The Day After *Hanif/Nishihama* Is Overruled

09.09.2010

Since *Hanif v. Housing Authority*, 200 Cal.App.3d 635 (1988) and *Nishihama v. City and County of San Francisco*, 93 Cal. App. 4th 298 (2001) were decided, defendants in personal injury actions have been allowed to reduce the plaintiff's claimed medical expenses by any amounts that were written off by the medical providers. These write-offs typically occurred as a result of agreements between the medical providers and the plaintiff's health insurers that limited amounts paid for medical services. The viability of the *Hanif/Nishihama* rule is now in question because the California Supreme Court has granted review in *Howell v. Hamilton Meats & Provisions, Inc.*, 179 Cal. App. 4th 686 (2009). So virtually every liability insurance carrier doing business in California is asking: "Are there any options if the California Supreme Court overrules the *Hanif/Nishihama* line of cases?" The simple answer is: "Yes, but you will need to be proactive."

First, you should understand what is *not* before the California Supreme Court. The attack on Hanif/Nishihama is based on the collateral source rule. The collateral source rule does not apply to breach of contract cases. *Bramalea v. Reliable Interiors*, 119 Cal.App.4th 468, 472-73 (2004). Therefore, the *Hanif/Nishihama* rule should continue to apply to claims brought under a policy's Medpay coverage.

The concern, of course, is third-party liability claims. Liability insurers are required to pay for "reasonable" medical expenses incurred by the injured party. The question, therefore, is what constitutes a "reasonable" medical expense? No matter how the Supreme Court rules, it is important to understand that the amount charged by the medical provider is not necessarily "reasonable." *Graf v. Marvin Engine Truck Co.*, 207 Cal.App.2d 550, 555 (1962); *Gimbel v. Laramie*, 181 Cal.App.2d 77, 81 (1960); *Dimmick v. Alvarez*, 196 Cal. App. 2d 211, 216 (1961); *Guerra v. Alestrieri*, 127 Cal.App.2d 511, 520 (1954).

The primary effect of overruling the *Hanif/Nishihama* rule will be to shift the burden of proof to the defendant. In a post-*Hanif/Nishihama* world, liability insurers will now have the burden to show that the amount charged by the medical provider is not reasonable - rather than simply asking the court to deduct the amount written off by the provider. There are at least two options that a defendant may consider pursuing to meet this burden.

First, the defendant should consider retaining an expert who specializes in the economics of health care. It is well-known that medical providers are paid their full billed amounts by only a small fraction of their patients. *Vencor Inc. v. Nat'l States Ins. Co.*, 303 F.3d 1024, 1029 n. 9 (9th Cir. 2002) ("It is worth noting that in a world in which patients are covered by Medicare and various other kinds of medical insurance schemes that negotiate rates with providers, providers' supposed ordinary or standard rates may be paid by a small minority of patients"); *Stanley v. Walker*, 906 N.E.2d 852, 857 (Ind. 2009) ("[I]nsurers generally pay about forty cents on the dollar of billed charges and . . . hospitals accept such amounts in full satisfaction of the billed charges"); David Stahl, *The Role of Courts in Protecting the Uninsured from Being Overcharged For Emergency Medical Services*, 33 Nova L. Rev. 269, 277 (2008) ("[A]ccording to one expert witness, some hospitals receive their full published

charges in only one to three percent of their cases"); Keith T. Peters, *What Have we Here? The Need for Transparent Pricing and Quality Information In Health Care*, 10 J. Health Care L & Pol'y 363, 366 (2007) ("[I]n 2004, hospitals in the United States were paid about thirty-eight percent of their list prices by patients or their insurers"); George A. Nation, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing*, 94 KY. L.J. 101, 104 (2005) ("The labels for these charges, 'regular,' 'full," or 'list,' are misleading, because in fact they are actually paid by less than five percent of patients nationally"); Margaret J. Davino, *The Class Action Against Hospitals for Collecting Payments*, New York Law Journal (Sept. 9, 2004) ("All together, a small percentage of patients pay charges").

We are currently working with some of our clients to retain a health care economist, who will be available to testify as to what medical providers customarily receive for similar treatment. *Corsini v. United Healthcare Serv. Inc.*, 145 F.Supp.2d 184, 190 (D.R.I. 2001) ("reasonable and customary charges" are determined based on amounts providers actually receive as payments rather than amounts providers bill); *Temple University Hosp. v. Healthcare Management Assoc.*, 832 A.2d 501, 508-10 (Pa. Super. 2003) (holding that "reasonable fee" for health provider's services must be based on amounts received, not amounts billed by providers); *Labomard v. Samaritan Health Sys.*, 991 P.2d 246, 254-55 (Ariz. App. 2000) (interpreting "customary charges" to mean amount actually paid to providers for their services, not the amount they billed); see *Baycare Health Sys. v. AHCA*, 940 So.2d 31 (Fla. App. 2006) (affirming agency order interpreting "usual and customary charges" to be based on amounts actually paid, not amounts billed); *Feiler v. New Jersey Dental Assoc.* 467 A.2d 276, 282 (N.J. Super. 1983) (holding that dentist committed fraud by representing to insurers that he was submitting bills for "usual and customary charges" when he actually received payment for those charges from only a small percentage of his patients); Harry Chamberlin, 49 Orange County Lawyer 26, 40 (Dec. 2007) ("Virtually all jurisdictions to address the issue reject the notion that 'reasonable and customary' means any amount billed by the provider . . . .").

Second, in cases involving large medical bills, it may also be advisable to conduct discovery into the amounts the plaintiff's health providers typically receive for similar medical procedures/treatment. For example, the defendant can notice the deposition of the "person most knowledgeable" at the hospital or other provider regarding such information.

The bottom line is this: there is no reason insurers must accept the amounts billed by medical providers as "reasonable" even if the Supreme Court overrules *Hanif/Nishihama*. Through the use of proper expert testimony and additional discovery, medical bills can be challenged based on essentially the same rationale that led to the *Hanif/Nishihama* rule.

Attorneys

Charles A. Danaher

Peter H. Klee

Practice Areas

Insurance Litigation

Industries

Insurance