defendant's alleged appropriation of the name, likeness and personality of Al Capone. The court accepted the defendant's argument that the action for unjust enrichment was in essence an action for the invasion of the right of privacy of Al Capone, which could not survive his death. *Maritote v. Desilu Productions, Inc.* (7th Cir. 1965) 345 F.2d 418.

Before that, a California appellate court had held that the widow of Jesse James, Jr., could not sue a film producer of a television show portraying the life of her husband for "exploitation of plaintiff's deceased husband's personality and name for commercial purposes." The court treated the two causes of action alleged in the complaint regarding this as personal to the deceased, so that even if there was an invasion of the right of privacy it was not a right that survived death. *James v. Screen Gems, Inc.* (1959) 174 Cal. App. 2d 650.

The common law of privacy comprises four distinct kinds of invasions of four different interests: (1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) Public disclosure of embarrassing private facts; (3) Publicity which places the plaintiff in a false light in the public eye; and (4) Appropriation for the defendant's advantage, of the plaintiff's name and likeness. *Lugosi*, supra, 25 Cal.3d at 819. As to any of these four, the courts were in agreement that the plaintiff's right is a personal one, which does not extend to members of the plaintiff's family (unless their own privacy is invaded along with his). Also, there is no common law right of action for a publication concerning one who is already dead. *Lugosi*, supra, 25 Cal.3d at 820.

In *Flynn v. Higham* (19843) 149 Cal.App.3d 677, the children of actor Errol Flynn were not permitted to bring a defamation action against the author and the publisher of a book about their father based upon allegations that the book stated that their father was a Nazi spy and a homosexual. In affirming the order sustaining the defendants' demurrer, the appellate court stated: " 'Defamation of a deceased person does not give rise to a civil right of action at common law in favor of the surviving spouse, family, or relatives, who are not themselves defamed.' " 149 Cal.App.3d at 680. The plaintiffs also could not cast their claim as one based upon the right of privacy because the publication must invade the plaintiff's privacy. Where the publication is directed at another individual and refers only incidentally to the plaintiff but is not directed at him, no recovery can be had. "Where the plaintiff's only relation to the wrong is that he is a relative of the victim of the wrongdoer, and was unwillingly brought into the limelight, no recovery can be had." (*Flynn*, supra, 149 Cal. App.3d at p. 683.)

Do these cases mean that any use of a person's likeness after his death is permitted? No. In *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal. App. 4th 856, 104 Cal. Rptr. 3d 352, plaintiffs' decedent was decapitated in a motor vehicle accident. Plaintiffs alleged that CHP officers had emailed nine gruesome death images of the decedent to their friends and family members on Halloween - for pure shock value. Subsequently, the photographs were spread across the Internet. The court concluded that the trial court erred in sustaining the officers' demurrer as to plaintiffs' invasion of privacy cause of action because the rights being protected were those of the living. The court relied on several cases in other jurisdictions where a cause of action had been allowed when the plaintiffs could be construed to be invoking their own privacy rights and not those of the decedent.

In one such case in particular, *National Archives and Records Admin. v. Favish* (2004) 541 U.S. 157, 168-169, the United States Supreme Court determined whether photographs of certain body parts of a decedent who had apparently committed suicide were exempt from disclosure under a provision of the Freedom of Information Act. It held that they were, emphasizing that the decedent's relatives were invoking their own privacy rights, not the rights of the decedent. Thus, the Court recognized that family members have a privacy right in the death images of a decedent.

But all of this deals with the four common law tort actions for invasion of privacy. What about the right of privacy contained in Article 1 Section 1 of the California constitution, which is the privacy right raised in connection with the physician-patient privilege, when a plaintiff wishes to restrict the medical records that the defendant may subpoena?

My search finally led me to *Boling v. Sup. Ct.* (1980) 105 Cal.App.3d 430. There, the plaintiff in a wrongful death suit sought to reverse an

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order of the trial court to produce certain records pertaining to the decedent, her son. The plaintiff mother claimed the psychotherapist-patient privilege barred disclosure of the records. The defendant claimed that the mere filing of the wrongful death action, with its attendant request for general damages for the loss of the love and companionship of the son, meant that the plaintiff had automatically tendered an issue regarding all aspects of the mental health of the son. The court disagreed, holding that the psychotherapist-privilege could still be claimed after the son's death and that "[a] valid claim of the privilege by plaintiff will preclude discovery, unless and until it is shown that the records are 'relevant to an issue concerning the mental or emotional condition of the patient' which has been 'tendered;' in the action . . . and which has been *precisely defined* in its course." *Boling*, supra, 105 Cal. App.3d at 442 (emphasis in original).

The court also held, however, that the mother had not yet established her standing as the holder of the privilege under Evidence Code section 1013 (c). (This section states that the holder of the privilege is the "personal representative of the patient if the patient is dead.") The court further held that the court itself had the obligation to maintain the confidentiality of the material under Evidence Code section 916, which requires the "presiding officer, on his own motion" to exclude privileged information if the person from whom it is sought is not a person authorized to claim the privilege and the presiding officer is not authorized to disclose the information by a person authorized to permit disclosure. Evid. C. § 916 (b)(1).

The court did not discuss the constitutional right of privacy, so it is not clear if that right survives death, as the right to claim the statutory

physician-patient and psychotherapist-patient privileges does, but in contrast to the common law right of privacy that supports the four common torts for invasion of privacy, which does not.

See also *Hale v. Sup. Ct.* (1994) 28 Cal.App.4th 1421 (where the doctor-patient relationship existed between the defendant, who caused a motor vehicle accident when she crossed over the centerline - apparently due to a medical condition - and the doctors who treated her before she died, during her hospitalization after she was injured in the same accident; "[E]ven if part of [the decedent defendant's] medical condition is in issue, it does not follow that [she] waived the privilege as to otherwise protected aspects of her medical history during her lifetime, or some condition she may have suffered from at the time of her death clearly unrelated to the accident." *Hale*, supra, 28 Cal.App.4th at 1424. See also *Rittenhouse v. Sup. Ct.* (1991) 235 Cal.App.3d 1584 (administrator of estate could invoke physician-patient and psychotherapist-patient privilege to prevent disclosure of decedent's medical records in will contest case).

Sometimes the trip can be as much fun as arriving at the destination. ♦

Jay Chafetz practices in Walnut Creek, specializing in personal injury, medical malpractice, elder abuse, and trust and will contests. He is on the Board of Directors of Contra Costa County Bar Association and the Litigation Section.

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Attorney for: Plaintiff Ronald Luck

SUPERIOR COURT OF CALIFORNIA

CONTRA COSTA COUNTY

RONALD LUCK, Plaintiff, vs. RONALD LUCK, et al., Defendants.	Case No. C14-09685 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** **Date: November 14, 2014** **Time: 9:00 a.m.** **Dept: 13**

INTRODUCTION

Plaintiff Ronald Luck, on February 2, 2013, traveled backwards in time to the year 1993, where he met the then 20-year-old Ronald Luck. During that visit, on February 10, 1993, the two men were in an automobile being driven by the younger Ronald Luck which collided with another automobile, causing the elder Ronald Luck to suffer severe injuries. Designed to avoid disclosing the time-traveler's identity and the fact of time travel to the 1993-era authorities, the accident triggered the time machine automatically and returned Mr. Luck to 2013.

Subsequently, Mr. Luck brought this action against the younger Ronald Luck, seeking damages for the personal injuries he had suffered in the accident, citing the younger Mr. Luck's negligence. The insurer that issued the policy to the younger Mr. Luck in 1993 defended the younger Mr. Luck with a reservation of rights and, on behalf of the defendant, has brought this Motion for Summary Judgment, arguing that the action is barred by the Statute of Limitations. The Motion should be denied, because whether the limitations period has passed presents triable issues of fact.

ARGUMENT

The Limitations period for a cause of action for personal injury has not expired because this action was brought by plaintiff within one year of when plaintiff suffered his injuries, or because the limitations period was tolled by plaintiff's disability.

Currently, the Statute of Limitations for an action for personal injury is Code of Civil Procedure §335.1, which requires that such an action be brought within two years of its accrual. In 1993, the Statute of Limitations was Code of Civil procedure §340, which provided for only one year within to bring such an action. This Court need not determine which statute to apply, since plaintiff brought this action within one year of suffering his injuries.

Of course, more than twenty traditional calendar years elapsed between the calendar date of the accident and the date this action was filed, but, for the elder Ronald Luck, only about eight months had passed, for his passage from 1993 to 2013 was nearly instantaneous. What this Court needs to determine, therefore, is, in counting the elapsed time between the accrual of a cause of action and the filing of an action, how to decide which party's subjective time stream should be used.

Albert Einstein's Theories of Relativity established more than a century ago that time is not a constant, immutable stream in which experiences flow from the past, through the present and to the future. Hawking, *A Brief History of Time*, 143. Although that is how human beings have subjectively experienced time – that is, until now, with the advent of practical time travel -- it would be scientifically inaccurate for this Court to presume that the historically subjectively perceived flow of time is somehow more "real" or accurate than is the flow of time perceived by the time-traveler. *Ibid*. There should, therefore, be no presumption that the limitations period is counted using either party's subjective sense of time, but, rather, should be evaluated in light of the policy and history[1] of statutes of limitations.

"(S)tatutes of limitations serve a number of functions including 'to prevent stale claims, give stability to transactions, protect settled expectations, promote diligence, encourage the prompt enforcement of substantive law, and reduce the volume of litigation.' *Pineda v. Bank of America, N.A.* (2011) 50 Cal. 4th 1389, 1397. Applying these purposes to the fluid reality of time is difficult. For example, a limitations period tied to historical human perceptions of linear time cannot promote stability of transactions where the reality of time travel necessarily means that the subjective experience of time could be greatly different for the parties to the transactions. In other words, automatic application of archaic notions of linear time would always leave transactions with time travelers unstable because of the divergence between their perceptions of time and that of the other party to the transaction. Similarly, if diligence is adjudged relative to the outworn notions of linear time, then it might be impossible for a time traveler to be diligent, because he was literally absent from the Newtonian

[1] The irony of referring to "history" in this context is not lost on plaintiff or plaintiff's counsel.

universe while his window to demonstrate diligence was open.

These dilemmas are not difficult to reconcile, because the law already recognizes exceptions, situations where time is stopped (the limitations period is "tolled") where the plaintiff is disabled from bringing his cause of action. Such disabilities exist during periods of time the plaintiff was mentally incapacitated (Code of Civil Procedure §352(a)), imprisoned (Code of Civil Procedure §352.1), or caught up in a war (Code of Civil Procedure §354). Code of Civil Procedure §357 requires that the disability have been in existence at the time the cause of action accrued in order for the limitations period to be tolled, but, in *Feeley v. S. Pac. Transp. Co.* (1991) 234 Cal. App. 3d 949, 952, the Court ruled that a disability caused by the event on which the cause of action would be based was sufficient to establish that the plaintiff was disabled as of the accrual of the cause of action.

Plaintiff, in the present case, was catapulted forward in time involuntarily by the automatic function of the safety mechanism of the time machine as a direct result of the event, the automobile collision, that gave rise to his cause of action. He was, therefore, disabled from bringing his cause of action, and the disability was caused by the event that gave rise to his cause of action.

CONCLUSION

Plaintiff in this action was disabled from bringing his cause of action by the occurrence that gave rise to this cause of action, so the limitations period should be tolled between the date of the accident and the time plaintiff returned to our subjective linear time line. However, that formulation of the issue is not sufficient for this new era where mankind can actually experience the reality of non-linear time, so this Court should explore more robust solutions than applying principles of tolling, and determine how to apply the principles of Statute of Limitation to parties with very different subjective experiences of time. In any case, the Motion for Summary Judgment should be denied.

Dated: October 21, 2014.

ABOUT THE AUTHOR

Joshua Genser, born and raised in West Contra Costa County, is the second generation of his family to provide legal services to West County businesses. Mr. Genser is also the Chief Executive Officer of the Richmond Development Company, LLC, developing office, warehouse, industrial and commercial properties in and around Richmond. He has a Master's Degree in Economics from Stanford University and his law degree from the University of California at Berkeley. Mr. Genser has practiced law since 1983, handling litigation and transactions in business and real estate matters. In 2007, Genser & Watkins was given the Chief Justice Ronald M. George Pro Bono Law Firm of the Year Award by the Contra Costa County Bar Association, and Joshua Genser was named Pro Bono Attorney of the Year by The Law Center. Joshua Genser has also been honored as a Northern California Super Lawyer.

Medicare Secondary Payer Compliance in 2012:

A Formalized Approach to the Question of Medicare Set-Asides for Civil Plaintiff & Defense Counsel

by **Matt Garretson, Sylvius von Saucken, Jason Wolf, and John Cattie**
Garretson Resolution Group

The Medicare Secondary Payer ("MSP") Act[i] obligates parties resolving liability insurance claims to address two broad obligations: 1) reimbursement/resolution; and 2) reporting.[ii] Within the reimbursement/resolution prong lie two components, past medicals and future medicals.[iii] To comply with future medical obligations, parties should screen the case to determine if a Medicare Set-aside Arrangement ("MSA") is appropriate under the case-specific facts. The MSA obligation is the subject of debate and uncertainty nationwide. The purpose of this article is to provide a formalized approach to addressing the MSA issue in a 2012 liability insurance settlement. [iv]

Whether an MSA is the appropriate way to consider and protect Medicare's future interest in liability settlements must be based upon a formalized, case-specific analysis that meets the following standard: *"reasonable good faith effort at compliance"* (the "Good Faith standard"). Meeting the Good Faith standard adheres to all relevant statutory, regulatory and administrative guidance from the Centers for Medicare & Medicaid Services ("CMS").

The MSA obligation in a liability settlement is only clear (on its face) in the specific case where a definitive allocation for future injury-related medical expenses exists for an injured Medicare beneficiary. For example, a liability MSA would be properly considered in the case where a liability action proceeds to trial, results in a judgment in favor of a Medicare beneficiary, and the trier of fact determines that a specific portion of the judgment is to be applied to pay for future medical expenses, because there would be an identifiable portion of the judgment against which to apply future medicals. In that setting, and if there is no other payor apart from Medicare obligated to pay for that future injury-related care, establishing an MSA and seeking CMS approval may be the best, but not only, way to ensure compliance.[v]

On the other hand, in the majority of settlements where the parties settle liability claims using a broad, general release of all claims and do not specify or otherwise allocate settlement proceeds to particular damages, whether due to policy limitations or other confounding factors to a claimant's full recovery of damages sustained, the procedures by which one can determine the propriety of an MSA becomes much less clear. When settling a liability case in which payment for future medical expenses is not specifically negotiated, if a general release is implemented that uses broad language (for example, referring to "all claims past and future"), a future medical expense component is not readily identifiable. The mere fact that an injured person has pled for future medical expenses as part of the claim or the insurance carrier is being released (under the terms of the settlement) from the obligation to pay for future medical expenses going forward does not necessarily mean the gross recovery contains proceeds for future medical expenses. Even the presence of a life care plan does not mean that the gross recovery contains proceeds for future medical expenses. While a claim may contemplate future medical expenses, that in and of itself does not guarantee the gross recovery contains proceeds for future medical expenses, even if the release makes reference to "all claims past and future."

To meet the Good Faith standard settling parties should take steps to: 1) determine whether an MSA is appropriate under the case-specific facts; and then 2) document the file accordingly. By screening every case with a formalized approach to verifying, resolving and satisfying potential MSA obligations, and documenting the file to demonstrate the steps the parties took, settling parties will ensure the following: 1) Medicare's future interest has been considered and protected appropriately; 2) the settling parties are fully compliant with the Medicare Secondary Payer Act (statute and regulations); and 3) the injured person's Medicare benefits are protected going forward.

MEDICARE,
cont. from page 33

SCREEN

Only after finding an injured person to be a candidate for use of an MSA (based on case-specific facts such as claimant's Medicare enrollment status, determining if claims resolution results in future medicals being closed such that Medicare becomes the primary payer of future injury-related medicals going forward[vi], as well as other relevant factors) can it be said that an MSA may be warranted.[vii] MSA allocation created without first determining an injured person's candidacy for an MSA may be creating an obligation which would not otherwise exist for the settling parties. If an injured person is not deemed to be a candidate for an MSA, then the settling parties are compliant with the MSP Act by simply documenting their respective files as to the reason why an MSA was not appropriate based on the case-specific facts.

ASSESS

If the injured person is an MSA candidate, the parties must next determine if the (potential) gross settlement proceeds contain sufficient dollars to fund any MSA obligation through an allocation to future medicals. To do this, parties should assess the damages sustained, compare those to the gross recovery and conclude whether: i) the gross recovery actually contains dollars for future medicals; or ii) whether due to the case-specific facts, the injured person is not being compensated for future medicals despite the fact that future medicals are a damage component being pled and released and/or a life care plan may be in existence, evidencing the injured person's need for certain future injury-related care. [viii]

Parties should rely on standardized damage allocation methodology in making this determination, ensuring a consistent application of these principles if challenged by CMS at a later date.[ix] Such a standardized methodology should be based on all guidance in existence at the time of settlement (including statutory, regulatory and administrative guidance from CMS as well as relevant case law). Absent such a thorough methodology being applied, the parties could be led off the path one way (funding an MSA when not warranted) or another (failing to fund an MSA when warranted).

If an allocation exists for future medicals, then an MSA is warranted. The amount of the future medical allocation figure represents 100% value for all future medicals funded within the gross award and the maximum possible MSA figure. It does not, however, represent the final MSA amount. To determine that figure, the parties should proceed to Valuing the future medical damages component; step three of the analysis.

VALUE

To identify the appropriate MSA amount to ensure compliance (and protect the injured person's Medicare card), a future cost of care ("FCC") analysis should be conducted to identify all future injury-related care services/expenses expected to be incurred by the injured person, and then divide those services/expenses between Medicare-covered services/expenses and non-Medicare covered services/expenses. The MSA would be fully funded (and the MSA obligation fully addressed) for the lesser of the future medical allocation and the FCC analysis.

A Formalized Approach to MSA Compliance Yields MSA Compliant Results

Settling parties should apply the following four step approach when addressing the MSA issue in order to "SAVE" a Medicare beneficiary's Medicare card and the Medicare program itself (relative to future medicals):

S **SCREEN** to validate an injured person's candidacy for an MSA;

A **ASSESS** damages to determine whether an allocation for future medicals exists within the gross recovery or potential gross recovery;

V **VALUE** future medicals for the injured person's case; and

E **EDUCATE** and administer the MSA results properly.

EDUCATE

At this point, the injured person faces the same funding and administrative decisions presented in the workers' compensation context. Liability MSAs may be funded either with a full lump sum dollar amount up front or with an initial lump sum, combined with the purchase of an annuity or other structured settlement vehicle. Liability MSAs may either be self-administered or administered by a professional custodian. What differs greatly from the workers' compensation context at this point is the ability to submit the MSA proposal to CMS for review and approval. While workers' compensation MSAs are submitted to a central CMS office and CMS has a formalized approach to the review of workers' compensation MSAs, liability MSAs may be properly submitted only to the appropriate CMS regional office. The CMS does not have the same formal review process for liability MSA proposals as it does for workers' compensation MSA proposals, and it may prove difficult to get CMS to review and approve a liability MSA proposal.

As of the date of this article, CMS does not encourage parties to submit a liability MSA for review and approval. Nevertheless, even though CMS does not currently have the resources to review liability MSAs (as a general rule), that does not mean that analysis and (perhaps) ultimately funding a liability MSA is unnecessary in today's environment. CMS officials have stated that its right to NOT pay for future medical expenses in certain liability cases comes from the same statutory rights under 42 U.S.C. §1395y(b)(2) and its accompanying regulations as do its rights to not pay for future medical expenses in the workers' compensation arena.

CONCLUSION

A formalized approach equals compliant results. By determining if an MSA is appropriate under your case-specific facts and then documenting your file accordingly, you will have achieved the Good Faith standard that will lead to the protections the settling parties seek. If liability MSAs are not yet on your radar as a standard question you must ask and answer in settling a personal injury case, it is likely that you have not yet had a settling party mandate that a liability MSA must be funded in order to disburse settlement proceeds. Instead of being blindsided in the last ten minutes of mediation by this "requirement" which seemingly comes out of left field, you have the ability to short-circuit the argument if you have applied a formalized approach and have documented your file. ♦

We submit this article to assist settling parties in better understanding the use of MSAs in a liability settlement context. At the same time, hopefully, we have provided some practical guidance/tips for dealing with situations where the settling parties are confused about their MSP compliance obligations, especially with respect to the related requirements (or lack thereof) concerning MSAs in liability settlements. For more information, please visit our website: www.garretsongroup.com

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[i] 42 U.S.C. §1395y(b)(2).

[ii] 42 U.S.C. §1395y(b)(8).

[iii] Technically, as opposed to a right of reimbursement for future injury-related medicals, the MSP Act endows CMS with the implicit right to NOT make payments for an injured person's future injury-related care when another primary plan or payer has already accepted responsibility for such payments and has made payment to an injured person of such funds allocated to the injured person's future cost of care needs. It is this right NOT to make a future payment which distinguishes this right from rights to reimbursement for any conditional payments made under the reimbursement provisions of the MSP Act.

[iv] Throughout this Article, when the term "settlement" is used, it encompasses settlements, judgments, awards and other payments where CMS's right of recovery ripens under the MSP Act.

[v] But, see *Schexnayder v. Scottsdale Insurance Company*, Civ. No. 6:09-cv-1390, 2011 U.S. Dist. LEXIS 83687, 2011 WL 3273547 (W.D. La. July 29, 2011) and *Smith v. Marine Terminals of Arkansas*, No. 3:09-cv-00027-JLH, 2011 U.S. Dist. LEXIS 90428, 2011 WL 3489806 (E.D. Ark. Aug. 9, 2011), where parties were unable to gain CMS's approval of the MSA proposal as a condition of settlement.

[vi] *Finke v. Hunter's View, Ltd. and Wal-Mart Stores, Incorporated*, Civ. No. 07-4267 (WRW/RLE), 2009 WL 6326944 (D. Minn. Aug. 25, 2009).

[vii] *Big R Towing v. Benoit*, Civ. Action No. 10-538, 2011 WL 43219 (W.D. La. Jan. 5, 2011).

[viii] See *Zinman v. Shalala*, 67 F.3d 841, 846 (9th Cir. 1995). where the Court foresaw this inherent problem in liability settlements under the MSP Act.

[ix] *Guidry, et al. v. Chevron USA, Inc.*, Civ. No. 6:10-cv-00868, 2011 U.S. Dist. LEXIS 148942 (W.D. La. December 28, 2011).

BAR SOAP

by **Matt Guichard**
Guichard Teng Portello

Goodness! After years of begging for jury verdicts for my column, I have finally found out how to get people's attention: Report that someone has moved and taken a new job. I think the strategy will be to say: "John Doe has just joined a new firm and has been nominated for ABODA, so if you want me to talk about you, send a jury verdict".

I am certain that will work. I cannot tell you the number of calls and messages I have recently received, complaining that I didn't post some announcement in Bar Soap. I am thinking of telling my partners I have no time to contribute to firm business, as I must run down rumors of law firm changes in our local legal community. I am sure they will understand. (I am smiling as I write this, you know.)

Scott Jenny goes to trial a lot, and he always reports his verdicts. So Scott, I wasn't talking about you. Scott of Jenny, Jenny & Jenny LLP, Martinez, California tried a case in Sacramento County Superior Court. Case No. 34200900066316, The Honorable Robert C. Hight presided at trial. County Counsel Keith Floyd represented the Sacramento Area Flood Control District SAFCA. Scott represented Patricia Hewitt, who owned 33 acres on the Garden Highway. On that property was an equestrian facility and her home. Ms. Hewitt is an author, a retired lawyer, a lobbyist, a teacher and a horse trainer.

The SAFCA took Ms. Hewitt's property and offered her $1,100,000. The property had been appraised at $2,500,000. The jury awarded Ms. Hewitt $2,500,000. Fancy that!

On another Scott Jenny note, he was named as a Super Lawyer this year in eminent domain. Congratulations, Scott! Well deserved. And speaking of the devil, Matt Guichard made it again this year. But not in eminent domain.

Very, very happy to see The Governor appointed **Terri Mockler** to our Superior Court. Congratulations, Judge Mockler! She is already a member of the Robert G. McGrath American Inn of Court, so we can safely draft her to head a pupilage group when we have a judge opening. Certainly, that must have been her motivation in applying for a judgeship.

Speaking of local Judges, **Judge Harlan Grossman** and **Judge Peter Berger** retired. Makes me feel a bit odd, as Harlan was on my hiring panel when I applied for a job in the District Attorney's Office, and Peter and I opposed each other in cases while he was a Public Defender. No, I am not retiring anytime soon. Remember, I have a ten-year-old and a nine-year-old. I am retiring from coaching their baseball teams this year however. Does that count?

I was sad to hear that **Judge Arnason** was stepping down after 49 incredible years of service. Certainly no one can ever fill that role in our legal community. He mentored lawyers, fellow judges and staff in such a professional, kind and thoughtful manner. I recall well his statement to those he had just sentenced. Remember, he said "Bye, Bye"? It was always meant as a good-will gesture. It was always taken as a good-will gesture, too. When I was the Calendar Deputy in Department 2, he advised me to be kind to those from whom I took pleas. They were after all going off to State Prison.

Speaking of judges, **The Honorable Diana Becton** is to receive the California Women Lawyers' 2012 Rose Bird Memorial Award. That is wonderful news and a very nice honor. I am told a reception is planned for March 23.

Robert Field, formerly of Field, Richardson & Wilhelmy, has announced his retirement after 51 years of law practice. Wow! Quite an accomplishment!

Kristen Thall Peters was elected as the managing partner of the Walnut Creek Office of Cooper White & Cooper. In that role she will also be on the firm's managing committee. Congratulations, Kristen!

Hansen Bridgett LLP opened its East Bay Office in Walnut Creek, this past summer. Among others, William E. Adams, formerly of Fitzgerald Abbott & Beardsley, LP, joined Hansen Bridgett and is a partner in that new Walnut Creek Office. Let me know who else is there and I will mention them in the next Bar Soap.

I did read in the local newspaper that **Todd Williams**, a former principal at Morgan Miller & Blair is now a partner at Wendel, Rosen, Black & Dean.

And speaking of changes, I just learned that **Hinton, Alfert, Sumner & Kaufmann** are breaking up. Peter Hinton, Peter Alfert and Karen Kahn are going in one direction, and Scott Sumner and Elise Sanguinetti are going in another direction. Scott and Elise are joining the Khorrami Law Firm. That firm is based in Southern California. Scott and Elise will be opening a branch office in Oakland. Don't know any of the other details. We wish them all well in their new endeavors.

Allan Isbell was selected for membership by the American Board of Trial Advocates, better known as ABOTA. Congratulations, Allan! In today's world that is no small feat, as one must have tried to jury verdict a number of cases, to qualify. One must also be a good lawyer, and nominated and elected by the group. So even some who have the requisite number of trials, do not necessarily get elected.

Did you know the Recorder named **Gwilliam, Ivary, Chiosso, Cavalli & Brewer**, one of the San Francisco Bay Area's Best Employment Law Practices? It's true.

District Attorney Mark Peterson recently had a reception at his office for former Contra Costa County prosecutors. It was a wonderful event and it was delightful seeing many of my former colleagues. The highlight of the event was visiting with our former boss District Attorney Bill O'Malley.

I am quite sure I will hear that I missed a lot of interesting tid bits in our legal community. I will just have to write about them next time. Please be sure to let me know your news.

Keep those cards and letters coming, and please write to me about those civil verdicts/settlements of any kind - You can reach me at mguichard@gtplawyers.com ♦

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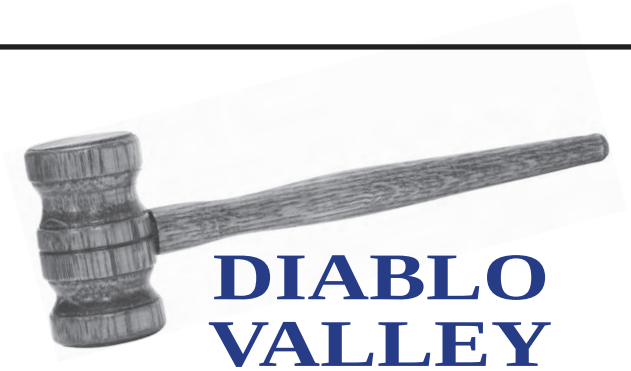

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