Weekly Law Resume

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WEEKLY LAW RESUME™

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Gratuitous Write-Offs and Medicare Reductions After *Howell*

Rosa Elia Sanchez, et al. v. Randall Alan Strickland, et al..
Court of Appeal, Fifth District (November 4, 2011)

This is one of the first cases after *Howell* [1] to address gratuitous medical write-offs and medical expenses paid by Medicare. In *Howell*, the California Supreme Court ruled that a plaintiff may only recover medical expenses actually paid by a private insurer, as opposed to the amounts billed before insurance write-offs and reductions.

This case arose from an automobile collision in October 2005. Pedro Hueso was driving a sedan along State Route 120, with his wife and a friend as passengers. Hueso's sedan collided with a tractor-trailer, killing the two passengers. Hueso, a Medicare beneficiary, spent four months recovering in a hospital, but died of heart failure six weeks after he was released. The three decedents' relatives and representatives (Sanchez, et al.) sued the owner of the tractor-trailer and its driver.

The jury returned a verdict for plaintiffs and awarded $3,115,569 in damages, of which $1,339,569 represented past medical expenses. The jury also found that Hueso was 30% responsible for the accident. Defendants filed a motion to reduce the verdict for past medical damages to the amounts actually paid, and then to reduce that amount for the comparative fault finding. The trial court granted Defendants' motion, but neglected to reduce damages according to Hueso's comparative fault. An amended judgment was entered to correct the omission, and Plaintiffs thereafter appealed. Defendants moved to dismiss the appeal as untimely, arguing that the time for filing an appeal began running when the initial judgment, not the amended judgment, was entered.

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As a threshold matter, the appellate court ruled that because the amended order was a substantial modification, the appeal was timely. Therefore, the time to file an appeal ran from the entry of the amended judgment. In adopting the "substantial modification" test, the court rejected the distinction between judicial and clerical errors. Instead, two lines of cases defining the substantial modification test were examined. One line of cases focused on whether the change resulted in a separately appealable order, while the second defined "substantial modification" as a modification materially affecting the rights of the parties. The *Sanchez* court held that the amended order was a substantial modification under either interpretation. The amended order was not separately appealable, and a 30% damages reduction materially affected the rights of the parties as a matter of law.

With the procedural issue resolved, the court then addressed the merits of the appeal. One of Hueso's medical providers declared that $7,020 billed to Medi-Cal was later written off because the provider was not actually contracted with Medi-Cal. The issue before the court was whether the collateral source rule applied to gratuitous write-offs by a medical provider. The court ruled that *Howell's* limitation on recovery to amounts actually paid does not apply to gratuitous medical care reductions. Although the court noted that *Howell* did not expressly decide whether the collateral source rule applied to gratuitous write-offs, the Howell opinion did state that the rationale behind the rule—an incentive to charitable aid—is not implicated in commercial agreements between a provider and an insurer.

The court then examined two pre-*Howell* appellate decisions that found the collateral source rule applied to gratuitous payments and their recovery was permitted (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 and *Arambula v. Wells* (1999) 72 Cal.App.4th 1006). Following these decisions, the *Sanchez* court adopted a rule of law holding that where a medical provider rendered and billed for medical services, then gratuitously wrote off a portion of those services, those amounts are recoverable under the collateral source rule. Thus, the *Sanchez* court distinguishes gratuitous discounts from negotiated discounts.

The *Sanchez* opinion is only partially certified for publication. In the unpublished portion of the decision, the court held that *Howell's* limitation on recovery to amounts actually paid—as opposed to amounts billed—applies with equal force to payments made by a private insurer and payments made by Medicare. The court opined that if the difference between medical expenses billed and the negotiated

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rate actually paid by a private insurer was not recoverable under *Howell*, then similar reductions for Medicare were not recoverable either. Without providing analysis on the issue, the court merely noted that "[n]one of the policy considerations or rationale contained in the Howell decision justify treating negotiated rate differentials obtained under private insurance differently from reductions obtained under Medicare."

[1] *Howell v. Hamilton Meats & Provisions, Inc*. (2011) 52 Cal.4th 541

COMMENT

This case is interesting for the court's choice of which portions it certified for publication. Although *Howell* finds the collateral source rule's rationale has no bearing on commercial agreements between an insurer and medical provider, the *Sanchez* court held the collateral source rule applied in these circumstances, relying on pre-*Howell* precedent. Though seemingly at odds with dicta in Howell, this portion was certified for publication. Conversely, the *Sanchez* court did not certify the portion of the opinion that appears to follow *Howell*, wherein the court ruled *Howell's* limitation on recovery to amounts actually paid applies to both private insurance and Medicare. At least in the Fifth District, defendants and insurers may expect to see an increase in write-offs being characterized as gratuitous, rather than contractual, to maximize recoverable damages.

For a copy of the complete decision see:

HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/F060582.PDF

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