CAIIA Status Report

MAY 2005

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Civil Procedure - Statute of Limitations - Two-Year Statute

Bertha Andonagui v. The May Department Stores Company, Court of Appeal, Second District, (April 13, 2005).

When the California Legislature enacted the new two-year statute of limitations for personal injury actions questions arose as to its application to claims that were in existence, but were not yet time-barred under the one-year statute. This case determined whether the one-year or two-year statute applied to such claims.

On December 15, 2002, Bertha Andonagui fell on a metal rack that had been left on the floor at a Robinson-May store. She filed a personal injury action on April 6, 2004. Robinson-May demurred to the complaint contending the action was barred by the one-year statute of limitations for personal injuries contained in former C.C.P. section 340(3). Andonagui argued that the two-year statute of limitations contained in new C.C.P. section 335.1 applied. This statute went into effect on January 1, 2003.

The trial court sustained the demurrer without leave to amend and dismissed the action, finding that the action should have been filed within one year. Andonagui appealed.

The Court of Appeal reversed. The issue was whether the one- or two-year statute applied to this case. The general rule is that a new statute does not operate retroactively unless the Legislature plainly states so in the statute. Retroactive application occurs when a statute revives an already barred claim. However, a new statute that enlarges a statutory limitation period does not act retroactively if it expands the time for actions to be filed that are not already time-barred. Until the statute of limitations has run, it may be extended. This is not a retroactive application of the statute of limitations.

In this case, when plaintiff sustained her injuries on December 15, 2002, the one-year statute of limitations applied. On January 1, 2003, the statute of limitations was extended to two years. Her action for injuries was not time-barred at the time the two-year statute of limitations became effective. Plaintiff thus gained the benefit of the new two-year statute when she filed her action.

The Court did note that there was a retroactive application of the statute to September 11, 2001, victims of terrorist attacks. This specific language in the statute revived those claims and was a retroactive application. However, application of the statute to claims that were not time-barred did not involve retroactive application of the statute. The Court rejected a U.S. district court decision that held otherwise, finding it not persuasive authority. The Court held the trial court erred in sustaining the demurrer. The judgment was reversed.

COMMENT

This opinion follows well-established California rules on the application of a limitation statute to existing claims at the time the statute goes into effect. Therefore, further appellate review is unlikely.

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An Employer Organization of Independent Insurance Adjusters

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■ PRESIDENT'S MESSAGE

Southern California was hit hard with storm losses earlier this year. And so were we adjusters. Finally, things are returning to normal and, once again, we can start worrying about not being busy enough. Feast or famine seems the way it is for adjusters. As Spring as upon us, there is a sense of renewal and growth. Hopefully, business will bloom for you all.

When I first took over the reigns of the CAIIA, there were things I wanted to accomplish as part of the cornerstone of my Presidency. I wanted the CAIIA to do things that increased its value to each of our members…and consequently our customers. First, education has always been a big thing for me and the recently unveiled SEED program was a new and exciting addition to our education offerings.

Second, professionalism and the enhancement of the claims agent's image is another cornerstone of my vision. Surrounding myself with talented people helps me and the CAIIA do just that. And we will continue to show our industry what talent there is in our midst with each and every claim we handle, every class we teach, and at every time we communicate with our customer.

Third, the Society of the Registered Professional Adjuster and its RPA designation was the product of the CAIIA and it seemed our association had somehow lost its connection to it. I wanted to rectify that loss which so much effort was spent creating. After all, education and professionalism is what the CAIIA and the RPA are all about. As I promised my CAIIA, I wasn't going to sit by and do nothing. After pitching my case on behalf of the CAIIA, the RPA Board of Directors agreed. As the RPA embarks on a renewed path, yours truly will be the newest Board member. For those of you who lost their connection to the RPA, give a second thought. In the months ahead, I will announce ways in which you can regain your position with the RPA and help support the organization we set into motion 10 years ago.

My final cornerstone will probably not be met until after my Presidency ends. It is my hope to change the independent adjuster "employment status" within California to an "exempt" status for purpose of overtime issues. Although a monumental task, it shouldn't be. If our legislators will only listen, I have a plan which will satisfy us all.

As I end my message, thank you to all my friends, the CAIIA members who represented your CAIIA at the recent CCC in the City of Industry. On behalf of the CAIIA, our condolences go out to the family of Bill King on his recent passing. He founded and was the person who made the CCC what it is today.

DOUG JACKSON, RPA
President - CAIIA 2004-2005

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

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Damages – Limits Placed on Hospital's Right To Assert Lien

Parnell v. Adventist Health System/West, California Supreme Court (April 4, 2005)

Over the past several years, California courts have grappled with the issue of what is the proper amount of medical bills that may be claimed by a plaintiff in a personal injury lawsuit. The issue has been complicated by the "managed care" system of financing health care services, whereby health insurance carriers enter into contracts with hospitals and physicians. Under these contracts, insureds receive services, normally for a premium. The carriers pay a per-determined fee to the provider for services rendered. This is usually a percentage of the "normal and customary charge" of the hospital or physician. In return, the providers receive an assurance of business. In *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, the Court of Appeal, First District, held that a plaintiff may only claim the amount of medical bills accepted by the hospital or doctor as payment in full, not he "normal and customary charge". The Nishihama decision was consistent with a prior Court of Appeal decision, *Hanif v. Housing Authority* (1998) 200 Cal.App.3d 635.

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HRB Insurance Coverage Update

Submitted by Hancock, Rothert & Bunshoft, LLP

Pilimai v Farmers Insurance Exchange Company, California Court of Appeal, Third District, Case #C047483, filed March 28, 2005.

The California Court of Appeal held that an insurance company in an uninsured motorist arbitration was subject to the penalties provided in Code of Civil Procedure section 998 and Civil Code section 3291 based on its refusal to accept a section 998 settlement demand within its policy limits even though the total of such costs and of the compensatory damages awarded in the arbitration exceeded the policy limits.

This case arose when the insured sustained injuries in an automobile accident with an uninsured driver. The insured filed a petition to compel arbitration with his insurance carrier, Farmers, under the uninsured motorist provisions in his policy. Prior to the arbitration, the insured served a section 998 settlement demand on Farmers, offering to settle the case for $85,000. The arbitration was then held, and the arbitrator found that the insured was entitled to recover $556.972. The arbitrator entered an awarded in that amount, less a $15,000 credit that Farmers was entitled to under the terms of its policy. The arbitration award was silent on the subject of costs and prejudgment interest.

Both the insured and Farmers filed timely petitions to confirm the award. Farmer's sought to reduce the award to a judgment of $250,000 – the amount of its policy limits, less the $15,000 credit – at a total of $235,000. The insured sought to obtain a judgment in the same amount, $235,000, plus costs and prejudgment interest. The insured claimed that he was entitled to recover his costs of suit and prejudgment interest based on section 998 and Civil Code section 3291. The trial court concluded, among other things, that because an award of costs and prejudgment interest would exceed the limit of the insurance policy, the insured was not entitled to recover costs or prejudgment interest. The Court of Appeal reversed.

The Court of Appeal found that as a result of the general rule of contract interpretation that applicable statutes are considered part of the contract, the parties are presumed to have had section 998 and Civil Code section 3291 – and their respective cost-shifting mechanisms – in mind when they entered into the insurance contract. The court then found that since nothing in the insurance policy explicitly waives the protections of section 998 and Civil Code section 3291; those sections are deemed to be part of the contract. Based on these findings, the Court held that the insurance company was liable for section 998 costs and Civil Code section 3291 costs even though when, added to the judgment for compensatory damages, the total exceeds the policy limits. The court said that these costs are not limited by the policy limit because they do not arise out of the insurance contract, but rather from statute and the insurer's status as a litigant in the action.

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A related issue involves a hospital or physician's ability to asset a lien in a personal injury action. Under the Hospital Lien Act (HLA) (California Civil Code sections 3045.1-3045.6), a hospital that treats a patient injured by a third party tortfeasor may assert a lien against any judgment or settlement recovered by the patient/plaintiff in the amount of its "reasonable and customary charges". This case analyzed whether a hospital could assert a lien under the HLA to recover the difference between its normal and customary charges and the discounted amount received from the patient and his health insurer.

Plaintiff Joel Parnell was injured in an automobile accident. Plaintiff received treatment for his injuries from San Joaquin Community Hospital, which was owned by Defendant Adventist Health Systems/West, (Adventist). Adventist was a preferred provider with the Community Care network (CCN). Parnell had medical insurance through a health plan that had a contract with CCN. Under the terms of the contract, Parnell's insurer agreed to reimburse CCN a discounted amount, specified in the contract, for services rendered. In turn, CCN agreed to accept those amounts as payment in full. Additional charges to Parnell were "written off".

Parnell later asserted a tort claim against the driver of the vehicle that struck his vehicle. Soon thereafter, CCN (and Adventist) filed a notice of lien against any settlement or judgment. The lien, pursuant to the HLA, sought to recover the difference between the hospital's normal and customary charge and the negotiated amount actually received by the hospital. In response, Parnell filed suit against CCN/Adventist alleging Unfair Business Practices, and other causes of action. Parnell argued that the Hospital had received full payment for services under the terms of its contract with Parnell's insurance provider, and therefore, was not entitled to recover its normal and customary changes. At the trial court level, CCN filed a motion for judgment on the pleadings. The trial court granted the motion and held that the HLA permitted full recovery of the normal changes. The Court of Appeal reversed. The California Supreme Court then accepted the case for review.

The Supreme Court first analyzed whether a lien asserted under the HLA requires the existence of an underlying debt owned by the patient to the hospital – as agreed by Parnell. In looking to the language of the statute and the Legislative intent, the Court concluded that any lien under the HLA must be based on a debt owed by the patient, CCN argued that any recovery under the lien comes from the tortfeasor, not from the patient. This did not sway the Supreme Court, which held that the HLA is simply a legal claim upon the property of another, in satisfaction of a debt owed by a patient for medical services.
The Supreme Court then looked to the contract between Parnell's health insurer and CCN. Pursuant to the terms of the agreement, the insurer's payment was "payment in full". This, Parnell's entire debt to the hospital had been extinguished. Because there was no outstanding debt to CCN for services, the Court concluded that CCN could not assert a lien under the HLA against Parnell's recovery from a third party tortfeasor. The Court of Appeal decision was, therefore, affirmed.

COMMENT

In ruling against Adventist, the Supreme Court recognized that its decision could result in financial hardship for hospitals. The Court commented that the hospitals could look to the Legislature for relief or renegotiate contracts with insurers so that the hospitals could preserve their right to recover their normal and customary charges through liens.

Wrongful Death – Statute Extending Right To Sue To Domestic Partners Applies Retroactively

Bouley v. Long Beach Memorial Medical Center, Court of Appeal, Second District (March 15, 2005).
In 2000, the California Legislature recognized the domestic

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partnerships of same-sex couples and certain male-female couples (Cal. Family Code section 297). Since that time, the Legislature has acted to expand the rights and responsibilities of domestic partners. This case addresses the rights of a domestic partner to sue for wrongful death.

A cause of action for wrongful death is governed by Cal. Code of Civil Procedure section 377.60. In this case, Plaintiff Karl Bouley's domestic partner, Andrew Howard, died in May 2001. As of May 2001, section 377.60 specified that a wrongful death action could be brought by the decedent's surviving spouse, children and issue of deceased children.

In January of 2002, section 377.60 was amended to include domestic partners, as defined in Family Code section 297. It was after that operative date that Mr. Bouley filed suit for medical malpractice against Defendant Long Beach Memorial Hospital and several doctors. The Defendants demurred to the suit on the grounds that Mr. Bouley did not have standing to sue, because section 377.60 did not include domestic partners at the time Mr. Howard passed away. The trial court sustained the demurrers of the defendants and dismissed the case. Mr. Bouley appealed arguing that the 2002 amendments, as well as additional 2005 amendments to section 377.60, were intended to operate retroactively.

The Second Appellate District, in reviewing the case, analyzed whether the legislature intended for the amendments to apply retroactively, and whether a retroactive application was Constitutional. In doing so, the Court felt that the Legislature's intent was unmistakable. Subdivision (d) of section 377.60 sets forth that the section applies to any cause of action arising on or after January 1, 1993. Further, the 2005 amendments (subdivision (f)(2)) explicitly apply to a death "occurring prior to January 1, 2002". Thus, the Court felt that under the plain language of a statute, Mr. Bouley could pursue a claim for wrongful death.

Defendants argued that the 2005 amendments to section 377.60 were not intended to revive a cause of action that had been fully and finally adjudicated. Indeed, the trial court had dismissed the action before January 1, 2005. The Court of Appeal rejected this argument. A judgment of the trial court is not final until the appellate court disposes of the case. This had not yet occurred.

The Court of Appeal then went on to address whether retroactive application was Constitutional. Retroactive application may be unconstitutional if it deprives a person of a property right without due process of law, or if it impairs the obligation of a contract. Defendants contended that retroactive application deprived them of due process. In essence, they argued that if they knew this additional class of persons could bring a wrongful death action, this would have affected their purchase of insurance. The Appellate Court rejected this additional argument. The Court was not convinced that an individual or a hospital would rely on section 377.60 during events, which may later become the basis for a wrongful death suit for medical malpractice. Damages for wrongful death are highly unpredictable. The Court failed to see how a doctor or hospital could determine the proper medical malpractice policy limits based on a prediction of an anticipated number of potential decedents.

Not only did the Court of Appeal rule that there was no Due Process violation, the Court concluded that there was a strong State interest in promoting families, and individual rights and responsibilities through the extension of rights to domestic partners. The Court, therefore, reversed the trial court ruling and reinstated Mr. Bouley's wrongful death action.

COMMENT

This decision by the Court of Appeal further clarifies the rights of domestic partners in California. It also provides guidelines as to the circumstances under which a statute may be applied retroactively.

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division

Case of the Month

A Stairway Trip Investigation

The case of the month relates to a trip and fall issue. An individual had fallen in a stairwell of a condominium clubhouse. We were not advised as to the severity of the injuries. GEI was assigned to examine the interior stairway for code compliance and an illumination survey.

The particular issues raised were:

1. Were standard construction practices followed in the original construction work for this project?
2. Did the stairway construction comply with applicable provisions of the Uniform Building Code at the time of original construction?
3. Was the stairway maintained in accordance with applicable provisions of the Uniform Building Code?
4. Were the illumination levels up to code?

Our expert visited the site and performed his inspection. The stairway where the claimant had fallen was located in the interior of the clubhouse. The general arrangement of the stairway was two flights of stairs meeting at an intermediate landing. The stairway structural construction was of rough sawn wood with the handrail and stair stiles painted white. A contrasting blue carpeting covered the stair treads and stair landings. The rough sawn wood stiles were painted white and were 2-inch by 6-inch nominal size. The stair construction was of open riser design. The rough-sawn 2-inch by 6-inch nominal handrail measured 38 inches above the stair treads. The stair tread inside measurement was 40inches wide with a tread depth of approximately 10 inches.

Riser/tread measurements were standard 7/10-stair geometry (7-inch riser, 10-inch tread) for the applicable stair stringer. This stair construction met both industry practices and the requirements of the Uniform Building code in the affected area. The carpeting, handrail and other stair aspects were in sound condition and thus met the maintenance requirements again of both industry practices and the requirements of the Uniform Building Code in the affected area.

The white-painted wood handrail and stiles with the blue carpeting covering the stair treads and stair landings provided a sharp contrast. The direct illumination on this stairway was provided by two wall sconce light fixtures, one at the top of the stairway and the other at the intermediate landing. Indirect illumination was provided by other fixtures in the clubhouse. Our expert measured the illuminations levels at several critical locations with a light meter and found no problems.

In summary, the stairwell was properly constructed, properly maintained, and well lit. The environment or condition of the stairwell was not the cause of the trip and fall.

Trio of Central Valley Residents Arrested for Auto Insurance Fraud and Solicitation of Felony Assault

Charged with multiple felonies, bail for the three suspects tops $2,000,000

FRESNO – On March 16, 2005, investigators form the Fresno County Urban Organized Auto Insurance Fraud Task Force (Task Force) and officers from the Stockton Police Department arrested Amberjeet Kaur Gill (aka Amber Gill, Amber Jeet Kaur Gill, Harjinder Kaur Gill), 32 of Stockton; Pete Vargas, Jr. (aka Peter Vargas, Pedro Vargas, Jr., Pete Vargas, "Peteyboy"), 36 of Fresno; and Becky Bishop (aka Becky Kumar, Becky Lee Kymar), 35, also of Fresno, for multiple felonies, including solicitation to commit felony assault, surrounding an alleged auto insurance fraud scheme. The Fresno County District Attorney's Office is prosecuting the case. The Task Force is comprised o the California Department of Insurance's Fraud Division and the Fresno County District Attorney's Office.

"Auto insurance fraud is aggressively pursued by this department, often by working with our local partners", said Insurance Commissioner John Garamendi. "This concerted effort protects consumers by helping keep auto insur

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Making adjusters obsolete . . . . The "claims process"

Hello. Welcome to County Farm Insurance Automated Claims. Para Espanol, marque el ocho.

If you would like to advise us that the accident was not your fault, please press 1.

If this is because the other car came out of nowhere, please press 2.

If this is because the other car was speeding, although you never saw it, please press 3.

If you believe the adverse independent witness is involved in a plot against you, please press 4.

If a hit and run vehicle shaped like a pole, curb, or covered in stucco, hit our vehicle, please press 6.

If your vehicle had a $5000 stereo system and all the receipts for it were inside the glove box, please press 7.

If you are calling to tell us that the other party could not have been injured, please press 8.

If you are calling to make us aware that $20 per day does not cover the cost of a rental car, please press 9.

If you regret choosing a high deductible, not purchasing rental coverage, MPC or a PIP, or not paying for higher liability or UM limits and would like us to deduct a lower amount, extend a coverage you don't have, or up your limits to a more convenient level, for a loss which has already occurred, please press 10.

If you do not plan to pay additional premium for your lower deductible or additional/higher coverages, please press 11.

If you wish to insist that we meet you at an accident scene, although it is completely obvious that you are at fault, please press 12.

If you are calling to tell us how many years you have been with County Farm and request that we therefore find you were not at fault for an accident, please press 13.

If you were served with a lawsuit two months ago and forgot to tell us, please press 14.

If we have been trying to reach you for months, and it is now Friday afternoon at 4:56 pm, and you are calling to demand immediate assistance, please press 15.

Please be aware that in the interests of customer service, we have discontinued the "live employee" pilot program. All claim services are now automated. Thank you for calling County Farm. We used to live where you live. This message will repeat.

Trio of Central Valley Residents Arrested . . .

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ance rates lower and tells would-be perpetrators that you will be caught and you will be prosecuted."

Gill was charged with four counts of insurance fraud, one count of solicitation to commit felony assault and one count of filing a false police report. Her bail was set at $1,021,000.

Vargas was charged with two counts of insurance fraud and one count of solicitation to commit felony assault. His bail amount was set at $1,010,000.

Bishop was charged with two counts of insurance fraud. Her bail amount was set at $10,000.

The investigation began after the Fresno HEAT (Help Eliminate Auto Theft) task force received information about a suspicious auto theft and forwarded the lead to the Task Force in June 2004.

The ensuing investigation revealed that Gill was introduced by Bishop to Vargas, who was allegedly solicited to strip and burn Gill's Ford Explorer so Gill could report it stolen and fraudulently collect insurance monies for the vehicle.

Additional investigation also revealed that Gill had allegedly solicited Vargas to severely beat an ex-business partner so that she could capitalize on her financial interest in their relationship. The former business partner had purchased an outstanding portion of a Fresno-area Port of Subs franchise from Gill's family. A clause in that sale, however, allowed for this ownership to revert to Gill if just one payment was missed, which likely would have occurred if he had been injured.

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