Appellate Reports

A review of recent decisions of interest to the plaintiff's bar.

By Jeffrey Isaac Ehrlich

Insurance/HMOs/balance billing

Prospect Medical Group, Inc. v. Northridge Emergency Medical Group
(2009) 45 Cal.4th 497
[87 Cal.Rptr.3d 299]

Section 1317 of the Knox-Keene Act (the "Act") requires emergency-room physicians to provide emergency services without first questioning the patient's ability to pay. The Act requires that when emergency-room doctors provide emergency-room services to HMO members, the HMO is obligated to reimburse the doctors for the care provided. In situations where there is no contract between the emergency-room doctor (or group) and the HMO, disputes can arise about the amount the of the bill. In situations where the HMO fails to pay the entire amount billed, the practice of the emergency-room physician seeking the unpaid balance of the bill from the patient is referred to as "balance billing." This case raised the issue of whether balance billing in this context is permitted by the Knox-Keene Act.

Prospect Medical Group ("Prospect") manages patient care by entering into contracts with HMOs (called health-care service plans in California). Essentially, the HMO pays Prospect to provide medical care to its members. As a delegated provider, Prospect is required to pay for emergency care provided to the patients who have subscribed to the HMOs with whom it contracts. (Health & Saf. Code, § 1371.4, subds. (b) & (e).)

Northridge Emergency Medical Group ("Northridge") provided emergency medical services to two California hospitals under written contracts. Northridge provided emergency services to Prospect subscribers and billed Prospect. When billing disputes developed between Prospect and Northridge, Prospect filed lawsuits against Northridge seeking, inter alia, a determination that the practice of balance billing was unlawful.

Held: Balance billing in this context is not permitted by the Knox-Keene Act. The Act (1) intends to transfer the financial risk of health care from patients to providers; (2) requires emergency-care patients to agree to pay for the services *or* to supply insurance information; (3) requires HMOs to pay doctors for emergency services rendered to their subscribers; (4) prohibits balance billing when the HMO, and not the patient, is contractually required to pay; (5) requires adoption of mechanisms to resolve billing disputes between emergency-room doctors and HMOs; and (6) permits emergency-room doctors to sue HMOs directly to resolve billing disputes, in that emergency-room doctors may not bill patients directly for amounts in dispute. Emergency-room doctors must resolve their differences with HMOs and not inject patients into the dispute. Interpreting the statutory scheme as a whole, the Court concludes that emergency-room doctors may not bill a patient for emergency services that the HMO is obligated to pay. (The Court limited its holding to situations where the doctors have recourse against the HMO, and expressed no opinion regarding a situation where no recourse was available, such as when the HMO disputes coverage, or is unable to pay the bill.)

Civil Procedure/Medical Malpractice /calculation of interest on judgments

Leung v. Verdugo Hills Hosp.
(2008) 168 Cal.App.4th 205
[85 Cal.Rptr.3d 203] (2d District, Div. 4.)

Patient prevails on medical-negligence action against hospital and is awarded a judgment with a present value of $14,893,277. As permitted by MICRA (Code Civ. Proc., § 667.7), the hospital moved for and was granted a periodic-payments schedule for the judgment. As part of the judgment, the court ordered the hospital to post a bond to provide security for the judgment, in an amount of 1.5 times the present value amount of the judgment, or $22,339,916.

The Hospital sought a writ of supersedeas in the Court of Appeal seeking to have the amount of the bond reduced to 1.5 times the amount of the judgment that was presently due and which would likely come due during the appeal. The court summarily denied the writ. The hospital then moved under Code of Civil Procedure section 996.030 to substitute a lesser bond, arguing that the $22 million bond was excessive in light of the fact that it had purchased an annuity to secure the periodic payments due under the judgment. The hospital again sought to have the amount of the bond calculated based on the amount of the judgment presently due, and the amount likely to come due during the appeal. The trial court denied the motion, the Hospital again sought a writ of supersedeas, and the Court of Appeal again summarily denied the petition. The hospital petitioned the Supreme

Court, which granted the petition for review and transferred the case to Court of Appeal with directions to vacate its denial and to instead issue an order to show cause. After further briefing and argument, the Court denied the writ on the merits.

Section 917.1 of the Code of Civil Procedure governs the manner in which a judgment is stayed during appeal. It requires that an undertaking must be given for an amount twice the amount of the judgment, unless the undertaking is provided by an admitted surety insurer, in which case it shall be for 1.5 times the amount of the judgment. There is no exception provided for lump-sum judgments made payable over time. Section 667.7 of the Code of Civil Procedure did not transform the present value of the judgment into a judgment of a lesser amount for the purposes of calculating the amount of the undertaking required by section 917.1; nor did the hospital's purchase of an annuity. The annuity was purchased after the judgment had already been stayed by the posting of a bond, and appeared to represent a tactical choice – an attempt to present a change in circumstances to justify the renewed supersedeas petition.

Civil Procedure/Arbitration/ sufficiency of award or remedy

Mossman v. City of Oakdale
(2009) 170 Cal.App.4th 83
[87 Cal.Rptr.3d 764] (5th District)

Mossman was employed by the City of Oakdale as an administrative secretary for the Chief of Police. When she was notified by the City that her position was being eliminated because of pending budget cuts, she filed a grievance, arguing that the City had failed to file its own personnel rules for reductions in force. The City rejected the appeal, and the matter was heard by an arbitrator. The arbitrator found that the City had, in fact, violated its personnel rules and ordered that Mossman should be "made whole," but left it to the parties to work out the details of the make-whole remedy. When they were unable to do so, Mossman filed a motion to vacate the arbitration award on the ground that the arbitration had failed to resolve all the issues submitted for decision. When the motion was denied she appealed. Held: an arbitration award that fails to specify the appropriate remedy is not enforceable. The court remanded to the arbitrator to determine the appropriate nature of the make-whole remedy.

Civil Procedure/sufficiency of service of summons

Travelers Cas. and Sur. Co. of America v. Brenneke
(2009 9th Cir.) 551 F.3d 1132

Travelers sued Brenneke, among others, seeking recovery under a commercial surety bond. Brenneke failed to respond to the complaint, so Travelers sought the issuance of a default judgment. Brenneke responded with an opposition stating that he had never been served.

Travelers filed an affidavit [that] its process server, stated that in the past he had encountered "considerably difficulty" in serving Brenneke, and was aware of other process servers having similar difficulty. In this case he tried to serve Brenneke four times without success. On the fifth attempt, an adult male answering to the name of Paul Brenneke responded to his ringing the intercom at the Brenneke residence. When the process server identified himself as such, the person on the intercom responded, "Oh great," but never opened the door. But the process server saw Brenneke standing behind the window next to the front door, watching him. The process server held the summons and complaint toward the window and said in a loud voice, "You are served." He then placed the documents on the doorstep.

The district court denied the motion to enter a default against Brenneke but ordered him to answer. He did, raising the sole affirmative defense of the lack of personal jurisdiction. Travelers then filed a motion for summary judgment on the bond, which was granted. In rejecting the affirmative defense of lack of personal jurisdiction, the district court held that Brenneke was properly served with the summons and complaint as a matter of law. The Ninth Circuit affirmed, finding that Travelers had substantially complied with the rules governing service under FRCP, Rule 4(e)(2).

Rule 4(e) provides that service upon an individual may be accomplished by: "(2) doing any of the following: (A) delivering a copy of the summons and complaint to the individual personally; or (B) leaving a copy at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides therein." The court noted that in cases where a process server is unable to effect in-hand service because the defendant is attempting to avoid service or refuses to accept delivery, it is usually sufficient to touch the defendant with the papers and leave them in the defendant's presence, or if touching is not possible, to simply leave them in the defendant's proximity. The declaration of the process server was sufficient to establish that this had occurred.

Civil Procedure/sanctions/ attorney's fees

Musaelian v. Adams
(2009) 45 Cal.4th 512
[87 Cal.Rptr.3d 475]

In *Trope v. Katz* (1995) 11 Cal.4th 274 [45 Cal.Rptr.2d 241], the Supreme Court held that attorneys' fees could not be awarded under Civil Code section 1717 to attorneys who represented themselves. The issue presented in this case is whether attorneys' fees could be awarded as sanctions under Code of Civil Procedure section 128.7 to a self-represented attorney.

Two earlier appellate cases had distinguished *Trope* and had held that prior section 128.5 of the Code of Civil Procedure would permit an award of attorney's fees as a sanction to a self-represented attorney. (*Abandonato v. Coldren* (1995) 41

Cal.App.4th 264, 269 [48 Cal.Rptr.2d 429], and *Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 469 [112 Cal.Rptr.2d 119].) Held: Fees could not be awarded to a self-represented attorney as a sanction under section 128.7.

In *Trope* the Court recognized that awarding attorney fees to self-represented attorneys but not to other self-represented litigants "would in effect create two separate classes of pro se litigants – those who are attorneys and those who are not – and grant different rights and remedies to each." (*Id.* at p. 277.) The Court was concerned that such disparate treatment between attorney and non-attorney litigants would be viewed by the public as unfair, and that, "In our view, the public perception of fairness in the legal system is of greater moment than a lawyer litigant's claim to an attorney fee award if he elects to represent himself." (*Id*. at 286.) This concern applies in this case as well.

While section 128.7 does allow for reimbursement of expenses, including attorneys' fees, its primary purpose is to deter filing abuses, not to compensate those affected by them. It requires the court to limit sanctions "to what is sufficient to deter repetition of [the sanctionable] conduct or comparable conduct by others similarly situated." (§ 128.7, subd. (d).) Subdivision (d) lists a number of sanctions the court may impose, only one of which relates to compensating the moving party for the time and effort of responding to a filing abuse. Even then, subdivision (d) speaks not to compensating a party for the party's time and effort, but only to reimbursing reasonable attorney fees or other expenses, and then only when "warranted for effective deterrence." (*Ibid.)*

The purpose of section 128.7 – deterring filing abuses – will not suffer if attorneys' fees are not allowed to attorneys representing themselves. Section 128.7 provides the trial court with a wide range of options all of which are designed to deter filing abuses. These options include ordering penalties payable to the court. It follows that a party who engages in abusive filing practices will not avoid monetary sanctions simply because the opposing party is a self-represented attorney.

Civil Procedure/pleading sufficiency/nuisance

Birke v. Oakwood Worldwide
(2009) 169 Cal.App.4th 1540
[87 Cal.Rptr.3d 602] (2d District Div. 7.)

A California father brought action on behalf of his daughter ("Melinda") against the owner of an apartment complex for nuisance and violations of the Americans with Disabilities Act ("ADA") based on the defendant's failure to restrict smoking in the outdoor areas of the complex. Specifically, Oakwood had a longstanding policy of prohibiting smoking in all indoor units and in indoor common areas, but permits smoking in the outdoor common areas. When Oakwood refused to ban smoking in the outdoor common areas, Melinda brought suit, asserting a single cause of action for public nuisance. After a demurrer, she filed a first-amended complaint, this time asserting claims for both public and private nuisance, and adding claims under the ADA. The first-amended complaint alleged that secondhand smoke posed a heightened risk of cancer and heart disease to the entire community, and also alleged that Melinda suffered a different kind of injury – aggravation of her asthma. The trial court sustained Oakwood's demurrer to the first-amended complaint without leave to amend, and plaintiff appealed.

Held: Reversed with respect to the claims for nuisance, but affirmed with respect to the ADA claim. (Perluss, P.J., dissented with respect to the ADA claim.)

To adequately plead a cause of action for public nuisance based on the presence of secondhand (or environmental) tobacco smoke in the outdoor common areas of her apartment complex, Melinda was required to allege (1) Oakwood, by acting or failing to act, created a condition that was harmful to health or obstructed the free use of the common areas of the apartment complex, so as to interfere with the comfortable enjoyment of life or property; (2) the condition affected a substantial number of people at the same time; (3) an ordinary person would be reasonably annoyed or disturbed by the condition; (4) the seriousness of the harm outweighs the social utility of Oakwood's conduct; (5) neither Melinda nor her parents consented to the conduct; (6) Melinda suffered harm that was different from the type of harm suffered by the general public; and (7) Oakwood's conduct was a substantial factor in causing Melinda's harm.

Paragraph 14 of the first amended complaint alleges the condition impacts all guests of the apartment complex whenever any of them are present at one of the three swimming pools, the common barbecue areas, the children's playground or the outdoor dining areas and expressly averred that the presence of secondhand tobacco smoke "affect[s] a substantial number of people at the same time." Although this may well constitute only a general allegation of ultimate fact, the rules of pleading require no more. A plaintiff need not plead evidentiary facts supporting the allegation of ultimate fact. A pleading is adequate so long as it apprises the defendant of the factual basis for the claim. Melinda's pleading was adequate with respect to the elements of nuisance.

With respect to the ADA, the court concluded that the statute did not apply to apartments or condominium units. The statute applies to "an inn, a hotel, motel, or other place of lodging." The legislative history of the statute clarifies that "other place of lodging" did not include residential facilities.


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