Fall 2024

The LITIGATOR

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Inside

Our Mission: Tools & Opportunities to Help You Fight the Good Fight

Daniel S. Glass
CCTLA President

Welcome to Fall. By the time this is published, we should be past the brutal heat of the Sacramento summer. In case you did not notice, July 2024 saw 21 days above 100 degrees; 13 of those days were above 105 degrees, and five topped 110 degrees — all new records. Let's hope for a cooler trend and a normal September.

Despite the heat, our law practices have persevered. It appears that everyone I have spoken with about their practices has said they are very busy. That's a good thing. But even though cases are plentiful, and people continue to need our services, it seems to be the result of insurance companies erecting hurdles to thwart settlement. The assertion of medical liens against personal-injury-case recovery has become so significant that it can be a sub-specialty part of the practice of law. Insurers seem to be demanding they add lienholder names to settlements just to make it more difficult for us.

In keeping with CCTLA's mission of providing our members with education and tools to fight against the insurers, we will be presenting the most popular and always needed Liens Seminar this Oct. 4, from 10 a.m. to 2 p,m, at McGeorge School of Law. This seminar, which will include significant materials, is always a must attend, if not every year, at least every other year.

We will have a joint education seminar with the local chapter of the American Board of Trial Advocates (ABOTA), thanks to Sacramento Valley ABOTA President John Demas, Secretary Michelle Jenni (both CCTLA past presidents) and the ABOTA members. This program should be a "do not skip" matter on your agenda: master trial lawyers will provide you with tips and insight to jury voir dire. The program may even give attendees the opportunity to actually participate and receive constructive advice and counsel while trying their hand at voir dire. More details coming soon.

We recently held our yearly Spring Reception, again raising funds for Sacramento Food Bank and Family Services. Due to the generosity of our multiple $1,000 and $2,500 donors, our larger sponsors (Noah Schwartz/Ringler; Robert Buccola and his wife Kawanaa D. Carter, MD; Judicate West; and Wilcoxen Callaham) and our silent and live auctions, we raised more than $113,000. As always, special thanks go to the Hon. Art Scotland (Ret.) for his time as Master of Ceremonies for the live auction and his ability to graciously ask for donations in person, and receive them.

Although our listserve is always a great source of information, I feel obligated to always provide an update about our local courts. Sacramento has seen a significant number of judicial retirements and appointments during the past year. Hopefully, the newly appointed judges will help keep the civil trial calendar moving. In fact, as of Aug. 1, the court has decided that it can assign more cases per day for trials and manda-

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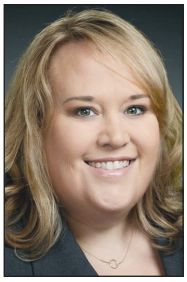

Marti Taylor, Wilcoxen Callaham LLP, CCTLA Treasurer

NOTABLE CITES

By: Marti Taylor

LORCH v. SUPERIOR COURT (KIA MOTOR AMERICA, INC.)

2024 4DCA/1 California Court of Appeal, No. D083609 (May 16, 2024)

PEREMPTORY CHALLENGE TO JUDGE IS TIMELY IF NOTICE OF ASSIGNMENT IS MADE BY TELEPHONE

FACTS: Plaintiff Leah Lorch sued Kia Motors. In October 2023, the case was assigned to the Hon. Judge Robert Longstreth as the trial judge. However, on the morning of Feb. 2, 2024, the parties were notified that the case was being reassigned. Judge Longstreth ordered the parties to appear the following Monday, at which time they would be notified of which judge they would be reassigned. He also informed the parties that they would have an opportunity to file a peremptory challenge pursuant to Code of Civil Procedure 170.6 at that time if they wished.

Later in the day on February 2, 2024, counsel for Plaintiff received a voicemail from the court's clerk stating that the case had been reassigned to the Hon. Judge Timothy Taylor. The message further stated that if either party wished to exercise a peremptory challenge, then they should call the court.

An hour after the voicemail, Judge Longstreth issued a minute order stating the case had been reassigned to Judge Taylor. In the order, he further noted that the parties had waived any challenge. Neither party was served with the order.

The following day, Plaintiff's counsel filed a peremptory challenge pursuant to Code of Civil Procedure 170.6. The challenge was rejected by Judge Taylor, who found it to be untimely.

The trial ultimately proceeded with Judge Taylor, and Lorch lost. Afterwards, Lorch petitioned for a writ of mandate, contending that the peremptory challenge should have been granted and requested that the trial court judgment be granted.

ISSUE: When does a peremptory challenge pursuant to Code of Civil Procedure 170.6 have to be filed to be timely?

RULING: Petition granted.

REASONING: If a party timely files a peremptory challenge pursuant to Code of Civil Procedure 170.6 in proper form, it is mandatory to grant the request. Peremptory challenges may be lodged at any time before a trial or contested hearing. There are three established exceptions, including if the court utilizes a Master Calendar and the party is directed to trial with a Master Calendar, then the challenge must be made to the judge supervising the Master Calendar immediately upon announcement of the assignment.

However, in this case, the exception does not apply where the assignment was made over the telephone by way of a voicemail from the clerk. Thus, under the general rule, Lorch's challenge was timely.

SHIKHA v. LYFT, INC.

2024 2DCA/3 California Court of Appeal, No. B321882 (May 17, 2024)

LYFT DOES NOT OWE A LEGAL DUTY TO IT'S DRIVERS TO CONDUCT CRIMINAL BACKGROUND CHECKS ON IT'S RIDERS

FACTS: In February 2020, Plaintiff Abdu Lkader Al Shikha was working as a Lyft driver when a passenger attacked him, stabbing him in his hands and legs. The attack was sudden and unprovoked. Unbeknownst to Al Shikha, the passenger had a criminal record.

Although Lyft conducts criminal background checks on its drivers, it does not similarly screen its passengers.

Al Shikha sued Lyft for negligence based upon its failure to conduct a criminal background check on his attacker, who had a long criminal history. Lyft moved for judgement on the pleadings which the trial court granted. The court concluded that Lyft did

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Motion to Compel Arbitration Win for Plaintiffs

By: Daniel Jay

Daniel Jay, York Law Firm, is a CCTLA Member

I recently secured a published decision from the Third District Court of Appeal that represents a big win for Plaintiffs in the fight against forced arbitration agreements buried in consumer contracts.[1] The court confirmed prior precedent that held family members cannot bind a loved one to arbitration by signing arbitration agreements presented on admission to a skilled nursing facility without evidence that they had the legal authority to bind their family member.

The court also held that signors cannot bind themselves to arbitration for their individual wrongful death claims when they are presented and sign an arbitration agreement in their capacity as the legal representative or agent of a family member. This is a victory[2] for consumers beyond just those presented with arbitration agreements during admission to a skilled nursing facility.

The case involves a multiple-plaintiff lawsuit against a skilled nursing facility in Redding, Windsor Redding Care Center. When a coronavirus outbreak led to the deaths of several residents, several family members of the decedents sued the facility and its related owners and entities in both their individual capacities and as successors-in-interest to the deceased plaintiffs. The complaint alleges elder abuse/neglect, fraud, and wrongful death, among other causes of action.

Defendants moved to compel arbitration as to four of the Decedents whose family members signed an arbitration agreement on behalf of the decedents. The trial court denied the motion for two key reasons.

First, on the basis that as to three of the agreements, there was no evidence that the signors agreed to arbitrate their individual claims for wrongful death. Second, Defendants failed to present evidence the family members who signed the agreements had power of attorney or were otherwise legally authorized to bind the decedents to arbitration. As to the fourth plaintiff, the Court found an enforceable arbitration agreement but exercised its discretion to deny the motion as to that plaintiff to avoid the risk of conflicting rulings from two different tribunals under Code of Civil Procedure § 1281.2(c).[3]

The Third District Court of Appeal affirmed the lower court's findings. The 3rd DCA affirmed that Defendants failed to present any evidence that the family members who signed on behalf of their loved ones were "agents" or "legal representatives" who had the legal authority to bind them to arbitration.

Because the signors executed arbitration agreements in their capacities as the purported legal representatives of their loved ones, the 3rd DCA also affirmed that those signors did not bind their individual wrongful death claims to arbitration since they did not sign in their individual capacities.

On appeal, the Defendants argued that the lower court erred in applying C.C.P. § 1281.2(c) when it declined to enforce the fourth arbitration agreement. Subsection (c) states: "This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295." Thus, C.C.P. § 1295 controls arbitration agreements in medical malpractice cases and is part of the Medical Injury Compensation Reform Act of 1975 ("MICRA"). Defendants argued that the complaint sounded in medical malpractice or professional negligence, and therefore the exception in C.C.P. § 1281.2(c) did not apply.

The 3rd DCA appropriately distinguished elder abuse/neglect from medical malpractice. The court described:

> Professional negligence is a negligent act or omission by a health care provider within the scope of licensed service that proximately causes personal injury or wrongful death. (§ 1295, subd. (g)(2). Whereas elder neglect, a form of elder abuse, refers to the failure to provide medical care. (Welf. & Inst. Code, § 15610.07, subd. (a)(1); *Delaney v. Baker* (1999) 20 Cal.4th 771, 783; *Avila, supra*, 20 Cal. App.5th at p. 843.) It includes a failure to provide for personal hygiene, food, clothing, shelter, and medical care; a failure to protect from health and safety hazards; and a failure to prevent malnutrition or dehydration. (*Avila*, at p. 843.) Elder neglect does not refer to substandard performance of medical services but rather the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations. (*Avila*, at p. 843; see *Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348-1349.)[4]

The court correctly analyzed the difference between neglect and medical negligence and found the exception for medical malpractice in C.C.P. § 1281.2 did not apply.

Overall, this decision is a great stepping stone on the path toward eliminating forced consumer arbitration agreements in the skilled nursing context and beyond and preserving the constitutional right to a jury trial.

[1] *Hearden v. Windsor Redding Care Center, LLC* (Cal. Ct. App., June 28, 2024, No. C098736) 2024 WL 3506986, ordered to be published on July 23, 2024.

[2] Forced arbitration is bad for consumers. One AAJ research report described, "More people climb Mount Everest in a year (and they have a better success rate) than win their consumer arbitration case." "Forced Arbitration in a Pandemic: Corporations Double Down," AAJ (Oct. 27, 2021), available at: https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic.

[3] C.C.P. § 1281.2(c) gives the vourt discretion to deny a motion to compel arbitration even where it finds an enforceable agreement where "A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact."

[4] *Hearden v. Windsor Redding Care Center, LL*C (Cal. Ct. App., June 28, 2024, No. C098736) 2024 WL 3506986, at *4.

President's Message

Continued from page one

tory settlement conferences. It had been assigning no more than 15 on Mondays and Tuesdays. It will now assign up to 25 for each day (*See article, page 32*).

If you have not noticed, since Aug. 1, the court has opened up a tremendous amount of earlier dates for trials and settlement conferences. Prior to Aug. 1, the first available dates were in 2025. Now they appear to potentially be only a month or two out. More judges have been assigned to civil cases, and we can all hope that cases that need to be tried will be able to find a courtroom and judge.

With regard to federal court, for those who end up there, it remains the most impacted and overworked in the country. Sacramento Superior Court Judge Dena M. Coggins has been confirmed by the Senate and will fill a judgeship on the US District Court for the Eastern District (Sacramento) in September. That is when Chief Judge Kimberly Mueller accepts senior status and Judge Troy Nunley becomes chief judge for the district. It is not known how this will affect civil cases in the district, but the addition of another judge has to helpful.

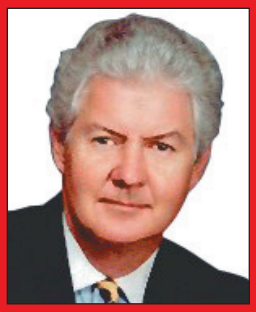
As a final note, CCTLA held its first joint mixer with the Solo and Small Practice section of the Sacramento County Bar Association. This was a success, with approximately 50 people attending and taking the opportunity to place a name with a face and generally meet other members.

Great thanks to CCTLA Board member Ognian Gavrilov for offering his restaurant (58 Degrees and Holding Company) and providing complimentary appetizers. Special thanks to CCTLA and Solo/Small Practice member Brittany Berzin for suggesting the mixer and following through on this joint venture.

I hope to see more of our 400+ members as the year progresses — at social functions, educational events and in trial.

This panel features the top lien experts in California and includes valuable materials!

Dan Wilcoxen, Esq.
Wilcoxen Callaham LLP



Don M. deCamara, Esq.
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CAPITOL CITY TRIAL LAWYERS ASSOCIATION PRESENTS:

Everything You Never Wanted to Know About Liens and More II

The program will cover information related to handling liens by insurance carriers, Kaiser Health, ERISA, MediCal, Medicare and comp liens

Friday, October 4 — 10 am to 2 pm
McGeorge School of Law
3200 5th Ave., Sacramento, CA 95817

Registration begins at 9:30 a.m.
Lunch and written materials are included with the registration fee

REGISTRATION FORM

Cost: CCTLA Member, $185 / CCTLA Member Staff, $135
Non-Member (Plaintiff Attorney), $285

State Bar No. _____

Name: _____

Address: _____

City/State/Zip: _____

Tel: _____ Email: _____

Mail Registration Form and check to:
CCTLA, P.O. Box 22403, Sac, CA 95822 by September 27, 2024
Credit card payment can be made by using this link:
https://cctla.com/event/liens-seminar-october-4-2024/

For more information, contact Debbie Keller at debbie@cctla.com

Credit has been approved with the State Bar of California for 3.25 hours of MCLE credit (2.5 will apply to general civil litigation and 1 hour will apply to ethics). Capitol City Trial Lawyers Association is a State Bar of California-approved MCLE provider. CCTLA will report to the State Bar your actual time spent in attendance at the program. It is up to each attendee to report to the State Bar if you only attended a portion of the seminar.

What Is the Defense Up to Now?

By: Daniel E. Wilcoxen

Daniel Wilcoxen, Wilcoxen Callaham, is a CCTLA Board Member and a CCTLA Past President

On June 6, 2024, the 4th District Court of Appeals, San Diego, certified for publication the case of plaintiff and appellant, *David Audish v. David Macias, et al. Audish v. Macias*, 102 Cal.App.5th 240 (2024). The Court in its order stated, "The opinion in this case filed May 21, 2024, was not certified for publication. In appearing the opinion meets the standards for publication specified in California Rules of Court, Rule 8.11105(c), the request pursuant to Rule 8.11120(a) for publications are granted."

The case deals with cross-examination of a life-care planner and dealt with the issue of whether or not the defense should be allowed inquiry into the plaintiff's future eligibility for Medicare benefits.

The trial court allowed the defense to question the plaintiff's life-care planner in that regard. Originally, the case was not certified for publication. However, a group of defense firms petitioned the 4th District to certify the case for publication.

Recovery of the plaintiff in the case was zero for past and future general damages, and only $32,790 for future medical expenses, despite the fact that the plaintiff's life-care planner rendered an opinion that the future medical expenses would be $1,417,146.

The appellate court considered whether or not the trial court abused its discretion by permitting the defense to make this inquiry concerning whether or not the plaintiff would be eligible for Medicare in the future, and whether or not the expert took this potential eligibility into account in rendering the expert opinion of future medical care.

Plaintiff's attorney objected on the sole ground of relevance. This was obviously a poor choice. No objection on the basis of violation of the Collateral Source Rule was made and found by defense counsels' questioning of the life-care planner regarding Medicare eligibility.

The appellate court discussed the *Howell* case and the *Corenbaum v. Lampkin* case (2013) 215 Cal.App.4th 1308, and *Pebly v. Santa Clara Organics* (2018) 22 Cal.App.5th 1266, both of which came after *Howell*. The *Howell* case obviously said bills were not relevant to medical expense; only the amount that was paid and that dealt with past medical expenses. These two cases, and the *Audish* case were discussed as the Court's conclusion that it was not an abuse of discretion to admit limited evidence about plaintiff's Medicare eligibility and the amounts Medicare might pay for plaintiff's future medical expenses.

Further inroads into this area can be found in two cases, *Cuevas v. Contra Costa County* (2017) 1 Cal.App.5th 163, and *Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, which held it was an abuse of discretion to exclude evidence of future insurance benefits that might be available under the Affordable Care Act. *Stokes* found no error when the defense referenced past medical insurer of the plaintiff and future eligibility for Medicare and Social Security.

Thus, the *Audish* decision is very dangerous and gives a basis for the defense on cross-examination of the life-care planner to bring Medicare's limited payments into play for future medical care costs that the life-care planner used.

Therefore, it should be the job of every plaintiff's attorney to read the *Audish* case and realize the poor job that was done in prosecuting this case by the plaintiff's attorney in failing to appropriately object to this line of questions under the Collateral Source Benefit Rule as to opposed to relevance.

This seems to be something that should be addressed by the legislature. I presented this case and all the documentation to CAOC to attempt to see if there is something that could clarify this that would be in the nature of legislative effort.

From Red Lobster to the Nursing Home: Private Equity is Coming for Everything You Love

By: Virginia Martucci

Virginia Martucci, York Law Firm, is a CCTLA Board Member

On May 19, 2024, news splashed across the Internet that would devastate shrimp and seafood lovers everywhere. Red Lobster, once the largest casual seafood dining chain in the country, filed for Chapter 11 Reorganization Bankruptcy. The news no doubt crushed Red Lobster's loyal fanbase. From its $20 all-you-can-eat shrimp to its famous cheddar biscuits, Red Lobster has been a staple of casual seafood dining for decades.

The bankruptcy filings reveal a bleak chain of events leading to the company seeking reorganization. The declaration of Red Lobster Management LLC's Chief Executive Officer[1] filed in support of the bankruptcy first-day motions details several financial and operational challenges that led Red Lobster to seek bankruptcy protection.

The declaration claims the bankruptcy filing was caused by "a difficult macroeconomic environment, a bloated and underperforming restaurant footprint, failed or ill-advised strategic initiatives, and increased competition with the restaurant industry."[2] Another factor precipitating the filing was "unfavorable leases" priced above market rates:

> "the Company currently leases 687 locations (247 in Master Leases and 440 individual property leases). In 2023, the Company spent approximately $190.5 million in lease obligations, over $64,000,000 of which related to underperforming stores. Given the Company's operational headwinds and financial position, payment of lease obligations associated with non-performing leases has caused significant strains on the Company's liquidity."[3]

However, what the declaration fails to acknowledge is that the ill-advised strategic initiatives and "unfavorable" leases were self-imposed by Red Lobster's ownership. In reality, the downfall of Red Lobster resulted in large part from unregulated private equity, which Red Lobster's network of affiliated companies welcomed into its business in 2014.

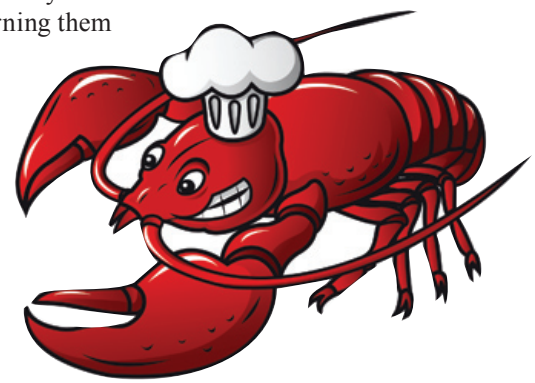
Private equity firms are traditionally known for acquiring distressed companies, turning them around, and selling them for profit. They are also known for buying companies and selling them piecemeal to maximize profits for investors. Most private equity firms use capital from both institutional investors and high-net-worth individuals in combination with large amounts of debt.

In 2014, Golden Gate Capital, a private equity firm based in San Francisco, purchased Red Lobster for $2.1 billion cash from a company called Darden Restaurants.[4] Darden owns other culinary bastions such as Olive Garden and LongHorn Steakhouse.[5]

In conjunction with that transaction and to recoup costs, Golden Gate Capital turned around and sold the real estate for 500 restaurants in a deal with American Realty Capital Properties, Inc., a publicly traded real estate investment trust company. It sold the real estate for $1.5 billion in a sale-leaseback transaction. The properties sold were described in a press release as "high-quality" and "premium." [6] The rental agreements included baked-in yearly increases in rents.

A sale-leaseback is where an owner sells property and leases it back from the new landlord. It can be a way to increase liquidity quickly while allowing the lessor to continue to occupy the property and run its business.

After the 2014 transaction, Red Lobster became a lessor of property it previously owned, at rents well above market value. This significantly increased its costs. The leases were "triple-net" leases, which means Red Lobster was responsible for nearly every cost of the property (taxes, insurance, operating expenses).[7] This resulted in Red Lobster



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paying hundreds of millions of dollars per year in rent, including for locations that the bankruptcy called "underperforming."

Golden Gate Capital went on to sell Red Lobster in pieces over the next few years. It sold a 25% stake to a seafood supplier called Thai Union a couple years after the initial deal for more than $500 million.[8] At some point during the pandemic, Golden Gate Capital offloaded its remaining stake to Thai Union and several other investors.[9]

Thai Union had an incentive to make sure Red Lobster continued to buy shrimp, given it was one of Red Lobster's biggest suppliers. This incentive apparently gave rise to the endless shrimp promotion created by former CEO Paul Kenny. The promotion was so popular (and marketed so heavily), that stores ran out of certain kinds of shrimp. However, the $20 endless shrimp promotion could not save the troubled company (Cue the jokes that the $20 endless shrimp deal bankrupted the company).

In reality, it wasn't the $20 shrimp deal that caused its downfall. The downfall resulted from its ownership selling Red Lobster's most valuable assets (real estate) to recoup its investment, leasing it back at above market rates, and then dumping it once it had squeezed enough capital out of it while saddling it with debt.[10]

Why does this shrimp-tastrophe matter and how does it relate to nursing homes?

Private equity firms aren't just coming for the endless shrimp. They are steadily infiltrating and investing in the healthcare industry. This includes buying physician practices, hospitals, and skilled nursing facilities.[11]

Why is it bad when private equity owns nursing homes and hospitals?

Many studies support that private equity ownership in healthcare is associated with increased hospital-acquired events (think pressure ulcers, foreign objects retained after surgery, falls, and infections).[12] This includes an increased chance of death.[13]

Researchers believe an increase in adverse events results from decreased staffing levels and failure to adhere to protocols meant to ensure patient safety.

Why do private equity-owned facilities have less staffing and safety protocols? Because both cost money. Private equity's primary focus is on reducing costs. In nursing homes, they do this by decreasing the number of overall staff (the number of nursing hours per patient, per day). Or by decreasing the hours of more skilled staff like registered nurses (who cost more) and instead relying heavily on licensed vocational nurses and certified nurse assistants.[14] The Centers for Medicare & Medicaid Services (CMS) reported that one study found in the two-to-three years after private equity invests in a nursing home, registered nurse staffing levels decrease by as much as 6%.[15]

Private equity owners of skilled nursing facilities often employ the same sale-leaseback transactions as Red Lobster's owners did. They acquire facilities, sell the real estate to a related company, and then lease back using triple-net leases. They charge themselves exorbitant rents well above market prices for outdated facilities as a way to siphon funds from the facility that could go to patient care. Instead, this money is funneled through a related entity to fund their next project, while saddling facilities with debt. When the debt gets too much to handle, these firms sell the facilities or file for Chapter 11 and reorganize while wiping out their debt. They do so with essentially little to no consequences.

Keep in mind that in the nursing home context, losses born by the facilities are typically passed onto taxpayers because most facilities are primarily state and federally funded through Medicare and Medicaid.

What private equity did to Red Lobster is important because it's typical of what private equity does to most industries. In healthcare, what's at stake is human beings instead of endless shrimp.

Red Lobster serves as a cautionary tale of the ever-growing risk to our communities and the economy of unregulated private equity. It highlights why private equity needs to be regulated in the healthcare industry and others.

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[1] Declaration of Jonathan Tibus in Support of Debtors' Chapter 11 Petitions and First Day Relief, (May 19, 2024), In Re: red Lobster Management, LLC, et al., Case No. 6:24-bk-02486-GER, available at: https://document.epiq11.com/document/getdocumentbycode?docId=4334036&projectCode=RLR&source=DM.

[2] Id. at ¶ 31. 3

[3] Id. at ¶ 38.

[4] "Darden Announces Sale of Red Lobster to Golden Gate Capital for $2.1 billion," (May 16, 2014), available at: https://www.prnewswire.com/news-releases/darden-announces-sale-of-red-lobster-to-golden-gate-capital-for-21-billion-259511991.html.

[5] Darden Restaurants, https://www.darden.com/.

[6] "American Realty Capital Properties Closes $1.5 Billion Red Lobster Sal-Leaseback Transaction," (July 28, 2024), available at: https://www.prnewswire.com/news-releases/american-realty-capital-properties-closes-15-billion-red-lobster-sale-leaseback-transaction-268936111.html.

[7] James Surowiecki, "Private equity and mismanagement: Here's what really killed Red Lobster," Fast Company (May 23, 2024), available at: https://www.fastcompany.com/91129776/what-really-killed-red-lobster-bankruptcy-private-equity.

[8] Id.

[9] Id.

[10] For a better and more fun synopsis of this transaction, check out the video posted by TikTok creator @jackmacbarstool.

[11] Judith Garber, "The rising danger of private equity in healthcare," Lown Institute (January 23, 2024), available at: https://lowninstitute.org/the-rising-danger-of-private-equity-in-healthcare/.

[12] Kannan S, Bruch JD, Song Z. Changes in Hospital Adverse Events and Patient Outcomes Associated With Private Equity Acquisition. JAMA. 2023;330(24):2365–2375. doi:10.1001/jama.2023.23147.

[13] Áine Doris, "When Private Equity Takes Over Nursing Homes, Mortality Rates Jump," (May 18, 2023), available at: https://www.chicagobooth.edu/review/when-private-equity-takes-over-nursing-homes-mortality-rates-jump.

[14] Borsa A, Bejarano G, Ellen M, Bruch JD. Evaluating trends in private equity ownership and impacts on health outcomes, costs, and quality: systematic review. BMJ. 2023 Jul 19;382:e075244. doi: 10.1136/bmj-2023-075244. PMID: 37468157; PMCID: PMC10354830.

[15] Disclosures of Ownership and Additional Disclosable Parties Information For Skilled Nursing Facilities and Nursing Facilities; Definitions of Private Equity Companies and Real Estate Investment Trusts for Medicare Providers and Suppliers, CMS (November 15, 2023), available at: https://www.cms.gov/newsroom/fact-sheets/disclosures-ownership-and-additional-disclosable-parties-information-skilled-nursing-facilities-and-0.

New laws provide greater protections for consumers and renters in California

By Ian Barlow

Important new laws have gone into effect that provide significant protections for California consumers and renters. These laws impact many of our current and potential clients and provide additional tools for protecting and enforcing the rights of California consumers and renters, including in the context of governmental, individual, and class actions.\

This article highlights three new laws in particular: California's "Junk Fee" Ban; the Right to Repair Act; and California's Cap on Rental Security Deposits.

SB 478: California's Ban on 'Junk Fees'

Hidden charges and fees unfortunately pervade consumer transactions. They affect purchases for event tickets, rentals, hotel stays, food delivery, and other e-commerce. They are deceptive and frustrating. California has recently taken steps to address this practice. SB 478 has been called California's "Junk Fee Law," the "Honest Pricing Law," the "Drip Pricing Law," and "Hidden Fees Statute." All of these names are appropriate; SB 478 essentially requires transparent pricing: the price a consumer sees should be the price they pay.

SB 478 became operative law as of July 1, 2024, adding a provision to the California Consumer Legal Remedies Act ("CLRA") that makes it illegal to advertise, display, or offer "a price for a good or service that does not include all mandatory fees or charges." Cal. Civ. Code § 1770(a)(29). Accordingly, all fees, with a few exceptions, must be disclosed to consumers at the outset of the transaction and represented in the advertised purchase price.

As with all CLRA claims, violations of section 1770(a)(29) can be brought as an individual or class action and make the following relief available: actual damages (no less than a total of $1,000 if a class action); injunctive relief; restitution; punitive damages; and attorney fees. Cal. Civ. Code § 1780(a) and (e). Additional monetary remedies are available for consumers who are a "senior citizen or a disabled person." *Id.* § 1780(b)(1)-(2).

Section 1770(a)(29) is also subject to CLRA pre-suit notice requirements for any action involving a request for damages. *Id.* § 1782.

However, the new law includes several exceptions. For example:

- ◆ Taxes and fees imposed by a government entity do not have to be included in the advertised price;
- ◆ While handling fees must be included, businesses can exclude reasonable shipping and delivery charges;
- ◆ Certain financial entities already required to comply with particular federal, state or regulatory disclosure requirements are exempt;
- ◆ Certain broadband internet services complying with FCC consumer labeling requirements are not included;
- ◆ Grocery store- or distributor-owned delivery services that deliver food items from the grocery store or distributor to a consumer are exempt; and
- ◆ Restaurants, bars, and grocery stores are not required to include mandatory fees and charges for food and beverage items in prices advertised to consumers. However, they must be clearly and conspicuously disclosed.

Cal. Civ. Code § 1770(a)(29)(A)(i)-(ii), (B)-(D). The law also does not apply to purchases of goods and services made for commercial purposes. *Id.* § 1761(a)-(b).

The California Attorney General's Office has created a helpful webpage that includes FAQs on SB 478. See https://oag.ca.gov/hiddenfees; see also https://oag.ca.gov/system/files/attachments/press-docs/SB%20478%20FAQ%20%28B%29.pdf.

Ian Barlow, Kershaw Talley Barlow PC, is a CCTLA Board Member

SB 244
California's Right to Repair Act

The Right to Repair or Fair Repair movement has steadily gained traction across the United States. Advocates argue that manufacturers should make diagnostic tools, repair manuals, and replacement parts available to consumers consistent with consumers' product ownership rights, to make product ownership and repair more cost effective, as well as reduce e-waste

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and promote sustainability. Organizations such as The Repair Association (repair.org) and US PIRG (pirg.org) have helped push the envelope and influence state legislation to advance consumer and environmental protections, create job opportunities, and enhance product quality and longevity.

California was one of four states to pass Right to Repair legislation in 2023 alone. Other states include New York, Colorado, and Minnesota. See National Conference of State Legislatures, ncsl.org, Right to Repair 2023 Legislation, at https://www.ncsl.org/technology-and-communication/right-to-repair-2023-legislation. Governor Newsom signed California's Right to Repair Act in October 2023, and it went into effect on July 1, 2024.

The new law broadly covers electronic devices—such as cell phones and laptop computers—and appliances and requires manufacturers to make repair guides, parts and diagnostic tools available to product owners, service and repair facilities, and service dealers "on fair and reasonable terms." Cal. Pub. Res. Code § 42488.2. The statute is expressly intended to "provide a fair marketplace for the repair of electronic and appliance products and to prohibit intentional barriers and limitations to third-party repair." *Id*. § 42488.1.

For products priced between $50 and $99.99, manufacturers must make documentation, parts, and tools available for at least *three years* after the last date the product was manufactured, regardless of warranty periods.

For products priced $100 or more, manufacturers must make such documentation, parts, and tools available for at least *seven years* after the product was last manufactured, regardless of warranty periods. It also encompasses electronic, and appliance products sold outside of direct retail, including to schools, businesses, and local governments. Cal. Pub. Res. Code § 42488.2(j)(3)(A).

California's law is in many ways broader than the Right to Repair laws enacted in other states. For instance, California's Right to Repair Act covers products manufactured and first sold in California on July 1, 2021. *Id*. By contrast, New York's Right to Repair law applies to products first sold or used in New York on or after July 1, 2023. N.Y. Gen. Bus. Law § 399-nn(2).

However, California's Right to Repair Act also includes several exceptions. For instance, the law does not apply to alarm systems or video game consoles. Cal. Pub. Res. Code § 424882.2(j)(3)(B)(ii)-(iii). It also carves out equipment categories, including agricultural, construction, industrial, and forestry equipment. *Id*. § 424882.2(j)(3)(B)(i). Furthermore, the law states that companies are not required to divulge trade secrets or source code or license intellectual property, "except as necessary to comply with this section." *Id*. § 424882.2(c).

A private right of action provision was included in a similar bill but it was unsuccessful. This a\Act only provides for public enforcement by city, county, city and county, or state entities. It allows for penalties to be imposed on companies that knew or should have known that it violated the Act in the amount of $1,000 per day for the first violation, $2,000 per day for the second violation, and $5,000 per day for the third and subsequent violations. Cal. Pub. Res. Code § 424882.3.

AB 12
Rental Security Deposit Caps

California also recently enacted a law intended to address housing accessibility and affordability in the state. To be sure, roughly 45% of households in California are made up of renters, compared to 35% nationwide. See Public Policy Institute of California, ppic.org, *California's Renters*, at https://www.ppic.org/blog/californias-renters/. As of 2022, close to 17 million Californians were tenants. Tenantstogether.org, Snapshot of Tenants in California 2022, at https://www.tenantstogether.org/sites/tenantstogether.org/files/TT%20Tenant%20snapshot%202022.pdf. Median rent across all bedroom and unit types in California is roughly $2,850 (Zillow.com, California Rental Market, at https://www.zillow.com/rental-manager/market-trends/ca/) and approximately $1995 in Sacramento (id. at https://www.zillow.com/rental-manager/market-trends/sacramento-ca/).

As of July 1, 2024, AB 12 limits the amount certain rental housing providers can charge for a security deposit to one month's rent. Cal. Civ. Code § 1950.5(c)(1). The new law does not apply to security deposits collected or demanded before July 1, 2024. *Id*. § (c)(5).

It also does not apply to smaller rental property owners who own two or fewer rental properties and no more than four total dwelling units. For those landlords, they are limited to charging no more than two months' rent for security deposits. *Id*. § 1950.5(c)(4)(A)(ii). However, if the prospective renter is a servicemember, even smaller landlords are required to limit security deposits to no more than one month's rent. *Id*. § 1950.5(c)(4)(B).

A landlord's bad faith claim or retention of security deposits or any portion of security deposits in violation of Civil Code section 1950.5 may subject the landlord to "statutory damages of up to twice the amount of the security, in addition to actual damages" and the landlord "shall have the burden of proof for establishing any authority "to demand additional security deposits." Cal. Civ. Code § 1950.5(l).

For a short video overview of the above laws, please visit: https://youtube/cB8kGg3AgNg?si=6rvqDe_kguAKSshl."

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CCTLA's Spring Reception:

Annual Awards & Sacramento Food Bank Support

CCTLA President Dan Glass, left, and Major Donor Noah Schwartz / Ringler Associates

Samantha Ramsey and Dan Glass, who received CCTLA's Joe Ramsey Professionalism Award

William Callaham, right, received CCTLA's Morton L. Friedman Humanitarian Award

CCTLA's 2024 Spring Reception on June 6 honored two members with its annual awards and raised $113,196 for Sacramento Food Bank and Family Services. William Callaham, of Wilcoxen Callaham, received CCTLA's annual Morton L. Friedman Humanitarian Award. Daniel Glass, Law Office of Daniel S. Glass and CCTLA's current president, received the Joe Ramsey Professionalism Award. Nominations from the membership for these honors are requested by the CCTLA board each year. The event, attended by 165, was held at the home of Amy and Chris Woods, and CCTLA extended a special thank-you to them for their hospitality and generosity. Miner's Leap Winery's donation of all the wine for the reception, which it has done for the last three years, also was greatly appreciated.

More on page 20

Justice Art Scotland (Ret.)

Judge Emily Vasquez (Ret.) and Judge Geoffrey Goodman (Ret.)

Noah Schwartz and Hostess Amy Wood

CCTLA Board Member and Host Chris Wood with Blake Young, SFBFS CEO/President

Left: Judge David Brown (Ret), Judge Russell Hom (Ret) and Sharon Camissa

Right: Aariya Shergill, Goldy Shergill, Sunsaara Shergill and CCTLA Vice President Amar Shergill

Spring Reception

(Continued from page 19)

CCTLA Board Member Ian Barlow, Kellen Ray, Board Member Drew Widders, CCTLA Past President Shelley Jenni and Board Member Marti Taylor

Above: Brad Schultz, Rick Crow, David Smith and Cynthia Crow

Above: Judge Jerome Price, Sean Musgrove and Nena Musgrove

Right: Shanon Kegler, Taylor Keller, Colleen McDonagh and CCTLA Executive Director Debbie Keller

The CCTLA Board extends a Special Thank You to our reception hosts, Chris & Amy Wood for their hospitality and generosity for this year's Spring Reception

Thank You!

to CCTLA's 2024 Spring Reception Sponsors & Silent Auction Donors! We raised $113,196 for the Sacramento Food Bank & Family Services!

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CCTLA Capitol City Trial Lawyers Association

SACRAMENTO Food Bank & Family SERVICES

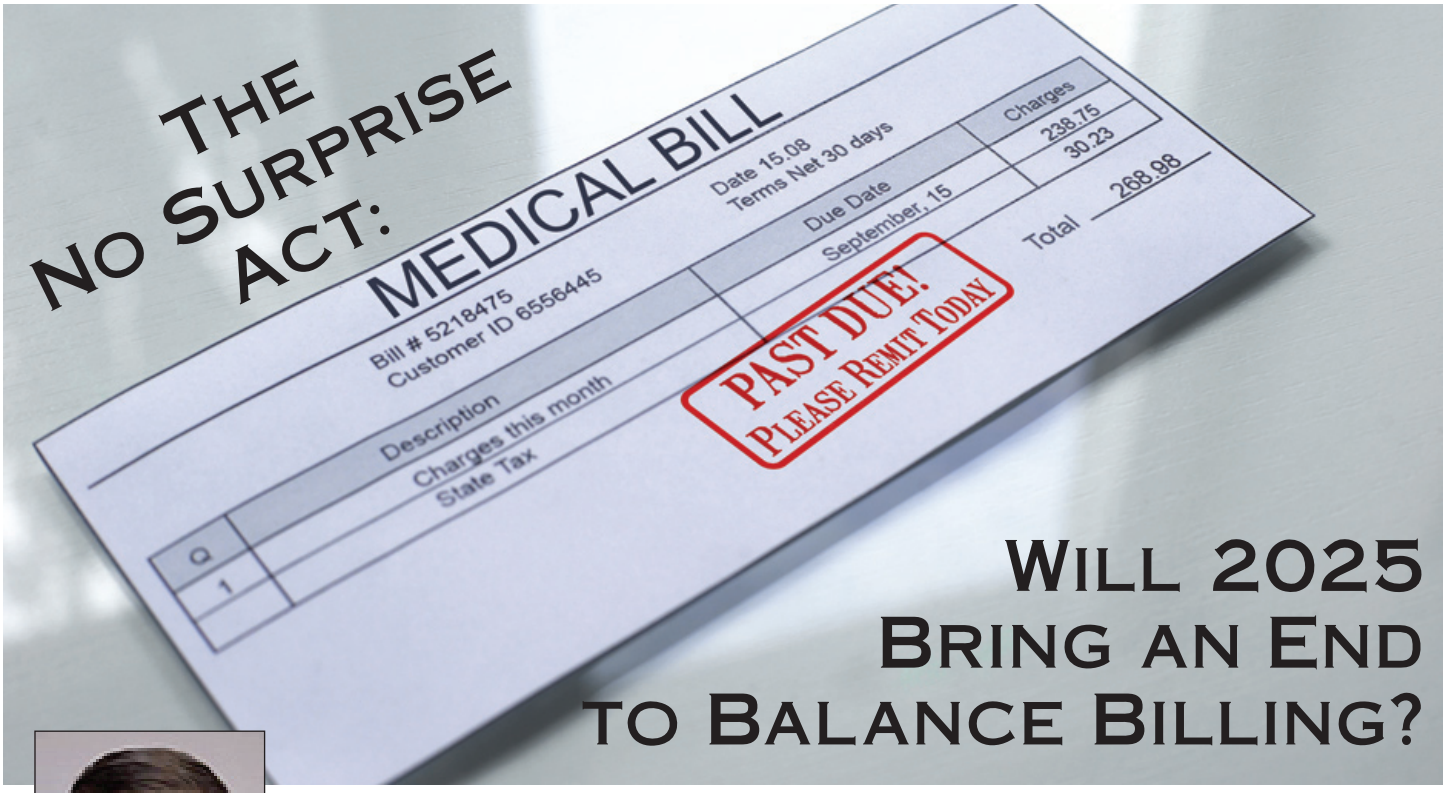
SAVE THIS DATE!!

CCTLA's Holiday Reception and Annual Meeting & Installation of the 2025 CCTLA Officers and Board

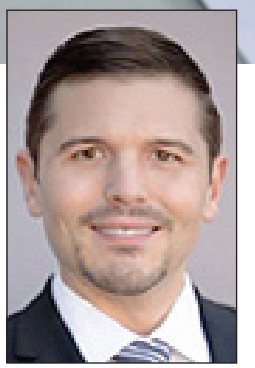
Date: Thursday, December 4, 2024
Time: 5:30 p.m. to 7:30 p.m.
Location: The Sutter Club
1220 9th Street, Sacramento

CCTLA will be making a donation to Mustard Seed School for the holidays, and we invite members to join in.

Sponsorship Levels available for this reception: Platinum $2,500 — Gold $1,500 — Silver $500
Contact Debbie Keller at debbie@cctla.com to secure your sponsorship.



The No Surprise Act: Will 2025 Bring an End to Balance Billing?



Drew Widders, Wilcoxen Callaham, LLP, is CCTLA Board Secretary

By: Drew Widders

This article serves as an update to one I wrote in 2022, prompted by recent developments and disclosures related to the "No Surprise Act." Recently, a colleague and I received detailed "No Surprise" disclosures from UC Davis, which are now available on hospital websites and provided to patients upon treatment. These disclosures emphasize that surprise billing is improper and should be reported to CMS.

As we approach the third anniversary of the federal No Surprise Act, signed by former President Donald Trump on Dec. 27, 2020, it is essential to reassess the impact and ongoing challenges of balance billing, particularly in light of these recent developments. Despite these apparent protections, I still encounter balance bill liens regularly. My new lien letter to the hospitals will now incorporate the "No Surprise" disclosures and request an explanation for why hospitals continue to attempt balance billing, given the current state of the law.

The No Surprise Act, which became effective on Jan. 1, 2022, aims to ban balance billing nationwide in most circumstances. In preparation for its implementation, on July 1, 2021, the Biden-Harris Administration, through the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury, along with the Office of Personnel Management, released an Interim Final Rule through the Center for Medicare & Medicaid Services (CMS), titled "Requirements Related to Surprise Billing; Part I."

The rule provides guidance on the Act's balance billing protections, significantly enhancing the protections for our insured clients against balance billing providers in California.

Understanding Balance Billing

Balance billing arises when a healthcare provider attempts to bill a patient more than the patient's insurance company paid, billing the healthcare provider's normal rate rather than the health insurance company's contracted rate. It usually happens when a patient unknowingly receives medical care from an out-of-network provider, frequently occurring in emergency situations. According to CMS, as of 2016, as many as 40% of emergency visits to an in-network hospital result in an out-of-network bill. The bill usually comes as a surprise to the insured who believes they are only responsible for co-pays, deductibles, and coinsurance, and only up to their plan's annual out-of-pocket maximum.

Balance billing is prohibited for those insured by both Medicare and Medicaid/Medi-Cal. The No Surprise Act intended to extend similar protections to Americans insured through all other health plans. This can protect insureds from surprise medical balance bills for emergency services, including air ambulance services, as well as out-of-network provider bills for services rendered at in-network hospitals and facilities.

Provisions of the No Surprise Act

In addition to the balance billing protections, under the No Surprise Act and CMS Rule, patients treated for emergency services by an out-of-network provider will only be responsible for the same amount of cost-sharing (which must be counted towards a patient's deductible) that

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they would have paid if the service had been provided by an in-network provider. For instance, if a plan requires 20 percent co-pays for in-network emergency room visits, the plan can impose a coinsurance rate of no more than 20 percent of the in-network rate for an out-of-network emergency room visit.

This cost-sharing must also be counted towards a patient's in-network deductible and annual out-of-pocket maximum.

According to the CMS Rule, a non-emergency out-of-network provider may still balance bill under the No Surprises Act if four conditions are met: (1) the patient is able to travel using non-medical transportation or non-emergency medical transportation to an available in-network provider or facility located within a reasonable travel distance; (2) the provider or facility furnishing the post-stabilization services satisfies the notice and consent criteria set forth in the Interim Final Rule (in a separate form from other healthcare documents); (3) the patient is in a condition to understand the notice and provide informed consent; and (4) the provider or facility satisfies any additional requirements or prohibitions under applicable state law.

Unfortunately, while the No Surprise Act and CMS Rule address the very high air ambulance transport balance bills, they do not protect consumers from ground transport ambulance balance bills. However, the No Surprise Act did authorize the creation of an advisory committee to recommend options for protecting patients from ground ambulance balance bills.

Recent Developments and Practical Implications

Recently, UC Davis released a detailed flyer making it clear that "surprise billing" is improper and should be reported to CMS. This notice has provided additional support in ongoing disputes with hospitals over balance billing-related liens. This comes almost three years after the Federal No Surprise Act was signed into law. The detailed flyer emphasizes that surprise billing is improper, reinforcing the protections intended by the No Surprise Act.

California's AB 716 Law

In addition to the federal No Surprise Act, California has taken further steps to protect consumers from surprise ground ambulance bills. On Oct. 8, 2023, Governor Gavin Newsom signed AB 716 into law. Effective Jan. 1, 2024, this law limits how much out-of-network ground ambulance providers can charge patients. Key provisions include:

- ▲ Cost Limitation: Patients can only be charged the equivalent of what they would have paid for in-network services. For uninsured patients, the cost is capped at the Medi-Cal or Medicare rate, whichever is greater.
- ▲ Consumer Protections: The law prohibits ambulance operators and debt collectors from reporting unpaid bills to credit rating agencies or taking legal action against patients for at least 12 months after the initial bill. This includes protections against wage garnishment and placing liens on primary residences (Health Access) (California Healthline) (The San Francisco Standard) (EMS1).

Assessing the Current Impact

We will have to continue monitoring the situation to assess the true impact of the No Surprise Act on medical balance billers in California. In the meantime, below is a refresher on the current state of balance billing defenses.

Balance Billing Defenses

Medicare and Medi-Cal: Already prohibit balance billing. These plans cover about 19.5 million of the approximately 40 million Californians. About 6 million Californians are insured by employee-sponsored plans subject to ERISA, which are not subject to the below state defenses against balance billing. However, starting in 2022, all health insurance plans in California should be protected when the No Surprise Act's balance billing protections go into effect.

California Health Plans: The remaining 14 million Californians are covered by California health plans regulated by two state departments, the Department of Managed Health Care (DMHC) and the California Department of Insurance (CDI). There are different defenses based on whether your plan is regulated by the DMHC or the CDI.

DMHC Regulated Plans:

The DMHC primarily regulates HMOs, covering around 13 million Californians. If your client sought treatment in-network, whether it was emergency or subsequent care, then Health and Safety Code section 1379 should be used to argue that your client is not liable for any sums owed by your client's health plan. If your client sought in-network or out-of-network emergency care, Executive Order S-13-06 and the subsequent DHMC regulation 28 CCR section 1300.71.39 (Unfair Billing Patterns) should be used as they prohibit balance billing by providers of emergency services.

CDI Regulated Plans:

The CDI generally regulates non-HMO health insurance plans, covering around 1 million Californians. Unfortunately, 28 CCR section 1300.71.39 (Unfair Billing Patterns) does not apply to these plans. There is a letter from the CDI to lien specialist Don de Camara that states balance billing is prohibited from in-network providers. If your client received treatment out-of-network, however, there is currently no prohibition against balance billing. In 2017, Health and Safety Code section 1371.9 and Insurance Code section 10112.8 were passed to prevent physicians at in-network hospitals or other facilities from attempting to balance bill patients in non-emergency situations. Unfortunately, this does not address the situation where we are usually faced with a balance bill from an emergency hospital and medical provider. The No Surprise Act fills this gap in protection.

Liens Based on a Contract with Your Client's Health Plan

Many times medical provider lien collectors argue that *Parnell v. Adventist Health Systems* (2005) 35 Cal. 4th 595 and *Dameron Hospital Assn. v. AAA Northern California, Nevada & Utah Ins. Exchange* (2014) 229 Cal.App.4th 549

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allow them to contract with your client's health plan to balance bill. At times, lien collectors will even ignore directly applicable prohibitions against balance billing and still argue they can balance bill if they have a contract with your client's health care plan. If so, demand a copy of the alleged contract. Since the source of any medical provider's right to balance bill should flow from the contract your client has with their health plan, many of the health plans I have reviewed limit any reimbursement rights to a third-party settlement to the amount paid by the health plan. Thus, there should be no additional medical provider reimbursement rights for the difference between the amount paid by your client's health plan and the claimed reasonable value of the services of the medical provider.

'Hospital Lien Act' Liens

In addition to medical provider contracts with your client's health insurance, many hospitals claim balance billing rights under the Hospital Lien Act found in Civil Code sections 3045.1 - 3045.6. Dameron Hospital Assn., supra, confirms that your client should not be on the hook for such liens. As stated therein:

"The clear import of section 1379 is to protect patients with health care service plan coverage from any collection attempts by providers of such medical care as emergency room services."

However, many settlement agreements with defendant insurance carriers have a hold harmless provision your client may be responsible for and must be explained to the client, or you will hold the defendant insurance carrier harmless. If your client agrees to hold the defendant harmless from liens, your client can be on the hook because your client has agreed to indemnify and defend the defendant's insurance carriers from said liens. If that is the case, the hospital is still limited to the reasonable value of their services, not the billed amount under the Hospital Lien Act (see *State Farm v. Huff* (2013) 216 Cal. App. 4th 1463). This gives you another argument to attempt to reduce any unreasonable medical billed amount for which no contract exists between your client and the provider.

Conclusion

In closing, hospitals and providers will likely continue to attempt to balance-bill our clients. The No Surprise Act, supported by CMS, should give a strong argument in the fight to prevent balance billing against consumers.

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Increasing Policy Limits in California through Defense Counsel's Malpractice

Ognian Gavrilov, Gavrilov & Brooks, is a CCTLA Board Member

By: Ognian Gavrilov

In California, plaintiffs' attorneys must navigate a complex web of procedural and substantive requirements to increase the client's recovery by obtaining a settlement or verdict which exceeds the defendant's insurance policy limits. This is called "opening the policy." Understanding the technicalities associated with opening the policy is crucial to ensuring claims are handled effectively.

Most personal injury attorneys misunderstand the essential steps involved in opening the policy. Often, attorneys believe the only way to open the policy is to initially demonstrate that the claim is likely to exceed the policy limits. If the carrier refuses to tender the policy limits under these circumstances, the policy is "open." However, in cases where the carrier does not initially tender the policy limits, plaintiffs' lawyers often give up, accepting what they can get from the carrier, thereby failing to maximize the full value of the case.

Why does this happen? Because plaintiffs' attorneys often do not know how to exploit the tripartite relationship between the defense attorney on the one hand, and the defendant and his insurance carrier on the other.

California Rule of Professional Conduct 3-310(C)(2) prohibits an attorney from representing clients with adverse interests in the same matter. Rule 3-500 requires the attorney to communicate significant case developments to the client. But in the world of personal injury defense, identifying the attorney's true client can be . . . murky. Is the client the defendant, or the insurance carrier?

The Defense Bar seldom appreciates that the insurance carrier's desire to gamble at trial cannot be squared with the defendant's desire to settle quickly to avoid the potential for an adverse verdict in excess of policy limits. Often, defense attorneys prioritize their long-standing relationships with the insurance carriers they work with over the needs of the individual defendant.

To that end, defense attorneys often take direction from the carrier's insurance adjuster, rather than communicating directly with the defendant. This can be a fatal mistake in defending a case, because the defense lawyer's "primary duty" is to the insured—even though both insurer and insured are technically "clients" in the same matter. *Purdy v Pacific Auto Ins. Co.* (1984) 157 Cal.App.3d 59, 76.

The savvy plaintiff's lawyer can and should exploit his opponent's tactical blunder. One way to achieve such leverage is to make a C.C.P. 998 offer slightly above the policy limits in cases where the policy is insufficient. The sum exceeding the policy should be reasonable, and an amount that the defendant can likely afford to pay out of pocket.

The experienced defense attorney will properly advise their client that the they can contribute his own money toward the settlement. However, defense counsel often fails to properly advise the defendant of this right. In such case, the defense attorney's representation has fallen below the standard of care, thereby obligating the defense lawyer to pay the difference between the C.C.P. 998 offer and an adverse judgment further down the line.

Another way to gain leverage is to highlight defense counsel's failure to recommend the client retain independent counsel under Civil Code section 2860 ("*Cumis* Counsel"). Most defense attorneys are not aware that they have an ethical duty to recommend that their client retain *Cumis* Counsel in cases where the carrier's direct involvement in the defense of the case creates a conflict of interest. Though, as an outsider, it may be difficult for the plaintiff's lawyer to spot such a

Continued on page 30

The Defense Bar seldom appreciates that the insurance carrier's desire to gamble at trial cannot be squared with the defendant's desire to settle quickly to avoid the potential for an adverse verdict in excess of policy limits. Often, defense attorneys prioritize their long-standing relationships with the insurance carriers they work with . . .

Continued from page 29

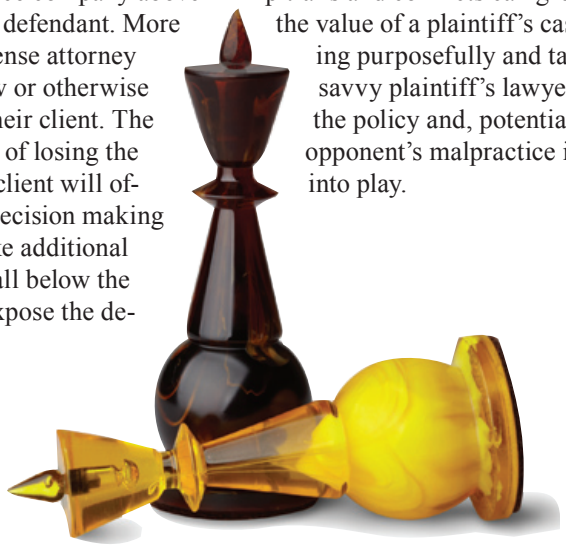
conflict, there are a few tricks to draw it out.

For example, if the plaintiff makes a policy limits demand that is reasonable, but the offer is denied, one can often safely assume it was the carrier and not the defendant that instructed counsel to reject the offer. The savvy plaintiff's attorney can remind his opponent, in writing, of his obligation to advise his client to retain *Cumis* Counsel. The plaintiff's attorney can also remind his opponent of his ethical obligation to request that the carrier indemnify the defendant in the event of an excess verdict, and to advise the defendant that he can contribute his own funds toward a settlement. Such tactics can drive a wedge between the carrier on the one hand, and the defendant on the other, thereby resulting in a favorable settlement for the plaintiff.

Finally, defense attorneys typically cannot resist arguing that the policy limits are not open. They fail to understand that this argument undercuts the defendant's interest in avoiding exposure from an excess verdict. To exploit defense counsel's tactical error, the plaintiff's attorney should request his opponent commit his opinion regarding the state of the policy to writing.

Once the defense attorney takes the bait, plaintiff's counsel should request, in writing, that the attorney disqualify himself, because they have placed the interests of the insurance company above those of the individual defendant. More often than not, the defense attorney will refuse to withdraw or otherwise report the conflict to their client. The defense attorney's fear of losing the carrier as a long-term client will often overshadow their decision making and cause them to make additional tactical errors which fall below the standard of care and expose the defendant to potential financial ruin. These tactical errors can add to the value of the plaintiff's case, because now, the defense counsel's malpractice insurance is an additional pot of money from which the plaintiff can recover down the line.

In short, the tripartite relationship can be a mine of pitfalls and conflicts for the careless defense attorney. Exploiting these pitfalls and conflicts can greatly add to the value of a plaintiff's case. By acting purposefully and tactically, the savvy plaintiff's lawyer can open the policy and, potentially, bring his opponent's malpractice insurance into play.



UPDATES

Status of Civil Justice System at Sacramento Superior Court from the Civil Advisory Committee and the Implementation of a Pre-Assignment for Civil Long Cause Trials

Compiled by: Jill Telfer

Jill Telfer, Telfer Law, is a CCTLA Member, Editor of The Litigator and CCTLA Past President

1. Trials and Courtroom Availability

• Between January and June 2024: 79 trials were assigned to a department for trial; 6 cases were preassigned; 0 cases were reset due to courtroom unavailability; 81 cases were continued by stipulation of the parties; 56 cases were settled; 18 cases were dismissed.

• The earliest date that the Court is currently setting Mandatory Settlement Conferences ("MSCs") is in November 2025.

• The earliest date that the Court is currently setting civil cases for trial is December 30, 3025.

2. Increase In Weekly Caps of Trials and Mandatory Settlement Conferences

• The weekly caps on the number of trials and MSCs that are set will be increased starting Aug. 1, 2024. For trial assignments set in Department 47, the limit of 16 on the Monday and Tuesday trial assignment calendar will be increased to 25. For mandatory settlement conferences set in Department 59, the limit of four settlement conferences in the morning and four in the afternoon will be increased to six. Effective Aug. 1, 2024, any case referred to the Trial Setting Process that has not yet selected MSC and trial dates will have the option to select dates created by the calendar expansion.

• Parties wishing to advance already-set MSC and Long Cause Civil Trial Assignment dates must submit a Stipulation and Proposed Order and the appropriate filing fee to the presiding judge's department. The stipulation should include three agreed upon Mandatory Settlement Conference dates and three agreed upon trial assignment dates. The documents must be submitted via e-Filing or at the Civil Front Counter.

3. Appointments and the Civil Judges

• Six new judges were appointed after March 2024.* The Court now has 10 judges dedicated to hearing civil trials: Judge Laurie Damrell, Judge Jill Talley, Judge Richard Miadich, Judge Jeff Galvin, Judge Julie Yap, Judge Thadd Blizzard, Judge Renuka George and Supervising Civil Judge Steven Gevercer. The court will also continue to use criminal judges Hon. Peter Southworth and Hon. Shelleyanne Chang for civil trials, as needed.

4. Law and Motion Department Update— Judge Christopher Krueger & Judge Richard Sueyoshi

• Law and Motion opened e-filing after Martin Luther King Day; many parties have been taking advantage of this filing option.

• There are a few nuances to e-filing the Court would like to make parties aware of:

o Documents first go into an e-filing manager. The filings are not generally available to court staff or the assigned judge until the documents are reviewed and filed in the court docket by a deputy clerk. Therefore, the court may not see documents the day they are submitted, especially if they are submitted late in the day. Documents e-filed after working hours will not be reviewed that day. However, documents are filed stamped the day they are submitted.

o The e-Filing Manager is reviewed constantly for priority documents. However, reply briefs and objections to evidence in motions for summary judgment that are filed five days before hearings causes the court to work until the last possible moment before the tentative ruling must be posted. This is especially true if the documents are e-filed on a Friday afternoon, because they are not processed until the next

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court day. Attorneys should try to file these types of documents at least by noon on the day they are due to ensure the Court has a proper time to review them.

- o If the Court cannot access filed documents before the scheduled hearing, the hearing will likely be continued.
- o Parties should check the day after documents are submitted to determine if they show up in the Court's online portal. If documents are not visible on the docket, parties should check first with the e-filing service they used, before contacting the Court.
- o Due to the volume of filings, the Law and Motion Departments are **not** requesting that parties email the department courtesy copies of the documents. Parties should check each department's specific rules.

• If the parties obtain a motion date which they discover will not be used, the parties should immediately release that motion reservation so that the time/date slot can be used in another case. Otherwise, the Court and other litigants will suffer further delay.

5. Courthouse Construction Update

• The new courthouse is 91% completed. It should be physically completed by March/April 2025, but all finishing touches, including technology, means that actual occupancy will be in approximately October 2025.

• The courthouse will have state-of-the-art technology.

6. E-Filing Update

•Mandatory e-filing is being extended from July 1 to late summer or early fall 2024. Additionally, e-filing for Small Claims Court will go online on June 17, 2024.

7. Stipulations for Pre-assignment of Civil Long Cause Trials

Effective July 8, 2024, a pre-assignment process for civil long-cause trials anticipated to last longer than seven court days was implemented. Counsel seeking pre-assignment should submit a Stipulation and Proposed Order for Pre-Assignment pursuant to CRC 3.734 and the appropriate filing fee to Department 47 through e-Filing Manager or the Civil Front Counter between 10 to 15 court days before the trial assignment date. The stipulation must include:

- *Whether the matter will be a court or jury trial*
- *Estimated length of trial*
- *Would further MSC be beneficial?*
- *Will there be a request to bifurcate?*
- *Are the parties willing to stipulate to the use of an eight-person jury?*
- *The nature and complexity of the case, including the number of pre-trial issues and the number of witnesses (including experts).*
- *Is travel time to Gordon D. Schaber Courthouse for any party, attorney, or witness more than 45 minutes for trial?*

If the Court grants the Stipulation for Pre-Assignment, parties will be notified of their assigned trial department and should contact the department to schedule a pre-trial conference and motions *in limine*. Motions pursuant to CCP 170.6 should be made as soon as possible after the Order on Stipulation for Pre-Assignment is made.

Parties may file an *ex parte* application or motion for pre-assignment if unable to obtain a stipulation from all parties to the case. Please refer to the Court's website for information on filing and setting motions in the presiding judge's department.

The Court has explained the context for its decision to implement pre-assignment. In the master calendar system, criminal trials are assigned one week before the civil trial assignment calendar is heard. To meet criminal case priorities and avoid underutilizing available judicial resources, the Criminal Master Calendar department assigns cases to open departments wherever possible.

Judicial resources become available for civil trials as criminal matters resolve or continue. Therefore, assigning shorter civil trials that are less than seven court days is easier. A complex, lengthy civil trial requires a match of several criteria to be assigned to a trial department on the trial assignment date.

Pre-assignment will depend on the number and complexity of pre-trial issues that require resolution, the anticipated length of trial, and the availability of an appropriate open trial department. In other words, a pre-assignment requires a match between the litigants' needs and the constantly changing availability of open civil trial departments.

Translating Causation from Epidemiology to Law: Bradford Hill and Beyond

By: William J. Lee

Across nearly all jurisdictions in California, other states, and at the federal level, analysis of the Bradford Hill criteria remains the gold-standard methodology by which epidemiological experts in litigation make their case for general causation (that a particular exposure generally causes or contributes to a particular injury).[1] In some jurisdictions, including in California, Bradford Hill can also be probative of specific causation (that a particular exposure actually caused or contributed to a particular injury in a specific person).[2]

For example, in a hypothetical pharmaceutical products liability case, a Bradford Hill analysis that demonstrates, *inter alia*, consistently elevated risk of cancer across multiple epidemiological studies can be used to establish that the drug can cause cancer (general causation) and, in some instances, that the drug actually caused cancer in a specific plaintiff (specific causation).

Accordingly, the impact of Bradford Hill in personal injury practice, and tort law generally, cannot be understated. It may come as a surprise, then, that Bradford Hill is often misinterpreted, misunderstood, and misapplied by key stakeholders including judges, lawyers, and even expert witnesses, which can compromise the admissibility, validity, and reliability of findings presented to the jury and establish questionable precedents moving forward.

Notwithstanding courts' reliance on Bradford Hill, this type of analysis is somewhat outdated and has remained largely unchanged in the nearly six decades since Sir Austin Bradford Hill first described his eponymous criteria in 1965.[3] Meanwhile, newer causal inference models by Rothman, VanderWeele, *et al*. that are potentially more plaintiff-favorable have been developed, widely published, and generally accepted in the peer-reviewed literature[4,5,6,7] but they have yet to make their way into the case law.

William J. Lee, J.D., M.S., MACE, Scientific Practice Group, Kershaw Talley Barlow, P.C., and the American College of Epidemiology

Jurisprudence has fallen behind the times with respect to causal inference in epidemiology,[8] leading jurists to inconsistently and improperly exclude expert testimony on the basis of alleged cherry-picking and other perceived errors.[9] Lawyers and epidemiologists must work together to accurately and precisely translate methods and principles to other stakeholders in a manner that ensures the integrity of the scientific process and access to justice for all litigants.

The Bradford Hill criteria are a set of guidelines used to determine whether an observed association between a potential risk factor and a health outcome is likely to be causal.[10] These criteria include nine key aspects: strength, consistency, specificity, temporality, biological gradient, plausibility, coherence, experiment, and analogy.

Strength refers to the magnitude of the association, while consistency addresses whether the finding is replicated across different studies and populations. Specificity focuses on whether a single exposure leads to a single outcome, whereas temporality ensures that the cause precedes the effect.

Biological gradient involves a dose-response relationship, and plausibility considers whether the association is biologically reasonable. Coherence checks if the association aligns with existing knowledge, experiment evaluates whether interventions can alter the risk, and analogy looks at similar associations in different contexts.

While the Bradford Hill criteria provide a useful framework for assessing causality, they are not rigid rules. Rather, they consist of factors that collectively help to build a case for causation. They emphasize that causality is not determined by any single criterion but by the overall weight of evidence. Epidemiologists use these criteria to evaluate the likelihood that an observed relationship is causal rather than coincidental or due to confounding factors.

Unfortunately, courts often misapply the Bradford Hill criteria as requirements in a checklist rather than guideposts to be considered, excluding certain experts for failing to demonstrate that a particular criterion or another has been satisfied.

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In fact, Sir Austin Bradford Hill warned against any bright-line rule:

> Here then are nine different viewpoints from all of which we should study association before we cry causation. What I do not believe – and this has been suggested – is that we can usefully lay down some hard-and-fast rules of evidence that *must* be obeyed before we accept cause and effect. None of my nine viewpoints can bring indisputable evidence for or against the cause-and-effect hypothesis and none can be required as a *sine qua non*. What they can do, with greater or less strength, is to help us to make up our minds on the fundamental question – is there any other way of explaining the set of facts before us, is there any other answer equally, or more, likely than cause and effect?[12, 13]

Moreover, courts have almost universally eschewed non-statistically significant results as inadmissible notwithstanding admonitions from the Federal Judicial Center, which publishes the "Reference Manual on Scientific Evidence," and best practices among epidemiologists to consider all available evidence of increased risk. For example, the United States Court of Appeals for the Fourth Circuit has established a gating factor that only statistically significant results may be used in a Bradford Hill analysis: "[A]pplying the Bradford Hill criteria to a set of data . . . the analysis requires a statistician to find a statistically significant association at step one before moving on to apply the factors at step two."[14] This gating factor, and the overreliance on statistical significance generally, is inconsistent with how Sir Austin Bradford Hill and modern epidemiologists think about statistical significance.

In his 1965 address, Bradford Hill warned epidemiologists about this very issue:

> No formal tests of significance can answer those questions [about causation]. Such tests can, and should, remind us of the effects that the play of chance can create, and they will instruct us in the likely magnitude of those effects. Beyond that they contribute nothing to the 'proof' of our hypothesis. ¶ Of course I exaggerate. Yet too often I suspect we waste a deal of time, we grasp the shadow and lose the substance, we weaken our capacity to interpret data and to take reasonable decisions whatever the value of P. And far too often we deduce 'no difference' from 'no significant difference'. Like fire, the X2 test [test of statistical significance] is an excellent servant and a bad master.[15,16,17]

Modern epidemiologists agree with Bradford Hill. The literature is replete with warnings against over relying on statistical significance because the systematic error introduced by inferential testing can exceed the random error such testing attempts to quantify.[18,19] Statistical significance relies on P-values to determine whether observed associations are likely due to chance, but this approach can be misleading. Systematic errors, such as biases in study design, data collection, or data analysis, can significantly distort results, rendering them less valid and reliable. For example, P-values might suggest a finding is significant when, in reality, systematic errors or confounding factors are driving the association. On the other hand, certain types of misclassification bias can spuriously attenuate otherwise statistically significant results to the null.[20] Therefore, while statistical significance is a useful tool, epidemiologists also routinely consider the broader context of study design, data quality, and potential biases to avoid misinterpreting results and to ensure robust and meaningful conclusions.

The causal inference landscape has evolved considerably since the Bradford Hill criteria were first described nearly six decades ago. Unfortunately, the judiciary has failed to consistently apply Bradford Hill's own guidance. It has also failed to keep up with newer causal inference models, creating a noticeable gap between the practice of epidemiology outside of litigation and its practice in the context of litigation. It is crucial that this gap be addressed by lawyers and epidemiologists who are best positioned to translate methods and principles in a manner that is consistent and rigorous. Effective advocacy for all litigants, especially plaintiffs, depends on it.

***

William J. Lee, J.D., M.S., MACE leads the Scientific Practice Group of Kershaw Talley Barlow, P.C., a nationally recognized plaintiffs' mass tort and class action firm. William is also a leading epidemiologist, an elected Member of the American College of Epidemiology (MACE), and Director of the American College of Epidemiology Research and Education Foundation. He can be reached at williamlee@ktblegal.com.

FOOTNOTES

[1] *See, e.g., Onglyza Prod. Cases* (2023), 90 Cal.App.5th 776, 781; *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102, 1116 (N.D. Cal. 2018); Hardeman v. Monsanto Co., 997 F.3d 941, 953 (9th Cir. 2021).

[2] *See, e.g., Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, fn. 12 (applying In re *Silicone Gel Breast Implants Prods. Liab. Litig.* (C.D.Cal. 2004) 318 F.Supp.2d 879, 893); In re *Silicone, supra*, 318 F.Supp.2d at 893 (applying Daubert v. Merrell Dow Pharms., Inc. (9th Cir. 1995) 43 F.3d 1311, 1320). "[A]ny properly-performed epidemiological study that finds a relative risk greater than 1.0 signifies that exposure to an agent increases the probability of contracting the disease. ¶ When statistical analyses or probabilistic results of epidemiological studies are offered to prove specific causation, however, under California law those analyses must show a relative risk greater than 2.0 to be 'useful' to the jury." *Id*. (quoting In re *Hanford Nuclear Reservation Litig.* (9th Cir. 2002) 292 F.3d 1124, 1134).

[3] Hill AB. The Environment and Disease: Association or Causation? *Proc R Soc Med.* 1965 May;58(5):295-300.

[4] Lash TL, VanderWeele TJ, Haneuse S, Rothman KJ. *Modern Epidemiology*. 4th ed. Philadelphia, PA: Wolters Kluwer; 2021.

[5] Höfler M. Causal inference based on counterfactuals. *BMC Med Res Methodol*. 2005 Sep 13;5:28. doi: 10.1186/1471-2288-5-28.

[6] VanderWeele TJ. Invited Commentary: The Continuing Need for the Sufficient Cause Model Today. *Am J Epidemiol*. 2017 Jun 1;185(11):1041-1043. doi: 10.1093/aje/kwx083.

FOOTNOTES continued on page 37

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[7] Rothman KJ, Lanes S, Sacks ST. The reporting odds ratio and its advantages over the proportional reporting ratio. *Pharmacoepidemiol Drug Saf.* 2004 Aug;13(8):519-23. doi: 10.1002/pds.1001.

[8] *But see guidance* in the *Reference Manual on Scientific Evidence*, which embraces a more modern approach to epidemiology including the probative value of non-statistically significant results. Federal Judicial Center. *Reference Manual on Scientific Evidence. 3rd ed*. Washington, DC: The National Academies Press; 2011. doi: 10.17226/13163.

[9] Lee W. Revisiting *Daubert*: Ensuring Equity and Integrity in the Admissibility of Scientific Testimony. *HPHR*. 2024 Jun 21; 85. doi: 10.54111/0001/GGGG1.

[10] Hill AB. The Environment and Disease: Association or Causation? *Proc R Soc Med*. 1965 May;58(5):295-300.

[11] *See, e.g.,* In re *Acetaminophen – ASD-ADHD Prod. Liab. Litig.,* No. 22MC3043 (DLC), 2023 WL 8711617 (S.D.N.Y. Dec. 18, 2023).

[12] Hill AB. The Environment and Disease: Association or Causation? *Proc R Soc Med.* 1965 May;58(5):295-300.

[13] Modern epidemiologists consider temporality the only required Bradford Hill criterion. Fedak KM, Bernal A, Capshaw ZA, Gross S. Applying the Bradford Hill criteria in the 21st century: how data integration has changed causal inference in molecular epidemiology. *Emerg Themes Epidemiol*. 2015 Sep 30;12:14. DOI: 10.1186/s12982-015-0037-4.

[14] *Lipitor Mktg. (Atorvastatin Calcium) v. Pfizer, Inc.,* 892 F.3d 624, 640-42 (4th Cir. 2018).

[15] Hill AB. The Environment and Disease: Association or Causation? *Proc R Soc Med.* 1965 May;58(5):295-300.

[16] A P-value tells you how likely it is to get results like yours if there was no real effect or difference. In other words, it helps you understand whether your findings are probably due to random chance or if they might be significant. A P-value ≤ 0.05 is generally considered statistically significant.

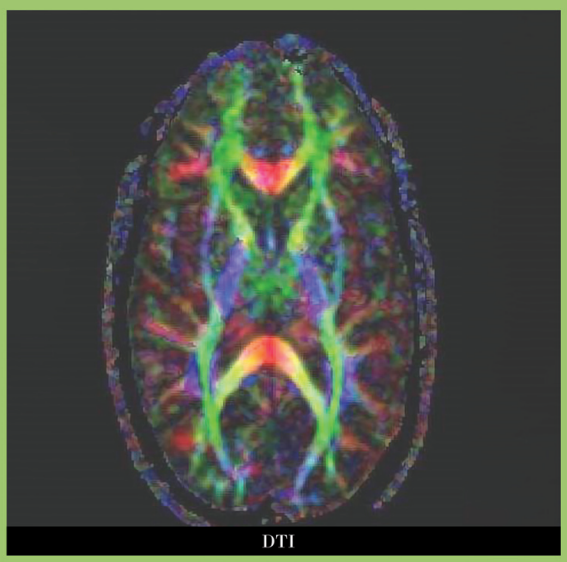
[17] A ❑2 (chi-squared) test is a statistical test used to determine if a statistically significant difference exists (based on P-value) between expected and observed counts in different categories or groups.

[18] Phillips CV, Goodman KJ. The missed lessons of Sir Austin Bradford Hill. *Epidemiol Perspect Innov.* 2004 Oct 4;1(1):3. doi: 10.1186/1742-5573-1-3.

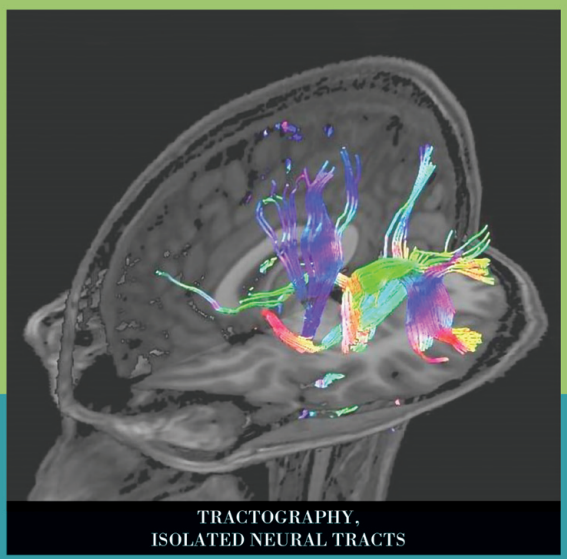
[19] Rothman KJ. Six persistent research misconceptions. *J Gen Intern Med.* 2014 Jul;29(7):1060-4. doi: 10.1007/s11606-013-2755-z.

[20] Wacholder S, Hartge P, Lubin JH, Dosemeci M. Non-differential misclassification and bias towards the null: a clarification. *Occup Environ Med.* 1995 Aug;52(8):557-8. doi: 10.1136/oem.52.8.557.

Standard MRI



DTI



TRACTOGRAPHY,
ISOLATED NEURAL TRACTS

DTI *and* TBI

DTI stands for diffusion tensor imaging, a type of medical resonance imaging (MRI) scan.

The DTI MRI is more sensitive than regular MRIs, so it will give you more details about a head injury, whether an explosion, anoxic injury, motor vehicle accidents, fight, fall, or another violent event was experienced. The DTI validates the injury. So, if the brain trauma does exist a DTI is your best option to detect an injury. It's more accurate than the PET Scan, CAT Scan or SPECT for determining the presence and severity of your traumatic brain injury. Particularly in cases where a CT or even a normal MRI doesn't show abnormalities, the DTI can show the real impact of your high-velocity accident.

The DTI software runs on MRI machines, with a 3T magnet at University Medical Imaging. It runs concurrently with regular MRI scans. DTIs have been used long enough here at University Medical Imaging, with a solid preponderance of evidence to hold up in court. If you are seeking a DTI MRI, a doctor must send a medical referral to us. **Contact us at 916-922-6747**

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Member Verdicts & Settlements

CCTLA members are invited to share their verdicts and settlements: Contact Jill Telfer, editor of *The Litigator*, jtelfer@telferlaw.com, for preferred sample format. The next issue of *The Litigator* will be the Winter issue, and submissions need to be sent to Jill before October 5, 2024.

VERDICT: $9,644,700.26

Deutsch v. Zegers
Case No: 34-2020-00277300-CU-PA-GDS

Jury Trial: Verdict - $9,644,700.26 reduced for comparative of 10% on the Plaintiff, for a net judgment of $8,680,230.23.

Plaintiff Christopher Deutsch was represented by **CCTLA members Roger A. Dreyer, Esq., and Dylan A. Dreyer, Esq. of Dreyer, Babich, Buccola, Wood, Campora, LLP, and Seth R. Bradley of Eason & Tamborini.**

Defendant Christopher Zegers was represented by Natalie P. Vance, Esq., and Kevin J. Gramling, Esq., of Klinedinst, PC.

The matter proceeded to jury trial on April 18, 2024, in Dept. 15 in Sacramento County before the Honorable Jeffrey Galvin. The jury trial lasted 15 court days, with 26 witnesses, both expert and lay, testifying. Closing arguments were delivered on May 10, 2024, and May 13, 2024, and the matter was given to the jury on May 13, 2024. The jury deliberated for two days before reaching its verdict. During trial, both alternates were seated, and when a third juror could not continue, the parties stipulated to an 11-person jury with Plaintiff still needing nine votes to prevail. The verdict was obtained by a 9-2 vote.

The case concerned a motor vehicle v. motorcycle collision that occurred on westbound I-80 on the causeway between Davis and Sacramento on July 1, 2019. At trial, Defendant, who was driving a 2010 Prius, disputed liability and argued the collision took place as a result of Plaintiff "lane splitting" and that Plaintiff rode his motorcycle into the far-left lane that the Defendant was occupying and collided with his vehicle.

Plaintiff denied he was "lane splitting" and claimed the collision took place when Defendant's vehicle crossed into the middle lane where Plaintiff was riding and struck him on his left side.

During trial, the sole witness testified by deposition that the Plaintiff had lane split between her and another vehicle and continued to drive straight within the far-left lane, when the Defendant moved to the right within the lane and struck the Plaintiff and his motorcycle. The witness testified that the collision occurred while both vehicles were within the far-left lane and to the left of the white dashed line.

The Defendant testified on direct examination that he only "drifted" to the right in order to look ahead at congested traffic and denied any responsibility for the collision, blaming it solely on the Plaintiff. On cross-examination, Defendant Zegers testified there was a gap in traffic in the lane to his right when he made the decision to move his car to the right, admitting he failed to signal, check his mirrors or look over his shoulder, which is why he never saw the Plaintiff on his motorcycle before impact.

Plaintiff's expert testimony and evidence at trial was that Plaintiff's injuries were directly and casually due to Defendant's negligence operating his motor vehicle when he volitionally moved his vehicle to the right, without checking his mirrors or warning of his movement, and struck the Plaintiff. Plaintiff and his treating physicians testified he sustained a shoulder injury and comminuted fractures in his left foot that developed into Complex Regional Pain Syndrome (CRPS). The physical evidence demonstrated that the left foot peg had been driven into his foot, which badly fractured his foot in multiple places. Plaintiff ultimately underwent a left shoulder surgery and five foot surgeries during the next four years, which rendered him non-weight bearing for significant periods of time and subsequently resulted in back and knee complaints from compensating for his left foot pain.

Plaintiff presented evidence from numerous Kaiser physicians regarding his extensive treatment over the past five years. These physicians spanned multiple disciplines and established continuous and consistent care and treatment provided to the Plaintiff for his left foot and shoulder injuries.

After five surgeries to his left foot failed to reduce his pain, and with his Kaiser doctors at a loss for how to proceed with effective pain reduction, Plaintiff elected to treat outside of Kaiser. During the course of this treatment, Plaintiff was diagnosed with a right knee meniscal tear, annular disc tear at L5-S1, and complex regional pain syndrome (CRPS) in his left foot.

In opening statements, Defendant claimed that the evidence will demonstrate that Plaintiff's pain in his left shoulder, back, and right knee were not casually related to the subject incident; however during cross-examination of their defense medical expert orthopedic surgeon, he related all three areas of injuries and the continued pain in Plaintiff's foot to the subject collision.

Additionally, Defendant claimed that Plaintiff's foot pain could be resolved with just one additional surgery and his future medical care only required medication as well as foot orthotics and injections starting in a decade. On

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cross-examination of the Defendant's pain management and rehabilitation expert, he testified Plaintiff would require multiple trips a year to a physician for treatment as well as significant physical therapy for the rest of his life in addition to medication and injections. Additionally, during the cross-examination of the Defendant's podiatric expert, he testified Plaintiff would require at least three more surgeries, if not more, as his foot condition would very likely continue to deteriorate over time.

All of the Defendant's medical experts testified, as did Plaintiff's medical experts, that the Plaintiff would have chronic pain in his left foot for the rest of his life. Plaintiff's medical experts also testified that Plaintiff's foot condition would continue to deteriorate over time and lead to further problems orthopedically to other parts of his body which would require significant medical treatment for the rest of his life. Plaintiff's pain management expert testified Plaintiff's best hope for appreciable pain reduction in his left foot was a spinal cord stimulator.

During trial, Plaintiff established that he was in good health and physically active outdoors and with his two young children prior to this incident. Plaintiff also presented evidence by way of family members and colleagues that proved the nature and extent of his losses. His mother, daughter, girlfriend, and ex-mother-in-law testified to his physical and mental state prior to and after the date of this incident, including his significant physical limitations and pain.

His current supervisor and former foreman also provided testimony as to the Plaintiff's skill and work ethic as a plumber before the incident and his efforts to return to work even after missing more than 600 days due to his injuries. Despite his best efforts to return to his work, his current supervisor testified that Plaintiff now was unable to perform his job without having another employee present to do any physical requirements, and his ability to continue to do his job as a plumber was coming to an end. This testimony was compelling as to the losses suffered by Plaintiff Deutsch and the employment and everyday limitations he suffered. Experts also provided testimony as to Plaintiff's future harms and losses as his injuries would make him unable to compete for jobs in the open market or provide household services to his family.

Prior to the trial, Plaintiff, through counsel, demanded the Defendant's $2.1mm policy limits with State Farm. The State Farm claims representatives were provided with all of his medical records and information regarding him not being able to work and needing future surgery. The policy limit demands were rejected, and State Farm offered $374,100 to settle the case. As a result, the lawsuit was filed and Plaintiff made a CCP section 998 demand in May of 2020 for $1,295,000, some $800,000 under the available limits.

During the course of the litigation, Defendant, through State Farm, continued to contest liability and never tendered the limits available. Plaintiff's counsel's position was that State Farm had committed bad faith in its representation of the Defendant. House Counsel for State Farm was substituted out for new counsel in February of 2024. On the eve of trial, Defendant made a CCP 998 offer for $8,000,000, nearly four times the policy limits. Plaintiff elected to go to trial against that statutory offer, receiving an award in excess of that offer and far more than the May 2020 statutory demand to settle.

The jury verdict determined that Defendant's conduct on July 1, 2019, was a substantial factor in causing Plaintiff's injuries and awarded damages in the amount of $9,644,700.26. The Jury verdict also determined that Plaintiff was 10% comparatively responsible, which resulted in the final judgment amount of $8,680,230.23. Plaintiff filed his cost bill for expert and trial costs of $302,000 and prejudgment interest of nearly $4mm.

Defendant has filed a motion to tax expert costs and prejudgment interest, claiming that serving the complaint with the statutory demand did not give State Farm time to evaluate and respond to the demand. House Counsel had requested to conduct discovery and a DME before responding and asked for an extension on the 998 demand. Plaintiff rejected that request, taking the position that State Farm had all the information necessary to determine that the 998 of $1,295,000 was reasonable and less than the Defendant's limits and therefore should have paid that sum when it had the opportunity to do so.

VERDICT: $603,609

Dr. Timothy Jang v. County of Los Angeles
Case No. BC587400Dr. Jang v. County of Los Angeles
Whistleblower retaliation after reporting unlawful discrimination/retaliation and Medicare reporting violations at Harbor-UCLA Medical Center

Verdict (P) $603,609: $342,038 in past economic damages, $111,571 in future economic damages, $100,000 in past non-economic damages, $50,000 in future non-economic damages, plus post-judgment interest and approximately $1,500,000 or more in attorneys' fees and costs.

Plaintiff's Counsel: **CCTLA member Lawrance A. Bohm, Lead Trial Counsel,** and Kelsey K. Ciarimboli**,** Bohm Law Group, Inc., Marina Del Rey and San Diego; Brandon P. Ortiz, Ortiz Law Office, Inc., Santa Monica.

Defendant's Counsel: David Weiss and Nick Weiss, David Weiss Law, Los Angeles.

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Member Verdicts & Settlements

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Court: Honorable Jon R. Takasugi, Dept. 17, Los Angeles County Superior Court

Trial Dates: July 31, 2023 to August 30, 2023

Case Summary: In 2004, Timothy Jang, MD, began working for the County of Los Angeles in connection with his simultaneous employment at UCLA as an assistant professor of emergency medicine. In 2008, Dr. Jang was recruited from Olive View-UCLA medical center to join the medical staff at Harbor-UCLA ("Harbor") Medical Center in Torrance, CA.

Dr. Jang was at the time recognized to be a "master teacher" of emergency ultrasound. He was hired to be the director of the Emergency Ultrasound service at Harbor. Dr. Jang would also serve as the Emergency Ultrasound Fellowship Program director. Dr. Jang selected, trained, taught, and mentored physicians seeking fellowship level instruction in ultrasound. Fellowships are generally sought by doctors immediately following successful completion of a residency training program. Selection for fellowships is extremely competitive. Generally, only the top resident candidates are offered such a position at at top tier program like UCLA medical school.

As a term of hiring, Dr. Jang was promised a minimum of one shift-relief credit for any year he had at least one doctor enrolled in the Emergency Ultrasound Fellowship. This promise was specifically included in Dr. Jang's offer letter. No other physician employed at Harbor had any such promise of shift-relief in their hiring letter. "Shift-relief" reduces the number of mandatory clinical emergency room shifts assigned to each faculty member in exchange for additional administrative work from assignment of non-clinical duties, like directing a fellowship. Emergency medicine faculty work 40 hours per week in a mix of clinical and administrative time depending on administrative responsibilities, if any.

From 2008 until present day, Dr. Jang has received positive performance evaluations for his work at Harbor. He also received all workforce-wide raises and benefits of employment. Regarding UCLA only, Dr. Jang received all faculty-related promotions, progressing from assistant professor to full professor.

In 2013, Dr. Roger Lewis was internally promoted to be the Emergency Department chair. Within of a month of Dr. Lewis's promotion, Dr. Jang reported alarming problems with the ultrasound equipment, including outdated machines, broken machines, dangerously few operational machines, and failure to maintain records sufficient for Medicare compliance. Almost immediately thereafter, Dr. Jang was targeted by Dr. Lewis for negative treatment in the workplace.

Initially, Dr. Lewis threatened to remove all ultrasound machines if Dr. Jang continued to report problems. Dr. Lewis pressured Dr. Jang to cease reporting the ultrasound issues because the problems were "never going to be fixed." In October 2013, Dr. Jang submitted a "sentinel event" report to Dr. Lewis regarding a workplace injury to a patient's visiting family member who slipped in a "mountain of alcohol foam" on the floor and suffered a dislocated elbow. The elbow went untreated for seven hours after orthopedic residents' repeatedly failed attempts to put the elbow back in place. Dr. Jang specifically complained that the treatment was "below the standard of care."

One month later, when Dr. Jang attempted to hire fellowship candidates in November 2013, Dr. Lewis commented that he did not want Dr. Jang to hire any "foreign doctors." (This comment was disturbing to Dr. Jang because Dr. Lewis was also outspoken that candidates from historically black colleges were "weaker" than candidates from other U.S. programs).

At the time, the list of applicants had no candidates educated outside of the US. The only "foreign" attribute of the candidates was the ostensibly foreign sounding names of all the applicants save one who had an Anglo-Saxon last name. As instructed, Dr. Jang submitted three applicants for final interview with Dr. Lewis. All were top-rated candidates from prestigious U.S. medical schools. Dr. Lewis ignored numerous requests to interview the remaining candidates, who ultimately were forced to choose other fellowship programs. As a result, Dr. Jang was not able to have an additional fellow for the 2014/2015 school year. Although Dr. Jang had a returning fellow, he normally would have two fellows each year.

In January 2014, Dr. Jang attended an Emergency Department faculty meeting led by Dr. Lewis. The meeting was audio-recorded. During the meeting Dr. Lewis commented that he had "tremendous advantage as an old white male" as compared to others in the department. Dr. Lewis then asked another old white male physician to confirm his belief. Some doctors at the meeting laughed at the comment. Dr. Jang did not. Instead, Dr. Jang obtained the recording of the meeting and later complained to both UCLA and the County of Los Angeles about the comment which he felt was improper.

In April 2014, Dr. Lewis announced that "shift-relief" would no longer be provided to fellowship directors to offset the additional work associated with the position. This change in policy only impacted Dr. Jang because he was the only non-vice chair fellowship director. This change also conflicted with Dr. Jang's employment offer letter, which included one shift-relief so long as he had a fellow enrolled

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Share your experiences, verdicts, lessons learned

CCTLA is seeking legal-themed articles for publication in its quarterly publication, *The Litigator,* which presents articles on substantive law issues across all practice areas. No area of law is excluded. Practice tips, law-practice management, trial practice including opening and closing arguments, ethics, as well as continuing legal education topics, are among the areas welcomed. Verdict and settlement information also welcome.

The Litigator is published every three months, beginning in February each year. Due to space constraints, articles should be no more than 2,500 words, unless prior arrangements have been made with the CCTLA office.

The author's name must be included in the format the author wishes it published on the article. Authors also are welcome to submit their photo and/or art to go with the article (a high-resolution jpg or pdf files; no website art, which is too small).

Please include information about the author (legal affiliation and contact and other basic pertinent information) at the bottom of the article.

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in his program. Dr. Jang immediately complained about the discriminatory treatment and unfair changing of his terms and conditions of employment to no avail. During meetings with Dr. Lewis about the new "no shift-relief" policy, Dr. Lewis suggested that he "could" eliminate the fellowship all together such that Dr. Jang had no basis for shift relief.

Dr. Jang brought the issue to his union, United Association of Physicians and Dentists (UAPD), and the grievance process followed. In September 2014, Dr. Lewis served as the grievance officer over his own decision and concluded he did nothing wrong. During the hearing, Dr. Lewis threatened to pull funding for Dr. Jang's ultrasound fellowship program if he did not withdraw his grievance. Dr. Jang's union representative, Jake Baxter, immediately reported the threat to County of Los Angeles Human Resources and the chief medical officer of Harbor as unlawful retaliation and bullying.

After being threatened at the grievance hearing, Dr. Jang complained about race discrimination and retaliation by Dr. Lewis. Dr. Jang specifically reported the "old white male" comment to numerous leaders at the county and UCLA. The same month Dr. Jang also appealed his grievance to the next step.

The following month in October 2014, Dr. Jang learned that Dr. Lewis would no longer fund a second fellow based on a new policy that "only one ultrasound fellow" was needed. This move precisely corresponded to the threat made by Dr. Lewis a month earlier. In response, Dr. Jang wrote detailed complaints about his medical whistleblower concerns, race discrimination, and retaliation. These letters were sent to the County Equity Office and president of Harbor Medical Center. Dr. Lewis was notified of these complaints in November 2014.

In January 2015, Dr. Jang and his representative attended the final step of the grievance process. This time the hearing officer was the old white man who promoted Dr. Lewis into his position as chair. Dr. Jang was informed that his equity concerns about race and retaliation would not be considered. The process concluded without any discussion of compromise. The grievance was summarily denied.

Following the denial of his grievance, Dr. Jang was passed over for promotion to "senior physician." Historically, promotion to "senior physician" was awarded based on seniority with the County of Los Angeles. In or around March 2015, a senior physician retired, leaving a vacancy and opportunity for promotion. Without any announcement and contrary to the "seniority" based process, Dr. Lewis gave the promotion to a physician who was eight years less senior than Dr. Jang (Dr. Jang learned of this promotion many months after it happened).

In September 2015, another senior physician retired, leaving a second vacancy and promotional opportunity. Once again, Dr. Jang was passed over for promotion for a less senior doctor with 10 years less seniority (Dr. Jang did not learn about this promotion until discovery from litigation which commenced in August 2015). In November 2015, another senior physician retired. Dr. Jang was passed over again in favor of a doctor that was essentially brand new to the County. Dr. Jang learned of the promotion from the doctor given the position after he asked Dr. Jang about the benefits of the "senior position" job, which he assumed Dr. Jang possessed due to his long seniority.

In December 2015, Dr. Jang was encouraged to apply for another senior physician opening by Dr. Lewis's administrative assistant because she did not think it was fair Dr. Jang was being passed over repeatedly. When Dr. Jang applied, he was told that a "new policy" was just instituted whereby the item would only go to people managing numerous employees. Dr. Jang never received any promotion to senior physician. The cost of the failure to promote Dr. Jang was approximately $50,000 in additional annual compensation.

Positions of the Parties: The County of Los Angeles asserted that all conduct by Dr. Lewis was not intended to be racially insensitive or retaliatory. Further, the county asserted that Dr. Jang pursued his reports as a ploy to get money and not because he cares about patients or his fellowship. The county also asserted that all actions were within its inherent judgment and power to manage its workforce (aka: business judgment rule). The county lauded Dr. Lewis as a legend committed to diversity and patient safety. The court excluded complaints from other doctors also alleging medical whistleblower retaliation and misogynistic comments (such as referring to a female gynecologist named Dr. Brotherton as "Dr. Beaverton").

The jury found for Dr. Jang on both of his retaliation claims and awarded him $603,609: $342,038 in past lost earnings, $111,571 in future lost earnings, $100,000 for past emotional distress, and $50,000 for future emotional distress for a total of $603,609. Plaintiff will also be seeking equitable relief from the court to award Dr. Jang the senior physician role and reinstate his shift-credit. The jury found that Dr. Jang reported unlawful discrimination/retaliation and disclosed Medicare reporting violations, and the county retaliated against Dr. Jang because of his reports. The jury found for Dr. Jang on all claims and denied the county's same decision affirmative defense.

Plaintiff's Experts: Charles R. Mahla, Ph.D., Sacramento; specialty: economics

Defendant's Experts: None

Notable Cites

Continued from page 2

not have a statutory or common law duty to conduct criminal background checks on its passengers.

ISSUE: Does a rideshare company owe a legal duty to their drivers to screen riders for criminal backgrounds?

RULING: Affirmed

REASONING: The court found that Al Shikha could not establish that Lyft had a legal duty to its drivers to conduct criminal background checks on all riders seeking to use the service.

To establish a cause of action for negligence, a plaintiff must prove that the defendant had a duty of care, that the duty was breached, and that said breach was the proximate or legal cause of the injury. While there is no general duty to protect others from injury, there is an exception if you can establish that a special relationship existed between the parties.

However, even if a special relationship exists, there are several considerations that can limit the duty. These factors include foreseeability; the connection between the plaintiff and the defendant; preventing future harm; and the extent of the burden and insurance availability.

In this case, there was a special relationship between Al Shikha and Lyft, but the court analyzed the various policy considerations of imposing a duty on a rideshare company. The Court found that imposing a duty on a rideshare company to do criminal background checks on all riders would be highly burdensome, and Plaintiff could not establish heightened foreseeability necessary to impose such a duty.

A.L. v. HARBOR DEVELOPMENTAL DISABILITIES FOUNDATION

2024 2DCA/2 California Court of Appeal,
No. B322729 (May 30, 2024)

REGIONAL CENTER HAD NO DUTY TO PROTECT DISABLED PERSON FROM THIRD-PARTY NOT EMPLOYED BY THEM

FACTS: Plaintiff A.L. is an adult with mental and physical disabilities which she has had since birth. She was a consumer with the Defendant Harbor Developmental Disabilities Foundation Regional Center since she was an infant. In 2018, she was living with her mother but attended an educational day program every weekday; she was transported to and from the program by Round Trip. Round Trip was a third-party vendor contracted with Harbor Developmental Disabilities Foundation to transport its members.

In May or June of 2018, a driver employed by Round Trip raped and impregnated A.L. while transporting her. In February 2019, A.L., through her mother acting as her guardian ad litem, sued Round Trip, the driver and Harbor Developmental Disabilities Foundation. The suit alleged that the Regional Center negligently hired Round Trip as a vendor and that the center negligently monitored Round Trip's compliance with their

contract.

The Regional Center filed a motion for summary judgment on the ground that it did not owe a duty to prevent sexual assault by a vendor's employee. The trial court granted the motion. A.L. appeals that order.

ISSUE: Does a Regional Center owe a duty to protect their clients from sexual assault by an employee of a third-party vendor?

RULING: Affirmed

REASONING: In order to maintain a case for negligence, a plaintiff must prove that they are owed a legal duty. Because Regional Center had some control over the protection of the disabled participants, a special relationship exists, giving rise to a legal duty to protect. However, whether Defendants owe a duty is a matter of public policy.

The court applied the factors set forth in *Rowland v. Christian* and determined that public policy warranted limiting the Regional Center's duty to only when the employee has a known propensity for sexual assault. In the instant case, the Regional Center had no prior knowledge or awareness that the employee would engage in sexual assault. The employee had no prior criminal history; no prior questionable behavior while employed. Therefore, the court found that no duty existed under those circumstances.

AUDISH v. MACIAS

2024 4DCA/1 California Court of Appeal,
No. D081689 (June 6, 2024)

IS IT AN ABUSE OF DISCRETION TO ADMIT EVIDENCE OF PLAINTIFF'S FUTURE ELIGIBILITY FOR MEDICARE AND AMOUNTS MEDICARE WOULD PAY?

FACTS: Plaintiff David Audish and Defendant David Macias were involved in an automobile collision. At trial, the jury found that Audish and Macias both operated their vehicles negligently and that each party's negligence was a substantial factor in causing harm to Audish.

Prior to trial, Audish sought to exclude evidence that he had, or would have, medical insurance. The trial court granted

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the motion in part and denied it in part. The court stated that an expert witness with a proper foundation could testify about the reasonable value of medical care based on the rates insurers pay for medical treatments.

At trial, a nurse and lifecare planner testified as a witness on Audish's behalf regarding future medical costs. On cross-examination, Defense counsel was permitted to ask whether Audish would be eligible for Medicare at age 65, to which she replied, "I assume so." The nurse also agreed with defense counsel that her numbers did not account for what Medicare would pay.

The jury found Audish suffered $65,699.50 in damages, including $29,288.94 for past medical expenses, $3,620 for past non-economic losses, and $32,790.56 for future medical expenses, and it assigned each party 50 percent of the responsibility for these losses.

Audish appealed, contending the trial court abused its discretion by admitting evidence that he would have Medicare medical insurance at the age of 65.

ISSUE: Did the trial court violate the collateral source rule by admitting evidence that Plaintiff would have Medicare insurance at age 65?

RULING: Affirmed

REASONING: The appellate court concluded the trial court acted well within the bounds of its discretion when it permitted the defense to question Audish's life-care planner briefly about his future eligibility for Medicare and the anticipated costs of his recommended medical treatments if he were to obtain Medicare coverage. The Court found that the evidentiary rulings did not violate the collateral source rule or amount to an abuse of discretion.

The Court cited the cases of *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308 and *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163 in its opinion that the trial court did not abuse its discretion by admitting the limited evidence at issue about Audish's future eligibility for Medicare and the expected amounts Medicare might pay for Audish's recommended future medical services.

They noted that multiple courts had concluded, under similar circumstances, that it is permissible—or even necessary—for a trial court to admit evidence concerning a tort plaintiff's future eligibility for health insurance and the anticipated amounts the insurer would be expected to pay for the patient's future medical needs—evidence that is relevant to the reasonable value of future medical care.

DOWNEY v. CITY OF RIVERSIDE

2024 California Supreme Court,
No. S280322 (July 22, 2024)

PLAINTIFFS ASSERTING BYSTANDER EMOTIONAL DISTRESS CLAIMS ARE NOT REQUIRED TO SHOW CONTEMPORANEOUS PERCEPTION OF THE CAUSAL LINK BETWEEN THE CONDUCT AND THE INJURY

FACTS: Plaintiff Jayde Downey was giving driving directions to her daughter Malyah Vance over cell phone when her daughter was severely injured in a car crash. Downey heard the collision and its immediate aftermath, but she could not see what had caused it.

After the crash, Downey sued the driver of the other car involved in the collision. She also sued the City of Riverside and Ara and Vahram Sevacherian, the owners of private property adjacent to the intersection where the crash occurred. Among other things, the complaint sought recovery for negligent infliction of emotional distress on Downey, who suffered emotional trauma as a result of hearing her daughter's accident occur in real time.

The city and the Sevacherians demurred to the complaint. They argued that Downey could not allege a negligent infliction of emotional distress claim against them because at the time of the collision she was not aware of how their alleged negligence had caused the collision.

Agreeing with the defendants, the trial court sustained the demurrers without leave to amend. It explained that the complaint's allegations were "insufficient to show that Downey had a contemporaneous awareness of the injury-producing event — not just the harm Vance suffered, but also the causal connection between defendants' tortious conduct and the injuries Vance suffered."

Downey appealed and argued that it was unnecessary for her to show contemporaneous awareness of the defendants' tortious conduct to state a claim for negligent infliction of emotional distress.

In a divided decision, the Court of Appeal rejected the argument. The court concluded that Downey was not entitled to recover emotional distress damages against these defendants unless at the time of the crash she was aware of a causal connection between her daughter's injuries and the defendants' alleged negligence in maintaining the intersection.

The California Supreme Court thereafter granted review.

ISSUE: Are plaintiffs asserting bystander emotional distress claims required to show contemporaneous perception of the causal link between the defendants conduct and the injury?

RULING: Reversed and remanded.

REASONING: The court found that neither precedent nor considerations of tort policy support requiring plaintiffs asserting bystander emotional distress claims to show contemporaneous perception of the causal link between the defendant's conduct and the victim's injuries.

Downey alleged that when she was on the phone with her daughter, she heard metal crashing against metal, glass shattering, and tires dragging on asphalt — from which she knew immediately that her daughter had been in a car accident. Downey has also alleged that she understood that her daughter was seriously injured because she could no longer hear her after the crash, and a stranger who rushed to the scene told her to quiet down so that he could find a pulse.

Precedence does not require Downey to allege that she was aware of how the defendants may have contributed to that injury. The Court of Appeal erred in concluding otherwise.

Notable Arbitration Win via Court of Appeals

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SEPTEMBER 2024
Tuesday, Sept. 10
Q & A Problem Solving Lunch - 12 noon - CCTLA Members Only - Zoom

OCTOBER 2024
Tuesday, Oct. 8
Q & A Problem Solving Lunch - 12 noon - CCTLA Members Only - Zoom

Friday, Oct. 4
CCTLA Liens Seminar – 10 a.m. to 12 noon
Topic: Everything You Never Wanted to Know About Liens and More II
Speakers: Dan Wilcoxen, Don deCamara, John Rice and Chris Viadro
Location: McGeorge School of Law

NOVEMBER 2024
Tuesday, Nov. 12
Q & A Problem Solving Lunch - 12 noon - CCTLA Members Only - Zoom

DECEMBER 2024
Wednesday, Dec. 4
Annual Meeting & Holiday Reception & Installation
of the 2025 Officers and Board
5:30 to 7:30 p.m. at The Sutter Club

Tuesday, Dec. 10
Q & A Problem Solving Lunch - 12 noon - CCTLA Members Only - Zoom

CCTLA Calendar of Events