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Court Tackles Scheme to Duck 'Howell' Medical Damages Rule

In August 2011, the California Supreme Court decided *Howell v. Hamilton Meats & Provisions, Inc.* and shook up how courts figure medical damages in personal injury cases. The court held that an injured plaintiff whose medical expenses are covered by insurance can't win more in damages than his health insurer actually paid his doctors and hospitals. The much larger amount those doctors and hospitals billed the plaintiff is irrelevant.

Attorneys who represent injured plaintiffs complain that, in practice, the ruling shrinks awards for pain-and-suffering damages in addition to medical damages because juries often base the first on the second. Plaintiffs attorneys have been looking for ways to get around the ruling ever since.

Earlier this month, the state Court of Appeal in Los Angeles threw a roadblock in the way of one of those avoidance maneuvers. In *Dodd v. Cruz*, the court ruled essentially that a plaintiff can't hide the amount the provider accepted as payment in full though a sale of the lien to an intermediary.

The case grew out of an auto accident in which the plaintiff injured his shoulder. He had his rotator cuff repaired at a surgery center, which billed between $40,000 and $50,000 for the procedure. Payment was secured by a lien the plaintiff gave the center against his future lawsuit recovery. On the day of the surgery, the center sold the lien to a "factoring" company called Medical Finance Inc.

Although the factor purchased the lien "at a discount," it demanded to be paid the full "book value" of the surgery center's bill "regardless of what the court or jury decides is the reasonable costs," according to the opinion.

When the auto accident defendant subpoenaed the factoring company for documentation regarding the assignment of the surgical center's lien, the factor refused to comply with the subpoena. A trial court judge ruled the information was irrelevant, quashed the subpoena and imposed sanctions of $5,600 on the defendant.

Ironically, the sanctions turned out to help the defense. A judge's mid-litigation discovery order cannot be appealed, but sanctions over $5,000 can be appealed immediately, according to the Code of Civil Procedure. In this case, the appellate court determined it had to review the order to quash the subpoena because it was "inextricably intertwined" with the sanctions.

The appellate court held the trial judge had abused his discretion by preventing the defendant from discovering three documents related to the lien and the factor's contract.

It noted that "the scope of permissible discovery is very broad" and "is equally applicable to … a nonparty as it is to parties in the pending suit." The information discovered does not necessarily have to be admissible at trial, but only appear "reasonably calculated to lead to the discovery of admissible evidence."

While the total amount of the surgery center's bill may not be relevant under *Howell*, documents in this case about the factor and the lien could well lead to discovery of admissible evidence, the court said.

They could, for example, show what the center "believed was the reasonable value of its services, apart from its calculation of the expense and risk of collection." Or an expert could consider the discounted amount the center accepted to help him form his opinion about reasonable value. Finally, the defendant could use the documents about the factor's "collection activity and policies and procedures" to support her claim that the plaintiff is not required to pay the total bill.

There is another irony in the case. According to the opinion, the factoring company's vice president is the brother of a doctor who is a limited partner in the surgery center. And the plaintiff's attorney, Michael D. Waks, also is the president of the factoring company. The attorney's double role could mean he has a conflict of interest in the case, the court said in a footnote.

New Law for 2014 Extend Employee Protections and More

Each new year in California brings scores of new laws, and 2014 is no exception. Gov. Jerry Brown signed 800 bills into law last year, with most having taken effect Jan. 1. Among them are laws to raise the minimum wage — but not till July — and to toughen penalties for violating some wage and benefit rules.

A set of three bills provide what has been described as "the strongest anti-retaliation protections for immigrant workers in the country." A provision in one of them declares that California lawyers can be disciplined for reporting or threatening to report an undocumented person's immigration status. Meanwhile, another new law allows undocumented aliens to become California lawyers themselves.

Here are brief descriptions of new laws of interest to businesses and litigants:

EMPLOYMENT

Immigration Status — A trio of new laws protect illegal immigrants from disclosure or threats by employers. AB 524 targets so-called "wage theft" against undocumented workers by broadening the definition of criminal extortion by threat or fear to encompass threats to report immigration status. AB 263 and SB 666 toughen prohibitions against retaliation for filing or attempting to file a complaint about a violation of the Labor Code to include complaints about unpaid wages or local law violations. The laws extend those protections to undocumented workers, and SB 666 declares that a retaliating employer who reports or threatens to report immigration status could lose its business license. AB 263 further prohibits "unfair immigration-related" practices, such as demanding more documentation than federal law requires.

Whistleblowers — SB 496 extends existing whistleblower protections to employees who report suspected employer wrongdoing to supervisors, not just law enforcement. AB 524 and SB 666 also broaden whistleblower protection in some ways.

Employee Lawsuits — Finally, AB 263 and SB 666 make it easier for employees to sue employers over Labor Code violations by declaring the employees do not need to first exhaust administrative remedies before the state Labor Commission.

Attorneys Fees — If an employer wins in a suit over unpaid wages or benefits, he now can collect attorneys fees only if he can show the employee filed the suit in bad faith, according to SB 462.

Sexual Harassment — Reversing an appellate ruling from 2011, SB 292 declares that in a sexual harassment lawsuit under the Fair Employment and Housing Act, the plaintiff does not have to prove the alleged harassment was motivated by sexual desire.

Job Bias — AB 556 adds "military veteran" to the list of employees protected by California's broad anti-discrimination Fair Employment and Housing Act. But the new statute does allow employers to ask about a hire's military status in order to award a veteran's preference.

Victims — Victims of crimes gain new job protections under two new laws. SB 400 prohibits an employer from taking action against a stalking victim who takes time off to deal with associated problems. It also bans discrimination against an employee who is the victim of stalking, domestic violence or sexual assault. SB 288 protects victims of many serious crimes from adverse employment actions for taking time off for court appearances.

Dismissed Convictions — SB 530 prohibits employers from asking job applicants about dismissed or sealed convictions or arrests or using such information in employment decisions.

LITIGATION

Motion to Compel — A litigant dissatisfied by his opponent's response to interrogatories, demands for documents or requests for admissions has 45 days from receiving the unsatisfactory response to move to compel more. AB 1183 makes clear the response must verified if that time clock is to start running.

Privilege — AB 267 extends the attorney-client privilege to cover communication between a lawyer referral service and someone who consults the service in search of an attorney or legal advice.

Judgment Debtor— SB 551 prohibits a judgment creditor from naming a judgment debtor whose liability has ceased on an application for a writ of execution or renewal of judgment.

Parole Evidence — The rule against using extrinsic evidence to explain a written agreement now covers trust instruments as well as contracts, deeds and wills, according to AB 824.

Dog Parks — A local public entity that owns a dog park is not liable for injuries to a person or pet caused by a dog in the park, according to AB 265.

MOTOR VEHICLES

Passing Bicycles — Drivers passing bicyclists must stay at least three feet away from them, according to AB 1371.

Limousines — SB 109 requires limo operators to equip limousines with at least two doors and one or two push-out windows to serve as emergency exits.

Cell Phones — SB 194 prohibits teenagers from using cell phones while driving even with hands-free devices.

MISCELLANEOUS

Food Service Gloves — AB 1252 prohibits employees of restaurants and bars from touching ready-to-eat food with their bare hands. They must wear gloves or use tools to handle the food. Exemptions are available.

Online Security — Expanding the types of information protected by California computer security law, SB 46 declares that people or companies that maintain computerized data about their clients or customers must notify them when their passwords, usernames or answers to security questions for their online accounts have been breached.

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The founder and president of The Rodolff Law Firm, APC, Barry L. Rodolff, is a highly experienced lawyer who has been assisting clients faced with civil litigation for more than two decades. Mr. Rodolff developed his skills with two well-respected defense firms, Schell & Delamer, and Haight, Brown & Bonesteel. He also worked in-house at Travelers Insurance Company, representing a variety of insured companies in many types of litigation. His clients have ranged from small businesses to multinational corporations. Mr. Rodolff brings extensive experience and knowledge in the defense of litigation involving premises liability, business, product liability, personal injury, employment, construction defect, and intentional torts.