

Appeal Panel Ruling on Real Value of Injuries Is a Big Win for Plaintiffs

By Evan George
Daily Journal Staff Writer

Dealing a blow to insurers and a potential windfall for trial lawyers, an appeals court has rejected what seemed conventional wisdom among California trial judges — that injured plaintiffs should only recover the amount their HMO actually paid to treat their injuries, rather than the much higher sticker prices doctors often charge for medical care.

Instead, defendants should be hit with the full bill and not benefit from negotiated rates, the 4th District Court of Appeal ruled Monday in a complicated and much-watched case that experts say could result in higher jury awards and more settlements.

The three-judge panel said the collateral source rule allows plaintiffs to recover the full cost of medical services as part of economic damages.

However, three other cases on appeal involve the same collateral source rule, so observers say the issue may need to be settled by the state Supreme Court.

The case at issue involved a San

Diego woman who sustained serious injuries when a meat truck plowed into her car in 2006.

Doctors at Scripps Memorial Hospital had to perform spinal surgeries and bone grafts that cost more than \$189,000.

Howell's health plan, PacifiCare, only paid \$59,691 because it contracts with Scripps to provide discount services to the thousands of patients it sends to the facility every year.

The question was whether that discount should be passed along to the defendant that hurt her.

The trial judge said yes, reducing the amount Hamilton Meats and Provisions Inc. owed.

That was wrong, the appeals court held.

"Howell, as a person who has invested insurance premiums to assure her medical care, should receive the benefits of her thrift," wrote Justice Gilbert Nares in the unanimous opinion. "Hamilton [Meat], as the party liable for Howell's injuries, should not garner the benefits of Howell's providence."

The reversal tripled the amount

of medical damages in her case to \$189,978.63, which is only part of the \$689,973.63 a jury awarded her.

Applied to all personal injury cases, the ruling could cost defendants — or, more accurately, their liability insurance carriers — hundreds of millions of dollars over several years.

the costs of their medical care.

That reduction has resulted in lower payouts by liability insurance carriers when the plaintiff is covered by a health plan.

"The trial judges were giving it to them," Rice said. "I got tired of walking into court and saying this is what

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ROBERT OLSON
GREINES, MARTIN, STEIN & RICHLAND

The case was about making defendants "pay for the full detriment that they caused, nothing more but nothing less," said John Rice, a partner at LaFave & Rice who handled the appeal.

For years, trial courts have reduced the portion of jury awards that deals with reimbursing injured plaintiffs for

the law is and the judge would scratch her head and say, "I don't think so."

The central question in the case, and others like it, is whether that \$130,000 that was "written off."

"These are virtual damages," said Robert Olson, a partner at Greines, Martin, Stein & Richland who defends such cases. "These are sticker price numbers that no one ever pays. It's a tax with the benefit going to the trial attorneys."

Howell's attorneys argued the \$130,000 not charged to Howell as a result of being a member of an HMO health plan still has a cash value.

For instance, Scripps physicians agree to accept lower rates in exchange for several promises from the insurer, including bulk business of patients and advertising opportunities.

Defense attorneys for Hamilton Meat said they were reviewing the case and could not comment as to whether they would petition the Supreme Court.

But Olson, who wrote the amicus brief on behalf of Association of Southern California Defense Counsel, said the case was a perfect candidate because it diverged from earlier appellate decisions.

The Consumer Attorneys of California filed an amicus brief on behalf of Howell. Trade groups for the insurance industry filed on the side of the defendant.

Scott Sumner, a partner at Hinton Alford & Sumner who wrote the amicus brief for Consumer Attorneys of California said he believed more cases would likely settle in mediation as a result.

It remains unclear whether the ruling could extend beyond the reimbursement of medical costs. The

collateral source rule in California generally says that a jury should not be told that a plaintiff can recover compensation from a party other than the defendant.

The ruling could mean significantly higher costs for auto and homeowner's insurance carriers, as well as small business, commercial and general liability.

Andrew H. Selesnick, a partner at Michelman & Robinson in Encino, said the ruling created an unfair windfall for plaintiffs because doctors are still paid less than the services are worth.

"You can't lose sight of the providers who actually render the medical services. It doesn't make a whole lot of sense to give the plaintiff a windfall at the expense of everyone else," Selesnick said.

Howell's husband, San Diego trial lawyer Mike Vallee, said the couple appealed the case not just to increase their damages, but also for the principal at stake.

"Wrongdoers and insurance companies shouldn't get a break," he said. "I'm just glad a court has stepped forward and that this is the way it's going to be."

evan_george@dailyjournal.com

Draft Cap-and-Trade Plan Unveiled

By Fiona Smith
Daily Journal Staff Writer

The California Air Resources Board on Tuesday revealed its most comprehensive plans yet for fighting climate change at the state level through a complex emissions trading scheme. The announcement comes after congressional leaders announced they would drop efforts to create a national climate strategy this year.

"As the eighth largest economy in the world, California is addressing a major international problem and taking action," said Mary Nichols, chair of the California Air Resources Board. "The program is designed to drive innovation and use market forces to find the least-cost solution to reduce greenhouse gas emissions."

The state air resources board is leading the charge to implement the state's Global Warming Solutions Act of 2006, also known as AB32. The law requires California to slash heat-trapping gases 30 percent by 2020 and the board's draft

on the amount of greenhouse gases that major emitters, such as oil refineries and cement factories, can release. It would then set up a market where companies that exceed the limit could buy credits from companies that emit below the limit.

In the preliminary draft regulations released Tuesday, the air resources board did not include specifics on one of the most controversial issues — whether to auction off or give away the emission allowances to impacted businesses. The board estimates an auction could raise substantial funds for a number of uses, although business groups such as the California Manufacturers & Technology Association are opposed, arguing it will hurt business. The board is waiting for recommendations on the issue from an economic and policy advisory panel early next year.

The draft regulation also leaves unanswered the question of whether to immediately include transportation fuels and commercial and

pected to approve a final regulation in October, and the scheme is set to take effect in 2012.

While some environmental groups support cap-and-trade, advocates for improving environmental conditions for low-income communities have already filed a legal challenge to the state's plan. The Center on Race, Poverty & the Environment, Communities for a Better Environment and others sued the state in San Francisco County Superior Court in June alleging the scheme fails to meet requirements to improve air quality in poor communities and will create an ineffective carbon trading market that will not bring enough real emission reductions.

The law is an attempt to stave off the serious threats California faces in the coming decades from the build-up of carbon dioxide, methane and other heat-trapping gases, according to air resources board. The threats include rising sea levels, increased infectious disease, diminished water supplies due to a shrinking Sierra snow pack, more

Sibling Battle Nets \$65 Million Award

By Catherine Ho
Daily Journal Staff Writer

LOS ANGELES — A jury awarded \$65 million to a man who accused his brother of wrongly cutting him out of his fair share of a real estate venture.

The plaintiff, Shashi Jogani of Glendale, sued his brother Hareesh in 2003, alleging he was wrongfully terminated from a business partnership agreement. After he was terminated, Shashi got \$2.7 million, said his lawyer, Sam Krane of Krane & Smith in Encino. The lawsuit, filed against Hareesh and other relatives and their respective companies, sought \$250 million.

Over the course of several years, the brothers had acquired more than 200 apartment buildings in Southern California and Las Vegas that at one point were worth \$1 billion, Krane said.

The case, *Jogani v. Jogani*, has

been on appeal twice. A previous summary judgment removed the question of whether there was in fact a partnership between the brothers, as Shashi claimed.

The verdict, awarded last week in Los Angeles Superior Court, was for the reasonable value of Shashi's services to the business between 1995 and 2002, the time during which he consulted for the company.

"My guy thought they were in business together and were going to share profits," Krane said of his client.

Marshall Grossman, who represented Hareesh Jogani, said jury confusion and misconduct — including factoring in real estate commissions even though Shashi was not a licensed real estate broker — resulted in a "flawed" verdict and possible retrial.

"I believe he was fully paid for services rendered, and that the proper verdict should have been zero," he

said. Grossman added that Shashi Jogani, who began investing in residential property in 1979, had at various points been sued and had judgments against him brought by tenants, creditors, employees and an insurance company.

In 1998, during judgment debtor examinations, he did not mention his involvement in the partnership which he later alleged in the 2003 lawsuit. Judgment creditors settled the cases for less than the amounts of the judgments.

"The plaintiff had no ownership interest in any of these entities," Grossman said. "He had testified under oath in multiple judgment creditor examinations that he had no ownership or interest in any of these companies, and then later filed this lawsuit claiming that he was a partner in each of these companies."

catherine_ho@dailyjournal.com