INSURANCE LAW

Hanif Got You Down? The Fourth Appellate District Provides Some Relief

by John Rice
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At this point, most of you are familiar with the "*Hanif* issue" and the effect it has had on personal injury claims. Starting a decade ago, defendants began claiming that recovery of past medical specials should be limited to what was paid in cash by private health insurers to satisfy the charges incurred by the patient/plaintiff. When they had some success reducing verdicts in post-trial motions, the effort spread to liability carrier claims offices and adjusters began requesting "payment" information in order to complete their claims analysis.

Because the cash payments from private health insurers to health care providers are generally less than the full charges incurred, the liability carriers recognized that if they could limit recovery to the cash payments, the savings would be tremendous -- in many cases reducing the specials damages by more than half, which would have a similar effect on general damages and total claim values. As a result, reserves could be reduced, more insurance dollars could be kept in investments and profits would follow. To say that liability carriers had an incentive to see their position upheld is an understatement. It's big money.

Defendants' biggest challenge in propagating their position was finding any support in California statutory or case law. Lacking either, they adopted the tactics of an octopus, spreading ink in the water to confuse predators. Defense attorneys simply began representing to trial courts what they wanted the law to be, rather than what it is, and spreading misinformation about how health care finance actual works. To their credit, they had remarkable success, lending credence to the adage -- if you say the same thing enough times, people (even judges) will start to believe it is the truth.

In *Howell v. Hamilton Meats* (Case # 053620, filled 11/23/09), 179 Cal.App. 4th 686, Rebecca Howell was slammed by a Hamilton Meats truck and seriously injured in 2007. She required multiple spinal surgeries and treatments. Fortunately, she had private health insurance with PacifiCare to pay the bills. Well before Mrs Howell was injured, PacifiCare had contracted with Mrs. Howell's providers to treat PacifiCare's insureds. These "alternate rate contracts" allowed PacifiCare to use its volume of insureds as leverage in negotiating with the providers to accept cash payments that are less than the full charges incurred. In exchange for the providers accepting less cash, PacifiCare agreed to provide other contract benefits like quick payments, pre-authorization and other administrative benefits.

When a jury awarded Howell $189,978.63 in past medical specials, the trial judge granted Hamilton's post-trial motion to reduce the verdict award for past medical expenses to the cash payments actually made by PacifiCare which totaled $59,691.73. Fortunately, Mrs. Howell is married to CASD member Mike Vallee, who was willing to take the fight to the Court of Appeal.

Justice Nares, writing for a unanimous Fourth Appellate District Court, Division 1, brings some clarity back to the law and the facts, ruling as follows:

> **We hold that in a personal injury case in which the plaintiff has private health care insurance, the negotiated rate differential is a benefit within the meaning of the collateral source rule, and thus the plaintiff may recover the amount of that differential as part of her recovery of economic damages for the past medical expenses she incurred for care and treatment of her injuries.**

Howell v. Hamilton Meats, supra, 179 Cal.App.4th at 690.

> **We conclude that the extinguishment of a portion of Howell's debt to Scripps and CORE in the amount of the negotiated rate differential ($130,286.90) was a benefit to Howell because she was no longer personally liable for that portion of the debt she personally incurred in obtaining medical treatment for her injuries.**
>
> **We also conclude that this benefit to Howell was a collateral source benefit within the meaning of the collateral source rule because it was conferred upon her as a direct result of her own thrift and foresight in procuring private health care insurance through PacifiCare, a source wholly independent of Hamilton as the defendant in this case.**

Id. at 699.

Justice Nares' opinion in *Howell* addresses head-on the issues of substantive law. First, it confirms that having received the health care services, Howell was personally liable for the charges incurred. Secondly, the opinion confirms that the collateral source rule applies equally to not just the cash payments from private heath insurers to providers, but also to the non-cash benefits negotiated for between these parties. Defendants are responsible for all the detriment they cause, not just some of it. Moreover, defendants do not get the benefit of collateral source payments, which reflect a plaintiff's investment in financial security. Pretty straight forward stuff.

The *Howell* opinion does not break any new legal ground. It does not reflect a change in the law in California. The opinion confirms that the California Supreme Court's opinion in *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1 is indeed the controlling authority on the application of the collateral source rule and that neither *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, nor *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 are contrary authority. *Hanif* is limited to cases in which the plaintiff is a Medi-Cal beneficiary and, "incure[s] no personal liability for the medical charges billed to Medi-Cal–and thus suffer[s] no compensable pecuniary detriment or loss beyond his judicially "deemed" liability for the medical services he receive[s] in the amount that Medi-Cal actually paid to the medical providers."

Nishahama focused on the medical provider's lien rights under the Hospital Lien Act and not on application of the collateral source rule. As the *Howell* court noted, "Because the holding in *Nishihama* is not based on such an analysis under California's collateral source rule, Hamilton's reliance on that case is misplaced." *Howell, supra*, at 690.

The *Howell* decision is already having a significant effect in trial courts and claims offices. Carriers are realizing the illusion of the law and facts they propagated has been dispelled. Defendants are being held accountable for the full value of the past medical charges caused by their conduct and plaintiffs are not being penalized for protecting themselves and their families by investing in private health insurance.

With the exception of the changes that barred third party claims for bad faith, the "*Hanif* issue" represents perhaps the most significant issue in the area of personal injury practice in my years of practice. As you know, I have led the charge here in San Diego. **But I have not stood alone**. Those of you who have fought and continue to fight the issue from discovery through post-verdict motions stand proudly by my side. We have been and continue to be aided mightily by Attorney Scott Sumner from Walnut Creek, whose appearance in *Howell* as *amicus curiae* counsel for CAOC, is greatly appreciated.

The fight is not over and will not be for some time. Even if *Howell* stands, there remain corollary issues that need to be resolved. Presenting consistent positions and arguments to our local judges can only benefit all of our clients. All CASD members are encouraged to continue to share briefs and coordinate efforts through the CASD list server.