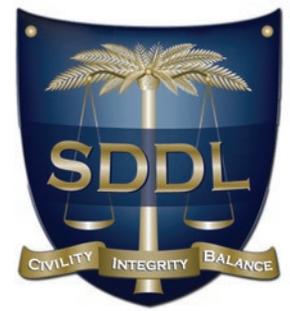


# THE UPDATE

SPRING 2017



SAN DIEGO  
DEFENSE LAWYERS

## Beware Of Plaintiff's Stipulation To Waive Past Medical Expenses!

By *Reece A. Román, Esq.*  
*TYSON & MENDES LLP*

Plaintiff's counsel informs you plaintiff is waiving his or her claim for past medical expenses and asks for your stipulation. At first blush it sounds like a winning proposition. It significantly reduces the damages exposure to your client. It eliminates the need for expert testimony on the cost and reasonable value of plaintiff's past medical treatment. It streamlines discovery and trial preparation, resulting in a cost savings for your client. But should you stipulate? Maybe not.

### Waiver of Past Medical Expenses May Have Unintended Consequences

Evidence on issues that have been removed from the jury's consideration by stipulation or an admission in the pleadings is irrelevant. (*Fuentes v. Tucker* (1947) 31 Cal.2d 1, 7; *People v. Derello* (1989) 211 Cal.App.3d 414,

425-426; *Hepler v. J.M. Peters Co., Inc.* (1999) 73 Cal.App.4th 1265, 1286.) Of course, irrelevant evidence is inadmissible. (Evid. Code § 350.) Your stipulation may result in the exclusion of evidence that is otherwise relevant and highly probative.

Defendants often stipulate to liability and argue evidence of the defendant's culpable conduct is therefore irrelevant and inadmissible. This may prevent plaintiff from parading in witness after witness to testify about your client's wrongful conduct and help limit the verdict.

The plaintiff's bar is increasingly employing a similar tactic by waiving past medical expenses. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 C.4th 541 and its progeny limit the amount an insured plaintiff may recover for past medical expenses to the amount accepted as payment in full from the plaintiff's insurance company. This is in stark contrast to the significantly larger amount

billed by the healthcare providers. Plaintiffs are waiving past medical expenses and arguing the lesser amounts paid are irrelevant, not only on the issue of past medical expenses, but for any purpose, including future medical expenses.

Consider the following example. Plaintiff is injured in a car accident. Plaintiff is treated at the emergency room and has knee surgery. The total amount billed is \$150,000. The hospital accepts \$50,000 as payment in full from plaintiff's insurer. Plaintiff presents expert testimony plaintiff will require a future knee surgery costing \$500,000. Defendant seeks to demonstrate the \$500,000 figure is outrageous by introducing the \$50,000 amount paid for the prior surgery. Plaintiff argues past medical expenses were waived by stipulation, thus evidence of the \$50,000 amount paid is irrelevant. If the judge agrees, your stipulation has unintentionally robbed you of perhaps your most probative and persuasive evidence of the reasonable value of future treatment.

### Evidence of Stipulated or Admitted Facts is Admissible Where the Stipulation or Admission is Equivocal, Limited in Scope, or Designed to Deprive the Opponent of the Legitimate Force and Effect of Material Evidence

You may have already stipulated to waive past medical expenses. Or the Court may

*continued on page 17*

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# President's Message

By *Bethsaida Obra-White, Esq.*  
DUMMIT, BUCHHOLZ & TRAPP

I am extremely honored to serve as this year's SDDL President and to have been entrusted to uphold the traditions of our organization while leading it into its 33rd year of existence. I am equally grateful to work alongside such an intelligent and talented board dedicated to serving SDDL's members and the defense community at large. Rest assured that SDDL will continue to execute the programs, events and services that you, our members, have enjoyed throughout the years including SDDL's List Serve, monthly continuing legal education presentations, quarterly evening seminars, SDDL's publication *The Update*, our annual charity golf tournament, national mock trial competition and numerous social events.

One featured agenda item this year is membership. SDDL continues to be one of the largest local defense organizations in the nation and we have only maintained our stature through the contributions of our members, supporters and sponsors. Please help us increase our membership ranks and influence by reaching out to other civil defense lawyers and paralegals in small or large firms, in-house or private practice, and those practicing in the area of public sector civil defense. We also welcome applications from those attorneys retired from a practice primarily devoted to the defense of civil matters.

Another item on our agenda this year is expanding SDDL's community and charitable involvement. Over the past 15 years, SDDL has contributed over \$125,000



to the Juvenile Diabetes Research Foundation. This year, SDDL will again co-sponsor the annual Red Boudreau dinner benefiting Father Joe's Villages, and is also honored to serve as a sponsor and contributor to the American Foundation for Suicide Prevention's Overnight Walk.

Despite our efforts, the same question often arises from our members and from within our own board of directors: What more can we do for the San Diego community? Despite working long hours as attorneys, fulfilling our commitments to family and friends, and other professional pursuits – our members want to give back. This in itself inspires us to find ways we can help members fulfill that need to contribute – as SDDL must be dynamic, fluid and responsive to both the needs and interests of its members, in order to remain relevant and effective. It is in this spirit that we appeal to you, the membership of SDDL, for input and participation. Although we have made some inroads, please continue to let us know what you care about, what projects or charity efforts you have in store for this year, and how SDDL can help because together, we can go further. Let us demonstrate the cohesiveness of our membership and SDDL's commitment to the community, while strengthening our bonds with organizations seeking to achieve similar goals. We look forward to hearing from you. ■

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## MEMBERSHIP INFORMATION

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are \$160/year. The dues year runs from January 1 to December 31. Applications can be downloaded at: [sddl.org](http://sddl.org)

## THE UPDATE

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## Congratulations...

Congratulations to former SDDL President **Kenneth N. Greenfield** for being named President of the San Diego chapter of the American Board of Trial Advocates (ABOTA), and to former SDDL President **Clark Hudson** for being named President of the Association of Southern California Defense Counsel (ASCDC).

## LUNCH AND LEARN

# Estate Planning for Clients Facing Future Long-Term Care Costs

By Janice Walshok, Esq.

Steven Ratner, Esq. presented at the San Diego Defense Lawyers' Lunch and Learn on April 11, 2017 on the topic, "Estate Planning for Clients Facing Future Long-Term Care Costs." Mr. Ratner, a founder of Ratner & Pinchman, APLC, is certified in Estate Planning, Trust and Probate Law by the State Bar of California Board of Legal Specialization. Mr. Ratner has also authored a chapter in the CEB treatise, "Complete Plans for Small and Mid-Size Estates." The attorneys who attended his presentation walked away thinking the same thing—consult with an estate planning attorney immediately. With parents living longer and increasing healthcare costs, estate planning should be at the top of your to-do list. Of course, the alternative is to spend years in probate court waiting for an overworked judicial system to sort it all out for you.

As Mr. Ratner discussed, estate planning is an area of the law where the potential exposure for malpractice is great. It touches upon complex issues such as taxes, real estate transfers, and healthcare planning just to name a few. As if each of these matters is not complicated by itself, when you throw in the family dynamic and you have the perfect recipe for a reality television show. In short, estate planning is best left to the experts.

Mr. Ratner discussed a number of estate planning matters, including long-term care planning and the Medi-Cal estate recovery process. Without a properly-prepared estate plan a Medi-Cal member's estate can be wiped clean upon his or her death, as Medi-Cal can seek repayment from the estate upon the death of a Medi-Cal member. This should be a growing concern as 40 percent of people 65 and older need nursing home care at some point in their lifetimes. In other words, that inheritance you were banking on receiving from Aunt Sally could be significantly diminished by the time Medi-Cal recovers against her estate. In order to avoid this risk,

an experienced estate planning attorney should be consulted to draft a plan to prevent the later recovery from the estate by Medi-Cal.

Mr. Ratner also discussed the California real property tax. Under Proposition 13, the maximum amount of property taxes assessed on real property is one percent of the full cash value of the property. Proposition 13 restricts increases in the value of the property to no more than two percent per year, and prohibits reassessment of the value of the property, except in the case of a change in ownership. Certain transfers are not deemed a "change in ownership." For example, there is an exclusion from reassessment for transfers between spouses or when the property is transferred from a parent to a child or from a child back to a parent. However, a transfer from a grandmother to grandchild will generally be deemed a change in ownership.

Finally, if you are fortunate enough to leave behind something for your children after paying for their college, graduate school and living expenses while they look for a job, there is a gift tax annual exclusion. For 2016, the annual exclusion amount was \$14,000. Thus, there is no requirement to file a gift tax return if no more than \$14,000 per donee was gifted in 2016. In addition, each individual has an exclusion of \$5,000,000. In 2016, this amount increased to \$5,450,000. In addition, spouses may transfer up to twice that amount through taxable gifts or at death with no estate or gift tax paid.

These tips and more were gratuitously doled out by Mr. Ratner, one of the lead attorneys in estate planning. Be sure to RSVP for upcoming Lunch & Learns for free practice points, advice and lunch. ■

## Upcoming Events Calendar

- |                     |  |
|---------------------|--|
| May 9, 2017         | Lunch & Learn CLE: "E- Discovery Issues" by Lauren Doucette and Nicole Guyer   |
| May 20, 2017        | American Foundation for Suicide Prevention Overnight Walk  |
| May 25, 2017        | Joint Mixer and Happy Hour with CASD at Basic Pizza  |
| August 18, 2017     | 6th Annual SDDL Tailgate Party and Padre Game  |
| September 8, 2017   | SDDL Golf Tournament for the Juvenile Diabetes Research Foundation at Coronado Golf Course   |
| September 16, 2017  | 33rd Annual Red Boudreau Trial Lawyers' Dinner at the U.S. Grant Hotel (co-hosted by SDDL)   |
| October 19-21, 2017 | 27th Annual SDDL National Mock Trial Competition   |
| November 3, 2017    | "Solutions Summit: Eliminating Sexual Harassment, Sexism and Bullying in the Workplace" at Point Loma Nazarene University (co-sponsored by SDDL) |

# Additional Insurance & Excess Coverage

By David P. Ramirez, Esq.  
TYSON & MENDES LLP

In the recent case of *Advent v. National Union Fire Ins. Co. of Pittsburgh*, (December 6, 2016; 2016 WL 7100489), California's Sixth District Court of Appeal refused to order a subcontractor's excess insurer to contribute to a general contractor's excess insurer because the general contractor did not qualify as an additional insured of the subcontractor's insurer, and the policy wording made the subcontractor's excess insurer second level excess above the general contractor's own excess insurance.

## Facts:

Advent, Inc. ("Advent") was the general contractor on a housing development and Johnson Western Gunitie ("Johnson") was a sub-subcontractor providing concrete on perimeter walls. A Johnson employee who was dispatched to retrieve plywood dumped between some of the buildings somehow fell down an open stairwell inside one of the unfinished buildings and suffered serious injury. The Johnson employee sued Advent and others for negligence, but could not remember how he fell.

Advent had \$1 million in primary coverage with Landmark American Insurance Company ("Landmark"), and \$5 million in excess coverage with Topa Insurance Company ("Topa"). The Topa excess policy promised to "indemnify the insured for the amount of loss which is in excess of the applicable limits of liability, whether collectible or not, of the Underlying Insurance," which was listed as the Landmark policy. "Loss" was defined as "the sum paid in settlement of losses for which the insured is liable after making deduction for all recoveries, salvages or other insurance..."

Johnson had \$1 million in primary coverage and \$15 million in excess coverage with National Union. The National Union policies included others as additional insureds "where required by written contract," "with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by ... Your [Johnson's] acts or omissions." Further, the excess policy stated that National Union "will not make any

payment under [the excess] policy unless and until ... the total applicable limits of Scheduled Underlying Insurance have been exhausted by the payment of Loss to which this policy applies and any applicable, Other Insurance have been exhausted by the payment of Loss..." "Other Insurance" was defined as "a valid and collectible policy of insurance providing coverage for damages covered in whole or in part by this policy."

The case was settled for \$10 million, with Landmark and Topa each paying their limits of \$1 million and \$5 million, respectively. National Union paid \$1 million and the rest was funded by others. Part of the deal involved Advent suing National Union for a declaration Advent was an additional insured under the National Union excess policy, with Topa intervening for equitable contribution to part of its \$5 million payment.

The trial court granted summary judgment to National Union, finding it owed nothing because Advent did not qualify as an additional insured of National Union, and equitable contribution failed because the policy wording made National Union a second level excess insurer above Topa rather than sharing the same level of liability. Topa appealed.

## Ruling:

The Court of Appeal affirmed. The Court of Appeal first engaged in a lengthy discussion of burdens of proof, explaining how the burden shifting for equitable contribution announced in *Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874, operates in a manner similar to the burden shifting for summary judgment motions. The Court of Appeal ruled National Union had met its burden of demonstrating that coverage could not be established, and that Topa had not shown a triable issue of fact to suggest otherwise.



The Court of Appeal noted under the National Union policies issued to Johnson, coverage for additional insureds extended only "with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by ... Your [Johnson's] acts or omissions; or ... The acts or omissions of those acting on your [Johnson's] behalf ... in the performance of your [Johnson's] ongoing operations for the additional insured(s)." The issue being whether the employee's injuries were caused, in whole or in part, by National Union's named insured Johnson or someone acting on behalf of Johnson. Since there was no evidence of a connection between the unexplained fall of a worker inside a building and Johnson's work on perimeter walls being performed outside, the Court of Appeal agreed there was no causal connection and, therefore, Advent did not qualify as an additional insured under the National Union excess policy.

The Court of Appeal further noted Topa had not met its shifted burden of showing a triable issue of fact, but was only speculating about the cause of the injuries. The court rejected an argument that mere presence at a jobsite was sufficient to find that an accident or injury arose from the subcontractor's actions, citing *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

The Court of Appeal went on to rule even if Advent were an additional insured of National Union, the policy wording made National Union second level excess above Topa's excess policy, which had to be exhausted first. The Court of Appeal cited *Carmel Development Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, for the proposition that policy wording may prevail over the general rule that when multiple policies share the same risk but have inconsistent "other insurance" clauses the

courts will prorate according to each policy's limits:

*"Here ... the National Union policy provided that National Union would be obligated only after 'Other Insurance has been exhausted by the payment of Loss....' The National Union policy specifically defined 'Other Insurance' as 'a valid and collectible policy of insurance providing coverage for damages covered in whole or in part by this policy.' And the Topa ... excess policy agreed to 'indemnify the insured for the amount of loss which is in excess of the applicable limits of liability, whether collectible or not, of the Underlying [Landmark] Insurance."*

The Court of Appeal rejected an argument Topa's definition of "Loss" constituted a countervailing other insurance clause and concluded it was clear from the language of the National Union policy it offered a

different level of coverage compared with Topa:

*"National Union's excess policy expressly states that coverage will not apply until 'the total applicable limits of Scheduled Underlying Insurance have been exhausted by the payment of Loss to which this policy applies and any applicable, Other Insurance have been exhausted by the payment of Loss.' Based on the foregoing, we also do not find the court erred when it entered summary judgment in favor of National Union. Topa cannot demonstrate that its policy was the same level excess policy as National Union's."*

Consequently, the Court of Appeal concluded National Union had no obligation to contribute to Topa's settlement payment. ■



**ABOUT THE AUTHOR**  
David P. Ramirez is Senior Counsel and primarily represents clients in complex litigation, including construction defect, insurance law, property disputes, and product liability. Mr. Ramirez was named as a "Top Lawyer" in San Diego for "Complex Litigation" in March 2016 by San Diego Magazine & "Top Lawyer in Southern California 2016" by the Los Angeles Times.



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# Class-Wide Arbitration is the Arbitrator's Decision Unless the Contract Says Otherwise

By Ian R. Friedman, Esq.

WINGERT GREBING BRUBAKER & JUSKIE LLP

California has a “strong public policy favoring arbitration” as a “speedy and relatively inexpensive means of dispute resolution.” (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195; *Epitech, Inc. v. Kann* (2012) 204 Cal.App.4th 1365, 1371; see also *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706-707 [praising arbitration as an “expeditious and economical method of relieving overburdened civil calendars”].)

Recently the Supreme Court took up the issue of whether class-action waivers are enforceable in arbitration agreements. (See *Lewis v. Epic Systems Corp.* (7th Cir. 2016) 15-2997; *Morris v. Ernst & Young* (9th Cir. 2016) 5:12-cv-04964.) That issue, like many is—in part—determined by whether the parties contractually agreed to arbitrate class-wide claims or whether the agreement was limited to individual claims. (See *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1130 [although parties agreed “to arbitrate all kinds of disputes that might arise between them, the choice of contractual language, by its ordinary meaning, unambiguously negates any intention” to arbitrate class claims], original italics.)

The issue of who, between arbitrator and judge, is responsible for deciding whether parties agreed to arbitrate class claims has been the subject of a recent change in California law. Up until last year, the rule was that “where an arbitration agreement is silent on the issue whether class and/or representative arbitration is available, the court, not the arbitrator, should determine whether the arbitration agreement contemplates bilateral arbitration, or rather, whether their arbitration agreement



Ian R. Friedman, Esq.

contemplates that class and/or representative claims may be pursued in arbitration.” (*Garden Fresh Restaurant Corp. v. Superior Court* (2014) 231 Cal.App.4th 678, 682.)

In *Garden Fresh*, the Court opined that the decision whether to order bilateral or class arbitration is “important enough that courts ‘hesitate to interpret silence or ambiguity’ as grounds for giving an arbitrator the power to decide them, because ‘doing so might too often force

unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.” (*Id.* at p. 684-685 [quoting *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 945].)

Considering this subject, the California Supreme Court held the issue was “not whether class arbitration is permissible here, but a matter antecedent to that issue: who should decide whether it is permissible, a court or an arbitrator.” (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 243.) Consistent with general contract law, the Court under the *Sandquist* standard first “must examine the parties’ agreements to determine what they say concerning the ‘who decides’ question.” (*Id.*) Despite the potential applicability of the Federal Arbitration Act, this “who decides” question “must be conducted, at least initially, through the prism of state law.” (*Id.* at p. 244.)

“Ultimately dispositive here are two other long-established interpretive principles. First, under state law as under federal law, when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration.” (*Id.* at p. 247.) “Second, ambiguities in written agreements are to be construed against their drafters.” (*Id.*)

In *Sandquist*, the three specific arbitration provisions at issue each shared the “same basic structure and much of the same language. All three contain two inclusive clauses that define the range of disputes that must be ‘submitted to and determined *exclusively* by binding arbitration.’” (*Id.* at p. 245 [emphasis in original].)

When the defendant argued that the superior court should determine whether a former employee’s class action discrimination complaint was limited to an individual action, the Supreme Court disapproved of *Garden Fresh* and held the defendant “could have prepared an arbitration provision that explicitly addressed any unstated desire to have the availability of class arbitration resolved by a court, notwithstanding the otherwise broad and all-encompassing language of the clause identifying matters for the arbitrator. It did not.” (*Id.* at p. 248.) In the absence of clear contrary contractual language, “as a matter of state contract law, the parties’ arbitration provisions allocate the decision on the availability of class arbitration to the arbitrator, rather than reserving it for a court.” (*Id.*) ■

## Bottom Line

**Title:** Russo v. Dinh, et al.

**Case No.:** Los Angeles Superior Court Case No. BC555500

**Judge:** Hon. Michele E. Flurer, Dept. S-10

**Type of Action:** 3 car freeway rear-end auto

**Type of Trial:** Jury

**Length of Trial:** 5 days

**Verdict:** Defense – no causation, with admitted liability

**Plaintiff’s Counsel:** Josef Avesar, Encino, CA

**Defense Counsel:** John T. Farmer, Farmer Case & Fedor

**Damages and/or injuries claimed:** Low back with epidurals and surgical recommendation; medical specials of \$58,742 and futures of \$5,000; no loss of earnings

**Plaintiff’s Settlement Demand:** \$150,000, reduced to \$75,000 before trial

**Plaintiff’s Request at Trial:** \$153,742

**Defendant’s Settlement Offer:** \$11,424, CCP §998 ■

# Howell Analysis: Capitated Risk Contracts

By David J. Kahn, Esq.  
 TYSON & MENDES LLP

The gravamen of the California Supreme Court decision *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541, 555 is: “To be recoverable, a medical expense must be both incurred and reasonable.”

A personal injury plaintiff’s recovery is limited to the lesser of what is paid or what is reasonable. When the plaintiff has private health insurance the amount incurred is what was *actually paid* by the health insurance plan (“Plan”). Thus, a plaintiff with private health insurance is only allowed to recover what was actually paid for the treatment:

**We hold, therefore, that an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial.**

*Id.* at 566, emphasis added.

## A. The Negotiated Rate Differential

The *Howell* decision was predicated on two key findings. First, to be recovered as economic damages, medical expenses (even if paid for by health insurance) must be reasonable and actually *incurred* by the plaintiff. *Howell*, 52 Cal. 4th at 551. In other words, the difference between what a medical provider charges and what it accepts as payment pursuant to a negotiated contract with a health insurance provider, what the court refers to as the “negotiated rate differential,” is not an economic loss to the plaintiff because it was never actually paid. The second key finding, which necessarily follows, is the negotiated rate differential which was never paid in the first place cannot therefore be considered a collateral source. *Id.* at 565.

The Plan in the *Howell* case was a Preferred Provider Organization (“PPO”). The provider



David J. Kahn, Esq.

contracted with the PPO at arm’s length rates for medical services which were discounted from the full billed value (what someone walking in off the street would be charged) in consideration of receiving a network of patients. The provider bills the Plan according to the negotiated contract rates for the services provider and the Plan in turn pays the provider the contract amount. Thus, in a PPO setting the plaintiff’s recovery for past medical expenses is limited to the amount plaintiff paid out of pocket (co-payment) plus what the Plan paid pursuant to the contract.

## B. The Capitated Risk Contract

But what happens where a provider, typically a hospital, enters into a capitated risk contract with a Health Maintenance Organization (“HMO”) Plan? A capitated risk contract is a flat fee arrangement where the Provider accepts a flat fee, typically monthly, for each eligible patient in the HMO. The amount of the fee is based on several factors including the Plan population, which is usually significantly larger than a PPO, the age and gender of each patient and the Plan’s co-payment structure. While the size of a Plan’s population varies, it is typically in the thousands and therefore the capitation payment for each payment is nominal in comparison to the full billed value for the services or what a contracted fee for service arrangement with a PPO Plan would be.

For example, assume an HMO Plan has a population of 10,000 eligible patients, the per capita monthly fee could be less than \$200 per month. Thus, the provider assumes the risk of treatment in consideration of a substantial monthly payment.

The capitated risk contract paradigm presents an interesting and often disputed question under *Howell*: What is the amount actually paid for the treatment? In the typical scenario, plaintiff and/or the provider will produce a bill which shows the full billed value for the services, the co-payment collected from the patient and the balance adjusted down to zero. For example, let’s assume an emergency surgical procedure with a two-night hospital stay. The billed value is \$50,000. The co-payment is \$500.00. The bill will typically show a cryptic adjustment of \$49,500 with a zero balance. Plaintiff’s attorney will claim the full billed value for past medical expenses even though that amount was never actually paid. The bill itself will not explain the nature of the capitated adjustment or the capitated monthly payment for the patient. The defense in this case must make further inquiry to determine the nature of the contractual adjustment and establish there is an underlying capitated risk contract. This is accomplished by



taking the deposition of the Person Most Knowledgeable (“PMK”) from the Plan regarding the HMO Plan contract. The purpose of the deposition is to establish the nature of the capitated risk contract and confirm the provider has been paid in full by the capitation payment and is not pursuing a lien.

### C. The “Allowed” Amount

In support of the adjustment, the Plan PMK will likely produce further documentation which may also include an internal Health Insurance Claim Form showing an internal billing from the Provider to the Provider’s finance department in the amount of the capitation adjustment, in our example \$49,500. The finance department will then use an internal fee schedule and adjust the full billed amount (\$50,000) down to what is referred to as an “Allowed” amount. In our example let’s assume a twenty percent reduction of \$10,000 with an Allowed amount of \$40,000. The Allowed amount is an internal accounting adjustment the Provider uses to track the performance of the capitated risk contract to ensure it is a profitable endeavor. The finance department will also adjust the Allowed amount down to zero so it does not cut itself a check. For the purposes of determining the *Howell* number, it is critical to appreciate the Allowed amount is never actually billed to the Plan and never paid by the Plan. So, when Plaintiff attempts to argue the Allowed amount is the reasonable value of the services, the defense response is the Allowed amount was never actually incurred by the plaintiff or the Plan. The Allowed amount is theoretically incurred by the provider as the risk it assumes in receiving a substantial monthly flat fee for agreeing to treat the Plan’s population, but it is not a real number for the purposes of calculating the *Howell* number.

### D. Using Capitated Risk as a Sword

If the billed amount is not the *Howell* number, and the Allowed amount is not the *Howell* number, what is the real *Howell* number in a capitated risk situation? Arguably, under a strict reading of *Howell*, it is the co-payment plus the monthly capitated fee for the patient, in our example \$700.00. Plaintiff’s attorney may argue *Howell* did not address capitated risk contracts and therefore they are entitled to the reasonable value, arguably the Allowed amount. We believe

# Trial Skills – Voir Dire, Opening Statement, and Cross-Examination

By Colin M. Harrison, Esq.  
WILSON GETTY LLP

On March 16, 2017, Brian A. Rawers, Esq., presented at SDDL’s Evening CLE sharing the vast amount of knowledge he has gained over 30 plus years in defending cases in trial. Mr. Rawers also provided several beneficial articles discussing various trial skills ranging from Voir Dire, Opening Statement and Cross-Examination. Mr. Rawers is General Counsel for Lawyers Mutual Insurance Company, as well as a former SDDL President (2010) and former San Diego Chapter ABOTA President (2013). He is a frequent speaker on trial tactics and other legal topics.

Mr. Rawers’ seminar began with how to engage in an effective Voir Dire, including a discussion on the purpose of Voir Dire and best tactics to select a fair and impartial jury. Next, Mr. Rawers discussed opening statements and the importance of addressing the “800 pound gorilla” in the case, i.e. not giving the adversary an opportunity to undermine defense counsel’s credibility by neglecting to tell the jury the most damaging



facts for your client. He also offered several tips for cross-examining witnesses, including positioning during questioning and repeating clear questions that the witness refuses to provide a clear response.

This was a very well attended CLE which provided the attendees with extremely useful information to use in future trials. SDDL thanks Peterson Reporting for graciously hosting the event and providing lunch to the attendees. ■

the *Howell* holding and rationale should apply because the HMO contract rate is a flat fee rather than a PPO discounted fee for service.

The capitated risk contract issue may eventually make its way to the California Supreme Court. Until then, the defense should aggressively investigate capitation adjustments. The capitated risk contract is a significant defense weapon and the plaintiff will likely be much more reasonable with its demand at the settlement table.

As a compromise, the defense could agree to value past medical damages based on the cumulative capitation payments depending

on when plaintiff was first eligible for Plan benefits. Using our example, assume the plaintiff was in the Plan for two years, the cumulative capitation payment would be \$4,800 (\$200 x 24 months). This is still a significant reduction from the billed value of \$50,000 and the Allowed value of \$40,000. If plaintiff continues to be unreasonable and the case proceeds to trial, the defense must file a motion in limine to exclude the billed amount and the Allowed amounts under *Howell*, because they were never incurred or paid by the plaintiff or the Plan. ■

# California Employers Required to Consider Leave Request for Employees Who are Caring for Disabled Family Members

By Regina Silva, Esq.  
TYSON & MENDES LLP

As part of its continuing interpretation of association discrimination, the California Court of Appeal (2<sup>nd</sup> District) issued a ruling in late 2016 indicating an employer's denial of accommodation to a nondisabled employee may be used as evidence of association discrimination under the Fair Employment & Housing Act ("FEHA").

In *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 246 Cal.App.4<sup>th</sup> 180, Plaintiff Luis Castro-Ramirez sued his former employer, Dependable Highway Express (DHE), alleging disability discrimination, failure to prevent discrimination, retaliation under FEHA, and wrongful termination. When plaintiff was hired by DHE, he informed the Company he had a disabled son who required daily dialysis and requested work schedule accommodations that allowed him to care for his son. Plaintiff was the only person in his household who knew how to operate the dialysis machine. His supervisor at that time accommodated his requested work schedule. Plaintiff's supervisor was later changed, and assigned plaintiff a 12:00 p.m. shift. Plaintiff objected to his new work schedule, and informed his supervisor he was unable to work the shift hours due to his son's condition. Plaintiff was subsequently terminated.

Plaintiff filed suit against DHE based on associational disability discrimination in violation of FEHA, stating he was fired because of his association with disabled family members. DHE filed a motion for summary judgment, which was granted by the trial court. The court concluded there was no triable issue of material fact on any of plaintiff's theories of liability. The court found plaintiff could not show the 12:00 p.m. assignment was improperly motivated because plaintiff had worked nearly identical hours on other days, but without objection.

The Court of Appeals reversed, holding

the plaintiff demonstrated triable issues of material fact regarding his causes of action for disability discrimination, failure to prevent discrimination, retaliation, and wrongful termination. In discussing Plaintiff's associational disability discrimination claim, the Court indicated the question is whether there is sufficient evidence that discriminatory animus motivated the employer's refusal to honor the employee's request for accommodations. The court concluded there was evidence to suggest plaintiff's supervisor "acted proactively to avoid the nuisance plaintiff's association with his disabled son" would impact the supervisor in the future (i.e., plaintiff requesting earlier shifts in the future).

In regards to the retaliation claim, the court acknowledged those claims are "inherently fact-specific," but held plaintiff's repeated complaints about the sudden change to his schedule constituted his opposition to the Company's denial of a reasonable accommodation to his schedule. Further, the

court held DHE was not entitled to summary judgment because when it failed to prove as a matter of law the discrimination claims and retaliation, it was similarly not entitled to summary judgment for its failure to prevent discrimination and wrongful termination.

## What does this mean for employers?

Employers should review their policies and practices to make sure they are properly responding to all requests for accommodation. Even if a request for accommodation is made by a non-disabled employee, if that person is associated with someone who would be considered "disabled," consideration needs to be made as to the scope of the request for accommodation. ■

## ABOUT THE AUTHOR

*Ms. Silva is a graduate of University of the Pacific. She is Director of Employment Practices in the firm's Employment Practices Group. She is a former prosecutor and has considerable trial experience.*

## Save the Date!

# 2017 SAN DIEGO DEFENSE LAWYERS NATIONAL MOCK TRIAL COMPETITION

San Diego Defense Lawyers will proudly present the 27th Annual National Mock Trial Competition on October 19, 20 and 21, 2017.

The Mock Trial Competition is a showcase event for San Diego Defense Lawyers and the San Diego legal community. It gives you the opportunity to judge teams from various law schools coming in from different parts of the country. This is a very popular event that has been well received by the bench, bar and participating law schools throughout the years.

The first two rounds will take place at the San Diego Superior Court on Thursday and Friday evening, October 19 and 20, 2017. The semi-final and final rounds will take place at USD on Saturday morning and afternoon, October 21, 2017.

There will be an estimated 20 teams participating and trying their cases before three-member panels. We need your help and participation as a judge/panel member judging the competition. So please save the date now and help these aspiring law students compete in this year's Mock Trial Competition. ■

# California Civil Law Update

By Monty McIntyre  
ADR SERVICES, INC.

## CALIFORNIA SUPREME COURT

### Arbitration

*McGill v. Citibank* (2017) \_ Cal.5th \_ , 2017 WL 1279700: In a class action alleging claims under the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.), the unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.), the false advertising law and the Insurance Code arising from a credit card agreement, the California Supreme Court reversed the Court of Appeal ruling ordering the trial court to order all of plaintiff's claims to arbitration. The California Supreme Court ruled that a provision in a pre-dispute arbitration agreement that waived the right to seek the statutory remedy of injunctive relief under the CLRA, UCL and the false advertising law was contrary to California public policy and thus was unenforceable under California law. The Supreme Court further held that the Federal Arbitration Act did not preempt this rule of California law or require enforcement of the waiver provision. The Court of Appeal's judgment was reversed and the matter was remanded for further proceedings consistent with the opinion. (April 6, 2017.)

### Attorney Fees

*DisputeSuite.com v. Scoreinc.com* (2017) \_ Cal.5th \_ , 2017 WL 1279701: The California Supreme Court affirmed the trial court's finding that defendants were not prevailing parties for purposes of an attorney fee award under Civil Code section 1717, even though they successfully obtained a dismissal from a California court on the ground that the agreement at issue contained a forum selection clause specifying the courts of another jurisdiction. The Supreme Court ruled that, under the circumstances of the case, where action had already been refiled in the chosen jurisdiction and the parties' substantive disputes remained unresolved, the trial court reasonably concluded that neither party had yet achieved its litigation objectives to an extent warranting an award of fees. (April 6, 2017.)

## CALIFORNIA COURTS OF APPEAL

### Arbitration

*Betancourt v. Prudential Overall Supply* (2017) \_ Cal.App.5th \_ , 2017 WL 895834: The Court of Appeal affirmed the trial court's order denying a motion to compel arbitration in a case alleging violations of the Private Attorneys General Act (PAGA) in California Labor Code section 2698, et seq. The trial court correctly denied defendant's motion to compel arbitration because a defendant cannot rely on a pre-dispute waiver by a private employee to compel arbitration in a PAGA case, which is brought on behalf of the state. (C.A. 4th, March 7, 2017.)

*ECC Capital v. Manatt, Phelps & Phillips* (2017) \_ Cal.App.5th \_ , 2017 WL 999227: The Court of Appeal affirmed the trial court's judgment confirming a final arbitration award of almost \$7 million against plaintiff. The award was for attorneys' fees, expert fees, and costs incurred by defendant as the prevailing party in an arbitration of legal malpractice claims by plaintiff against defendant. The Court of Appeal rejected plaintiff's arguments that the arbitrator violated mandatory disclosure rules, the engagement agreement was illegal, defendant obtained the award by fraud, and that the arbitrator improperly limited plaintiff's discovery rights. (C.A. 2nd, March 15, 2017.)

*Emerald Aero v. Kaplan* (2017) \_ Cal. App.5th \_ , 2017 WL 767004: The Court of Appeal reversed the trial court's order confirming an arbitration award of over \$30 million (mostly punitive damages) following a telephonic arbitration hearing. The Court of Appeal ruled the trial court erred in entering judgment on the award because the arbitrator exceeded his powers by issuing an award that violated applicable arbitration rules and procedural fairness principles. (California Code of Civil Procedure § 1286.2(a)(4).) Less than 24 hours before the arbitration hearing, plaintiffs notified defendant for the first time they were seeking punitive damages. Plaintiffs did so by requesting punitive damages in a

late-filed arbitration brief attached to an email sent to the arbitrator and copied to defendant (who was not represented by counsel at the time). This notice violated the parties' arbitration agreement because it was not reasonably calculated to inform defendant of the punitive damages claim and precluded a fair arbitration proceeding. The notice defects were also compounded by other procedural irregularities in the arbitration process. (C.A. 4th, February 28, 2017.)

*Farrar v. Direct Commerce, Inc.* (2017) \_ Cal.App.5th \_ , 2017 WL 1090483: The Court of Appeal reversed the trial court's order denying defendant's petition to compel arbitration in an action by a former employee. The Court of Appeal did not find procedural unconscionability because this case was a negotiated employment agreement for a top level executive who had extensive experience in sales and business development and was experienced in contract negotiations. While the Court of Appeal found that substantive unconscionability was present because of a "carve-out" provision for claims related to the Assignment of Inventions & Confidentiality Agreement between plaintiff and defendant was not limited to provisional judicial remedies, it concluded that the trial court abused its discretion in refusing to sever out the offending exception for claims arising from the confidentiality agreement. The case was remanded with directions to sever the exception for claims arising from the confidentiality agreement, declare an implied requirement that defendant bear all arbitration forum costs, and grant defendant's petition to compel arbitration. (C.A. 1st, March 23, 2017.)

### Attorney Fees

*Beck v. Stratton* (2017) \_ Cal.App.5th \_ , 2017 WL 588009: The Court of Appeal affirmed the trial court's attorney fee award of \$31,365 to respondent (under California Labor Code section 98.2(c)) after petitioner's unsuccessful appeal (under section 98.2(a)) of the California Labor Commissioner's

**CONTINUED ON PAGE 14**



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To get your case on the path to resolution, please contact Richard's case manager Kathy Purcell at (619) 238-7282 or email [kpurcell@westcoastresolution.com](mailto:kpurcell@westcoastresolution.com).



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# San Diego Defense Lawyers



## 2017 Juvenile Diabetes Research Foundation Golf Benefit

Presented by



**Friday, September 8, 2017 at 1:00 p.m.**



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CORONADO CALIFORNIA

Mark your calendars! On Friday, September 8, 2017 at 1:00 p.m., the San Diego Defense Lawyers will return to the **Coronado Golf Course** to show off our finely-tuned golf skills and enjoy an afternoon filled with friends, colleagues, and mulligans. A portion of the proceeds will benefit the **Juvenile Diabetes Research Foundation**.

Sign-up information and details to follow. Please email [sandiegodefenselawyers@gmail.com](mailto:sandiegodefenselawyers@gmail.com) for sponsorship opportunities.

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Direct line — 619.719-4704

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**CALIFORNIA CIVIL LAW UPDATE**  
**CONTINUED FROM PAGE 11:**

award of approximately \$6,000 in unpaid wages and penalties to respondent. The trial court properly ruled that respondent's motion for attorney fees was timely filed within the 60-day deadline applicable to fee motions in unlimited civil cases in California Rules of Court, rules 3.1702 and 8.104. The 30-day deadline for fee motions in limited civil cases in California Rules of Court, rules 3.1702 and 8.822, did not apply. (C.A. 2nd, March 8, 2017.)

*Gonzalez v. Santa Clara County Department of Social Services* (2017) \_ Cal.App.5th \_ , 2017 WL 781551: The Court of Appeal affirmed the trial court's order granting attorney fees of \$7,500 to one lawyer under Code of Civil Procedure 1021.5, but reversed the trial court's order denying attorney fees of over \$52,000 for the other three lawyers who had represented plaintiff in a writ action and appeal that successfully challenged an administrative order declaring that plaintiff should be reported to the statewide child abuse index for what was deemed excessive discipline of her 12-year-old daughter. The Court of Appeal reversed the denial as to the three attorneys and directed the trial court to reconsider those claims. (C.A. 6th, February 28, 2017.)

*Walent v. Commission on Professional Competence* (2017) \_ Cal.App.5th \_ , 2017 WL 691747: The Court of Appeal affirmed the trial court's attorney fee award of \$199,817 to petitioner after she had successfully challenged her termination by respondent before the Commission on Professional Competence. California Education Code section 44944(f)(2) does not preclude the use of a lodestar, and a lodestar applies absent a statutory exception. The trial court properly interpreted the code to require the award of reasonable fees, using a method of interpretation long accepted for these purposes in California. (C.A. 2nd, March 13, 2017.)

**Civil Procedure**

*Haniff v. Superior Court* (2017) \_ Cal. App.5th \_ , 2017 WL 786464: The Court of Appeal granted a writ petition directing the trial court to reverse its order compelling plaintiff, who alleged serious personal injury

claims, to undergo a defense vocational rehabilitation examination. The Court of Appeal held that a defense vocational rehabilitation examination is not one of the six methods of civil discovery expressly authorized by the Civil Discovery Act (Code of Civil Procedure section 2016.010, et seq.), and whether a defense vocational rehabilitation examination should be an available discovery method, as a matter of fundamental fairness where the plaintiff seeks compensatory damages for wage loss and loss of earning capacity, is better addressed to the Legislature. (C.A. 6th, March 1, 2017.)

*Iqbal v. Ziadeh* (2017) \_ Cal.App.5th \_ , 2017 WL 1101421: The Court of Appeal reversed the trial court's order granting summary judgment to a defendant in a personal injury action. The trial court ruled the action was barred by a general release plaintiff had previously executed immunizing the "affiliates" of defendants in a former case because the defendant was an affiliate. The Court of Appeal reversed the finding that defendant was an affiliate. The common meaning of an affiliate generally is one who is dependent upon, subordinate to, an agent of, or part of a larger or more established organization or group. Defendant was the property owner who leased the land to a used car dealership (the former settling defendant), and who had left several vehicles from his former used car dealership on the property on a consignment basis for tenant company to sell, including the car that injured the plaintiff. There was no evidence that the lease and consignment agreement made defendant property owner dependent upon, under the control of, an agent of, or a part of the tenant used car dealership. (C.A. 3rd, March 24, 2017.)

*Quiles v. Parent* (2017) \_ Cal.App.5th \_ , 2017 WL 1130936: The Court of Appeal granted a writ of supersedeas staying the enforcement of the costs portion of a judgment pending appeal where no bond had been filed for the appeal. Plaintiff obtained a jury verdict awarding her \$383,500 in damages for wrongful termination. The trial court conditionally granted a motion for new trial, which plaintiff accepted, reducing the judgment to \$208,500. The trial court later awarded plaintiff attorney fees of \$689,310.04 and costs of \$50,591.69. Defendant then paid the total damages and interest owing,

leaving only the attorney fees and costs unpaid. Defendant appealed the fees and costs without filing a bond, and plaintiff sought to execute because no bond had been filed by defendant. The trial court denied defendant's motion to stay execution. The Court of Appeal ruled the costs and attorney fees were awarded as costs under Code of Civil Procedure section 1021, et seq., and therefore no undertaking was required to stay execution of the judgment pending the appeal. (Code of Civil Procedure § 917.1(d).) (C.A. 4th, March 27, 2017.)

**Employment**

*Vaquero v. Stoneledge Furniture* (2017) \_ Cal.App.5th \_ , 2017 WL 770635: The Court of Appeal reversed the trial court's order granting summary judgment to defendant in a wage and hour class action involving employees paid on commission that alleged failure to provide paid rest periods under Labor Code section 226.7 and the applicable wage order, failure to pay all wages owed upon termination under section 203, unfair business practices, and declaratory relief. The Court of Appeal ruled that employees paid on commission are entitled to separate compensation for rest periods mandated by state law, and employers who keep track of hours worked, including rest periods, violate this requirement by paying employees a guaranteed minimum hourly rate as an advance on commissions earned in later pay periods. (C.A. 2nd, February 28, 2017.)

**Indemnity**

*Oltmans Construction v. Bayside Interiors* (2017) \_ Cal.App.5th \_ , 2017 WL 1179391: The Court of Appeal reversed the trial court's summary judgment for a subcontractor regarding a contractor's claim for indemnity, but dismissed the appeal because the parties had settled the case. The subcontractor agreed to indemnify a general contractor for injury claims arising out of the scope of the subcontractor's work "except to the extent the claims arise out of, pertain to, or relate to the active negligence or willful misconduct" of the general contractor. The trial court erred in finding that this provision, and California Civil Code section 2782.05, precluded the general contractor from recovering any indemnity if its active negligence contributed to the injury. The Court of Appeal ruled that the written agreement and section 2782.05 instead limited the recoverable indemnity

to the portion of liability attributable to the negligence of others. (C.A. 1st, March 30, 2017.)

### Probate

*Pizarro v. Reynoso* (2017) \_ Cal.App.5th \_\_, 212 Cal.Rptr.3d 606: The Court of Appeal affirmed the trial court's order finding the trustee acted properly, and affirmed an award of attorney fees and costs except to the extent the trial court made two beneficiaries personally liable for attorney fees and costs rather than liable solely from their shares of the trust assets. (C.A. 3rd, March 28, 2017.)

### Torts

*Phillips v. Honeywell International Inc.* (2017) \_ Cal.App.5th \_\_, 2017 WL 1034389: The Court of Appeal affirmed a judgment after a jury trial of over \$5.8 million (including punitive damages of \$3.5 million) to the spouse and surviving children of a man who died of asbestos-related cancer. The jury found the mesothelioma contracted by decedent was caused in part by exposure to asbestos contained in Bendix brakes. The Court of Appeal found that the trial court had properly admitted—subject to a limiting instruction—a 1966 letter of a Bendix employee sarcastically addressing an article in *Chemical Week* magazine that stated asbestos had been accused, but not yet convicted, as a significant health hazard. The letter was circumstantial evidence relevant to Bendix's awareness of asbestos's potential to cause cancer. The trial court properly admitted the testimony of plaintiffs' expert about causation and the contributions to decedent's risk of cancer from every identified exposure to asbestos that he experienced. The application of the every-identified-exposure theory in this case was consistent with California law addressing proof of causation in asbestos-related cancer cases. In the unpublished portion of the opinion, the Court of Appeal rejected several other arguments raised by defendant. (C.A. 5th, March 17, 2017.) ■

### ABOUT THE AUTHOR

*Monty A. McIntyre is a full-time mediator, arbitrator, referee and special master at ADR Services, Inc. and has been practicing law in California since 1980. Mr. McIntyre has extensive trial experience representing both plaintiffs and defendants in a wide variety of business, insurance, real property and tort cases.*

# New Board Member Introductions - Welcome!

The *Update* is pleased to spotlight the following new members to the SDDL Board during 2016/2017:

### Laura Dolan

#### Wilson Elser Moskowitz Edelman & Dicker LLP

Laura joined the SDDL Board of Directors in January 2017 for a two-year term. Laura is an attorney with Wilson Elser and focuses her practice on the defense of medical, dental and legal malpractice claims. She practiced at the New York office for five years before transferring to San Diego in 2016. Laura attended law school at Penn State but stays true to her alma mater, the Florida Gators. She regularly supports the American Foundation for Suicide Prevention and is excited to walk as the SDDL team captain in this year's Overnight Walk.



### Evan Kalooky

#### Dummit, Buchholz & Trapp

Evan also joined the SDDL Board of Directors in January 2017 for a two-year term and is the Editor-in-Chief of the *Update*. He has been an attorney in California for over a decade and focuses his practice on defending tort claims, with an emphasis on medical malpractice and premises liability. Evan grew up in Raleigh, North Carolina and, after obtaining an undergraduate degree at Georgetown University, he attended law school at the University of North Carolina - Chapel



Hill (and is still basking in the glory of the Tarheels' 2017 men's basketball title). Beyond being an avid sports fan, Evan enjoys spending his free time with his wife and two young daughters, as well as playing indoor soccer, attending concerts and travelling. ■

# Howell v. Hamilton Meats: Strategies For Negotiating Statutory Medical Liens

By David J. Kahn, Esq.  
TYSON & MENDES LLP

California statutory and case law has established limits on what certain stakeholders may recover in a personal injury action and from whom. Personal injury plaintiffs are limited to recovering the lesser of what was paid/incurred or what is reasonable as damages for medical treatment. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541. Under *Howell*, a plaintiff may only recover the amount actually paid by a health care services plan to a provider pursuant to a negotiated rate agreement. The difference between the provider's customary charge and the contract rate is what the *Howell* court termed the "negotiated rate differential." In evaluating exposure potential and settlement value, defense counsel and claims examiners must also consider potential exposure to other stakeholders such as hospitals and health care service plans who may have lien or subrogation rights which attach to a plaintiff's recovery. The following will briefly examine these statutory lien claims and provide strategies for reducing settlement value and mitigating exposure.

## 1. Statutory Hospital Liens

Emergency care providers such as hospital emergency rooms are required by statute to provide emergency care services regardless of the patient's ability to pay. California Health & Safety Code § 1317(d). As such, the legislature enacted the Hospital Lien Act ("HLA") which gives emergency care providers statutory lien rights subject to certain notice requirements. California Civil Code § 3045. Specifically, the HLA gives emergency care providers a statutory lien on the patient's recovery from a third party tortfeasor. The tortfeasor and its liability insurer are required to satisfy the lien when paying any money to an emergency room patient. California Civil Code § 3045.4.

## A. Negotiated Fee Agreements and Balance Billing

In order to keep a steady flow of patients in their emergency rooms, hospitals enter into negotiated fee agreements with various health care service plans including preferred provider organizations ("PPO") and health care maintenance organizations ("HMO"). These contracts are regulated by the *Knox-Keene Act* which provides certain patient protections. One key patient protection prevents an emergency care provider who accepts payment pursuant to a negotiated fee agreement with a health care services plan from balance billing the patient, subscriber or enrollee for the negotiated rate differential. Health & Safety Code § 1379. In the case of emergent care, health care service plans are required to reimburse out of network providers. Health & Safety Code § 1371.4 (a) and (d). In *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal. 4th 497, the California Supreme Court extended the statutory protection of patients from balance billing to emergency room physicians who did not directly contract with the plan. The *Prospect* court reasoned the *Knox-Keene Act* precludes any attempt to bill *patients* for the amount exceeding the negotiated rate paid by health care service plans.

## B. Limits on Recovery of Customary Rates

The question of whether emergency care providers could recover the negotiated rate differential from *third party tortfeasors and their insurers* so as to be compensated their full "customary" rate was addressed by the California Supreme Court in the case of *Parnell v. Adventist Health System/West et. al.* (2005) 35 Cal. 4th 595. The Supreme Court in *Parnell* held hospitals may not recover customary rates when they accepted payment in full from a plan pursuant to a negotiated contract. However, *Parnell* left the door open for emergency care providers to reserve their right to collect the negotiated rate differential

from third party tortfeasors and their insurers by including an express reservation in their contract with the health care services plan.

A subsequent Court of Appeal opinion confronted the issue left open by the *Parnell* court, *Dameron Hospital Association v. AAA* (2014) 229 Cal. App. 4th 549. The *Dameron* case involved a hospital suing third party tortfeasor liability carriers for the negotiated rate differential after the carriers had settled with the patients. The hospital had filed statutory lien notices which were ignored by the defense liability carriers at the time of settlement. On appeal, the defense carriers argued among other things that the holding in *Howell* prevented the hospital from recovering the negotiated rate differential. The *Dameron* court disagreed with this argument interpreting *Howell* narrowly as limiting a patient-plaintiff from recovering the negotiated rate differential *but not the care provider*. However, the *Dameron* court ultimately held the hospital could not recover its customary fees because the subject contract did not provide the express contractual reservation of rights required by *Parnell*.

## 2. Statutory Health Care Services Plans Liens

Another stakeholder with potential recovery rights is the health care services plan itself. Civil Code § 3040 gives certain health care services plans ("Plan") the right to recover amounts paid on behalf of insured members or enrollees from third party tortfeasors. As with HLA liens, **the key is there must be an express contractual provision** in the subscriber agreement giving the Plan such a right. In instances where the subscriber agreement contains a provision allowing the plan to recover amounts paid on behalf of the enrollee or member from a third party tortfeasor, the statute provides several limitations which can significantly reduce the recoverable amount.

## A. Co-Payment and Capitation Reductions

Although not specified in the statute, the first automatic deduction from any Plan lien is for co-payments made by the insured. The next deduction to be considered as set forth in § 3040 relates to the type of payment made by the Plan to the provider. If the payment is "incurred" the Plan pays off of an itemized bill from the provider. The statute limits this amount to a sum which does not exceed the reasonable cost of what was actually paid. Civil Code § 3040(a)(1). If the

payment is capitated (flat fee per member), as is the case in most HMO settings such as Kaiser, the statute provides for an automatic twenty percent adjustment off of the usual and customary charge. Civil Code § 3040(b)(2). Because these deductions are based on reasonableness, bill review audits may be warranted to ensure the contracted rates are reasonable and to identify any billing and coding irregularities.

### B. Comparative Fault Reduction

Civil Code § 3040(c) provides a reduction for the comparative fault of the insured. Determination of this amount necessarily requires a finding by the trier of fact. However, prior to an actual finding, the potential for comparative fault is *negotiable*. To facilitate settlement or in cases where liability against the third party tortfeasor is likely and there is also the potential for significant comparative fault, it may be advantageous for the defense to negotiate the Plan lien. The defense may be able to reduce the settlement value of the case by pre-negotiating the Plan lien and securing an agreement from the Plan to accept a lower number. This is so, because Plaintiff's counsel will be reluctant to make strong comparative fault arguments until *after* settlement with the third party tortfeasor has been reached. In addition to comparative fault, the defense can also use disputed liability (not mentioned in the statute) to create doubt in the Plan's confidence of recovery. Disputed liability arguments used in tandem with the statutory comparative fault reduction can effectively result in significant reduction of the Plan lien and facilitate settlement.

### C. Attorney's Fees and Costs Reduction

The Plan lien must also be reduced by the insured's reasonable attorney's fees and costs under what is known as the "common fund doctrine." Civil Code § 3040(f). The common fund doctrine recognizes the recovery efforts of the insured on behalf of the Plan. The amount recovered from the third party tortfeasor is thus characterized as a common fund from which the insured's reasonable attorney's fees and costs are deducted from the insured's gross tort recovery.

### D. Maximum Ceiling Limits Reduction

The statute also provides a maximum ceiling limitation on Plan liens based on the insured's net tort recovery. After deductions for capitation, comparative fault, and attorney's fees, the Plan lien cannot exceed one-third of the insured's net recovery in cases where the insured is represented. Civil Code § 3040(c). In cases where the insured is not represented, the Plan lien cannot exceed fifty percent of the insured's net recovery. Civil Code § 3040(d).

### 3. Conclusion

In cases involving private health insurance, it is critical to understand not only how much plaintiff is legally entitled to recover but who else may have a stake in the outcome. The same concerns which apply to potential Medicare liens are also present. If served with an HLA lien from an emergent care provider, the contract between the provider and the Plan must be examined to determine if the Provider expressly reserved its right to collect the negotiated rate differential from third party tortfeasors. If so, the HLA lien must be addressed *before* any money is paid to the plaintiff.

If the plaintiff's health care services plan is seeking to recover the contracted amount from the plaintiff's third party recovery, the subscriber agreement must be examined to determine if the Plan expressly reserved its right to recover what was paid on the insured's behalf. If so, Civil Code § 3040 provides statutory reductions which can significantly reduce the Plan's lien. To facilitate settlement, the defense can pre-negotiate settlement with the Plan to ensure all statutory reductions are made and to create uncertainty and doubt with liability arguments and defenses. As a result, these negotiations will lower the settlement value by taking money out of the Plan's pocket during settlement negotiations rather than leaving it for plaintiff's counsel to do after settlement has been negotiated. ■

#### ABOUT THE AUTHOR

*David Kahn specializes in civil litigation in the areas of personal injury, professional liability, general liability, and employment litigation.*

### COVER STORY CONTINUED FROM PAGE 1

determine past medical expenses are irrelevant based on plaintiff's unilateral waiver. Does that mean amounts paid for past medical treatment are wholesale inadmissible? Not necessarily.

Ephemeral or equivocal admissions do not render the subject matter irrelevant. (*Thor v. Boska* (1974) 38 Cal.App.3d 558, 562.) Defendants can argue plaintiff's 11th hour waiver, failure to amend the pleadings, or references to past medical treatment for other purposes (e.g. to prove pain and suffering or causation), are inconsistent with the claimed waiver.

Similarly, the introduction of evidence of admitted facts is permissible in cases where the admission is ambiguous in form or limited in scope or where, during the trial of a case, a party seeks to deprive the opponent of the legitimate force and effect of material evidence by the bald admission of a probative fact. (*Fuentes v. Tucker* (1947) 31 Cal.2d 1, 7.) In seeking to prevent evidence of the reasonable value of future treatment, this is precisely what plaintiffs are seeking to do. Defendants should not be deprived of the legitimate force and effect of the amount paid for similar past treatment.

Further, defendants should argue evidence of past medical treatment is relevant and admissible for other purposes, such as impeaching the plaintiff's credibility, the basis of plaintiff's expert's opinions, and to prove the reasonable value of future medical treatment.

### Conclusion

Think twice about stipulating to waiver of past medical expenses. And beware of plaintiff's attempts to do so. You may unknowingly render your best evidence irrelevant. However, with effective advocacy and a sympathetic trial judge you may be able to overcome the waiver and instead use it to your client's advantage. ■

#### ABOUT THE AUTHOR

*Reece Román is an associate at Tyson & Mendes LLP. He specializes in personal injury, employment, professional liability, and business litigation.*

# San Diego Defense Lawyers to Walk in the May 20, 2017 Overnight Walk

All SDDL members and their office staff are invited to join the SDDL team in the American Foundation for Suicide Prevention's May 20, 2017 Overnight Walk in San Diego, a 16-18 mile journey to raise awareness for suicide prevention.

Please visit our team page at [www.theovernight.org/team/SDDL](http://www.theovernight.org/team/SDDL) or

contact our team coach, Laura Dolan, at [laura.dolan@wilsonelser.com](mailto:laura.dolan@wilsonelser.com) to sign up or get involved.

SDDL is especially proud to support this cause in light of the heartbreaking impact that suicide and depression has had on our profession and the San Diego legal community – from personal struggles to the loss of colleagues, friends, and family members.

As part of our commitment to this great cause, SDDL recently sponsored the Kickoff



event for the Overnight Walk, where people were invited to learn what is being done locally to stop suicide and what people can

do to get involved in the Overnight Walk. The event had a great turn out with over 100 people in attendance. We also learned additional information about the Overnight that we want to pass on to our members to encourage you to join our team.



## The Overnight Walk

The Overnight will begin with the opening ceremony at sunset, where you will meet people of all ages and backgrounds, each with their own story that led them to take a stand against suicide. The walk is 16-18 miles from dusk until dawn. It's a place to laugh, to cry, and to heal - to honor the past and embrace a future that your work will change for the better.

## The Luminaria

Lining the end of the route are thousands of luminaria, each one represented a life touched by suicide. The luminaria are truly a moving sight, and a reminder of the importance of AFSP's mission.

## The Honor Beads

The honor beads show our personal connection to the cause. Each color represents a different meaning, from loss of a relative or friend, spouse, child, sibling, or just a supporter of the cause. ■

# SDDL First Quarter Happy Hour

The First Quarter SDDL Happy Hour took place on March 30, 2017, at The Pendry Hotel, Nason's Beer Hall in San Diego. This well attended event was sponsored by Special Counsel and D4. The attendees, including several SDDL Past-Presidents, enjoyed the opportunity to mingle with one another while enjoying good German themed food and libations. As always, the Happy Hour proved to be another excellent opportunity to take a few hours away from the office to meet with colleagues from the defense bar. We would like to thank Special Counsel and D4 for graciously sponsoring the event and supporting SDDL. ■



# Balestreri Potocki & Holmes Attorneys Named 2017 Top Lawyers in San Diego

**B**alestreri Potocki & Holmes is pleased to announce that Thomas Balestreri (Construction Law) and Karen Holmes (Professional Liability) have been listed in San Diego Magazine as 2017 Top Lawyers in San Diego.

Balestreri has dedicated most of his 32-plus years in practice to the representation of developers, property owners and general contractors in litigation, negotiations and risk management. He has tried a number of high exposure cases with great success and has received numerous professional awards and honors including Top San Diego Lawyers and Super Lawyers for the last several years.

Holmes is a successful litigator and trial attorney specializing in professional liability defense and civil litigation. She handles contract review and negotiation as well as the defense of construction delay, extras and defect claims on behalf of architects, engineers and contractors. Holmes has extensive trial experience and has served as Judge Pro Tem as well as arbitrator and mediator for the San Diego Superior Court. She is the recipient of many professional awards and honors including being named a San Diego Super Lawyer since 2007.

San Diego Magazine's 2017 Top Lawyers in San Diego list reflects those local attorneys who have been recognized by Martindale-Hubbell as 2017 AV® Preeminent™ Peer Review Rated attorneys. Martindale-Hubbell® is the preeminent objective attorney rating service. For more



*Karen Holmes*



*Thomas Balestreri*

than 140 years, lawyers have relied on the Martindale-Hubbell Law Directory for authoritative information on the worldwide legal profession. The Martindale-Hubbell Peer Review Ratings are an objective indicator of a lawyer's high ethical standards and professional ability, generated from evaluations of lawyers by other members of the bar and the judiciary in the United States and Canada. It is achieved only after an attorney has been reviewed and recommended by their peers - members of the bar and the judiciary. More information can be found at [www.martindale.com](http://www.martindale.com).

Balestreri Potocki & Holmes is a boutique law firm headquartered in San Diego, California. The firm provides representation to a diverse range of business clients with an emphasis in the legal advocacy and consultation of business owners and companies working in or related to the construction, transportation and hospitality industries. The firm is located in downtown San Diego at 401 B Street, Suite 1470, and more information can be found at [www.bph-law.com](http://www.bph-law.com). ■

## LUNCH AND LEARN

# Cyber Liability and You

**O**n February 18, 2017, SDDL held its second "lunch and learn" of the new year. Elaine Harwell, Esq.; James McFaul, Esq.; Kelly Potter of Cavnac & Associates; and Dean Sapp, Chief Information Security Officer for Braintrace, gave a one hour presentation on "Cyber Liability Consideration for Practitioners – What Lawyers And Their Clients Ought To Know," a rapidly evolving area of the law.

The presentation made clear that an attorney's duties of confidentiality, competence and supervision to the client are all potentially implicated in the event of a security breach of an attorney's computer system that leads to the theft or disclosure of protected client information. Ms. Harwell pointed to a state bar advisory opinion that specifically dealt with the issue of protection of a client's personal data. Moreover, as Mr. Sapp explained, any business that maintains or stores personal information, including a law firm, is subject to potential civil liability for data breaches.

Fortunately, Ms. Potter noted, there is insurance available to cover the potential civil liabilities. At this point in time, the coverage is a relatively new market development and is therefore reasonably priced. The policies are typically "burning limits," meaning the dollar amount of the coverage is depleted by defense costs, but carriers are often willing to negotiate terms with respect to the coverage. ■

# Spotlight on a Local Business Owner and Veteran

By David Cardone, Esq.  
DUNN DESANTIS WALT & KENDRICK

**M**omentum Actual is a private investigation and consulting firm based in San Diego and founded by retired Navy SEAL David Hartzell. After he spent 8 years as a SEAL, Mr. Hartzell retired from the military and decided to make good use of his skill set and natural curiosity by offering his services as a consultant to people with problems and nowhere to turn.



David Hartzell was born in Buffalo, New York. After graduating from Suny Buffalo and obtaining a degree in international business, he decided to move to San Diego and pursue becoming a Navy SEAL. Under a “challenge contract,” he was able to attend and graduate from the BUDS school. After leaving the Navy in early 2015, he decided to explore the concept of a “security concierge service.”

Today, Momentum Actual provides a variety of services to a wide range of clientele. On any given day, Mr. Hartzell and his team can be involved in conducting employee background checks for investment bankers or pre-merger intelligence for commercial interests. On another day he might be doing criminal background checks or conducting a missing persons investigation for a family whose attempts to find a loved one through law enforcement proved fruitless. He does political opposition research, asset recovery, domestic surveillance, and commercial surveillance including for companies who are concerned about risk management in the workplace. He provides counseling to companies in advance of mass terminations of employees, as well as vetting employees before they are hired.

As a licensed private investigator, Mr. Hartzell’s services extend far beyond security

engagements. His work has led to criminal convictions, as well as prison sentences for those who victimize his clients. For example, Mr. Hartzell recently was able to step in and help a client that the FBI was unable to help. He recovered a large sum of money for a client who was the victim of white collar fraud. As part of his investigation, he was able to amass enough information and package it in such a way that he ultimately delivered

an open and shut criminal case to law enforcement.

Along with white collar fraud cases, Mr. Hartzell and his team are regularly involved in high end asset recovery – stolen aircraft for

example – across California and the western United States. He also assists high net worth people, including professional athletes and business owners, who want to vet possible affiliates or employees or to assess their personal security protocols and strategies. His work has led to a variety of unusual assignments, including a role in Transformers 5, which will be released in the summer of 2017.

Mr. Hartzell’s background offers insight into why he chose the field of private investigation after finishing his duties in the military. He offers a unique skill set and background to the private investigation and security consulting options in San Diego. For the civil defense bar, Mr. Hartzell also offers process serving services. After his years of service to our country, the spotlight on this small business owner in San Diego is well deserved. ■



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# Bottom Line: Neil Dymott Two Verdicts

## SUCCESSFUL DEFENSE OF UROGYNECOLOGIST AGAINST CLAIMS SUBURETHRAL SLING SURGERY CAUSED NERVE INJURY

Case Name: *Speakman v. Kahn, M.D.*

Defense Firm Name: Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson; San Diego, CA

On December 9, 2016, Clark Hudson, a shareholder at Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson, APLC, and Elizabeth Harris, an associate at Neil Dymott, obtained a defense verdict after the jury deliberated for 45 minutes. The case concerned a plaintiff who experienced nerve irritation following placement of a suburethral sling for stress urinary incontinence.

Plaintiff claimed the urogynecologist negligently positioned her in the lithotomy position intraoperatively, which resulted in widespread injury to the lumbosacral plexus. Plaintiff focused on one post-operative progress note in particular, in which the urogynecologist documented the patient was positioned with “extreme flexion of the hips” prior to surgery. This was recognized prior to the 20-minute procedure beginning, and the patient’s hips were repositioned to extend the legs to 90 degree angles. According to plaintiff, it was below the standard of care to position her legs with extreme flexion of the hip. Specifically, plaintiff introduced evidence that her injuries, which do not occur in the absence of negligence, could only have resulted if her hips were both hyperflexed and hyper-abducted intraoperatively. According to plaintiff, despite her diligent efforts to rehabilitate her left leg, she still experiences instability and weakness, such that she is unable to squat down without a bar to assist her or sit for long periods of time.

The defense presented evidence that plaintiff’s symptoms were initially musculoskeletal in nature, and the symptoms plaintiff claimed she still had in 2016 were not the same symptoms she complained of



after her surgery in 2013. The defense argued there was simply no evidence that plaintiff’s leg was hyperflexed and hyper-abducted intraoperatively.

Instead, the urogynecologist made every possible effort to determine the cause of and treat plaintiff’s post-operative symptoms. While he was considering all potential causes, he documented in his medical records that plaintiff’s leg was observed to be hyperflexed and repositioned prior to the surgery beginning. It is not below the standard of care, or even uncommon, for the urogynecologist to fine tune a patient’s lithotomy positioning prior to beginning a procedure. Even if plaintiff were correct that she experienced a lumbosacral radiculopathy or plexopathy, these injuries would have nothing do with lithotomy positioning.

With respect to damages, plaintiff reluctantly admitted on cross examination that she began taking flying lessons 7 months after her surgery while she was also receiving disability benefits. Based on plaintiff’s testimony about her continued complaints of left leg instability, the defense introduced various Facebook pictures which depicted plaintiff balancing on her left leg on the strut of an aircraft and squatting beneath the aircraft to check the fuel. These pictures demonstrated plaintiff’s symptoms were not as severe as plaintiff claimed.

The jury ultimately agreed with the defense that the urogynecologist performed at all times within the standard of care.

## SUCCESSFUL DEFENSE OF ORTHOPEDIC SURGEON AGAINST CLAIMS TOTAL HIP REPLACEMENT SURGERY CAUSED SCIATIC NERVE INJURY

Case Name: *Belfiore-Braman, et al. v. Rotenberg, M.D.*

Firm Name: Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson; San Diego, CA

On December 20, 2016, Clark Hudson, a shareholder at Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson, APLC, and Elizabeth Harris, an associate at Neil Dymott, obtained a defense verdict on behalf of their client, an orthopedic surgeon. The case concerned a plaintiff who developed sciatic nerve damage and resulting “foot drop” condition following a total hip replacement surgery.

It was undisputed the surgery was indicated for the patient, who had a long history of severe arthritis of the left hip. Instead, plaintiffs alleged the orthopedic surgeon negligently performed the surgery by utilizing hip implant components which were too long and too tight. Plaintiffs claimed these components stretched the sciatic nerve, which in turn, negligently caused the patient’s injury. Plaintiffs’ expert further claimed there was no documentation in the medical records of the surgeon’s efforts to properly position the left leg and protect the sciatic nerve intraoperatively. Thus, plaintiffs’ expert was unable to determine whether positioning also played a role in the patient’s injury.

The orthopedic surgeon presented evidence showing the patient experienced a rare, but recognized risk of the total hip replacement surgery. In fact, both plaintiffs’ expert and the orthopedic surgeon’s expert agreed sciatic nerve injury can occur even if the surgeon does everything, including intraoperative positioning, perfectly. The defense argued the orthopedic surgeon properly used trial implant components to determine the proper length for the final implant. When the +0-millimeter femoral head was difficult to reduce during the trial reduction, the surgeon appropriately utilized the -3.5-milimeter head, which allowed for full range of motion and was stable in all directions. Although the plaintiff experienced a serious complication from the surgery, the complication occurred in the absence of negligence and despite the surgeon’s best efforts to avoid it.

The jury agreed with the defense theory of the case and returned a verdict in the orthopedic surgeon’s favor. ■

# 2017 SDDL Installation Dinner

SDDL held its 33rd Annual Installation Dinner on January 28, 2017 at a new venue, the Omni Hotel in San Diego. Beyond thanking the outgoing Board and welcoming new Board members, the event honored Robert W. Frank as SDDL's Lawyer of the Year and Ian R. Friedman as SDDL's New Outstanding Attorney award recipients. The dinner was a rousing success highlighted by SDDL presenting a donation of \$10,000 to the Juvenile Diabetes Research Foundation. ■



Master of Ceremonies Brian Rawers



SDDL Lawyer of the Year Robert W. Frank



Presentation of donation to the Juvenile Diabetes Research Foundation



SDDL Outgoing President Stephen Sigler



President Beth Obra-White with her parents Des and Alice Obra



SDDL New Outstanding Attorney award recipient Ian Friedman with SDDL Board member Eric Deitz

# SDDL Recognition of Law Firm Support

The Update traditionally included a list of current SDDL members at the end of each edition. As part of the SDDL Board's proactive efforts to protect the privacy of its members, the Update will no longer include a list of current members. We have observed over the course of the last year or so an increasing number of requests from vendors and other bar organizations to hand over the contact information of our members. In each case, we have rejected the request. The SDDL Board is concerned that third parties may use other means to identify our members to target them for the marketing purposes. Because the Update is published online and searchable through Google (and other search engines), the decision has been made to discontinue the identification of the entire membership in the Update. In place of the membership list, the SDDL Board will instead recognize the top 20 law firms in regard to SDDL membership. If there are any errors in the information provided, please email [evan.kalooky@dbtlaw.org](mailto:evan.kalooky@dbtlaw.org) so that corrections can be made for the next edition.

- #1 - Tyson & Mendes - 36 members
- #2 - Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson – 23 members
- #3T - Balestreri Potocki & Holmes – 14 members
- #3T - Wilson Elser Moskowitz Edelman & Dicker LLP – 14 members
- #5T - Farmer Case & Fedor – 12 members
- #5T - Grimm Vranjes & Greer LLP – 12 members
- #7T - Horton, Oberrecht, Kirkpatrick & Martha, APC – 10 members
- #7T - Winet Patrick Gayer Creighton & Hanes – 10 members
- #9T - Ryan Carvalho & White LLP – 8 members
- #9T - Wingert, Grebing, Brubaker & Juskie, LLP – 8 members
- #11T - Dunn DeSantis Walt & Kendrick, LLP – 6 members
- #11T - Lorber Greenfield & Polito, LLP – 6 members
- #11T - Lotz Doggett & Rawers LLP – 6 members
- #14T - Belsky & Associates – 5 members
- #14T - Dummit Buchholz & Trapp – 5 members
- #14T - Klinedinst PC – 5 members
- #14T - Lincoln, Gustafson & Cercos – 5 members
- #14T - Walsh McKean Furcolo LLP – 5 members
- #19T - Hughes & Nunn, LLP – 4 members
- #19T - The Roth Law Firm – 4 members ■



*SDDL Board of Directors (from left to right): Gabriel Benrubi, Vanessa Whirl, Evan Kalooky, Eric Deitz, Zachariah Rowland, Janice Walshok, Colin Harrison, Beth Obra-White, Dianna Bedri (Executive Director), Ben Cramer, Patrick Kearns and Laura Dolan*

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