THE LEGAL GAZETTE

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Introduction: To my clients, past and present, and to my friends and colleagues in the legal and medical professions: As many of you know, I dissolved my partnership the beginning of this year and moved to a new office in Irvine, where I am currently practicing as a sole practitioner. My decision was motivated by the need for a change after being in practice for 31- ½ years, and to better serve my clients. I am continuing to represent clients in the area of personal injury, tort litigation, and general business and real estate related litigation as well. I hope that you find your receipt of this latest edition of *The Legal Gazette*, as previously published for my client base when I was in my prior professional incarnation, to be either informative, amusing, or at least not irritating enough for you to demand that I take you off of my mailing list. I especially want to thank my wife for being the supportive partner that she has been to me over the years.

Recent Legal Decisions of Note:

***Howell vs. Hamilton Meats & Provisions* (November 23, 2009) 179 Cal.App.4th 686, 101 Cal.Rptr.3d 805:** It has long been a cornerstone of personal injury law that a person responsible for causing an injury to another is not allowed to profit by their victim's prudence and foresight in being the beneficiary of health insurance that will cover, in whole or in part, the medical expenses as related to their injury. This has come to be known as the *Collateral Source Rule* (CSR), such that the negligent defendant is still liable for the reasonable cost of the plaintiff's medical bills, even though the plaintiff's insurance may have covered same.

As a practical matter, most HMOs, general medical insurance carriers, and automobile insurers who provide medical benefit coverage for an accident have contractual rights to reimbursement from their insured, if the injured person obtains a recovery on their injury claim.

Over the years, a subtle but dangerous erosion of the CSR has taken place based upon the case of *Hanif vs. Housing Authority* (1988) 200 Cal.App.3d 635, which dealt with a situation where an injured plaintiff received Medi-Cal benefits to cover her bills, and the Medi-Cal benefits paid were far less than the face amount of the bills. The *Hanif* court ruled that because the plaintiff was never really legally responsible for the face amount of the bills, due to her status as a Medi-Cal beneficiary, that her damages for medical bills were limited to the lesser amount paid by Medi-Cal and not the larger face amount of the bills.

Since *Hanif* was decided, most insurance carriers for defendants took the position that it applied across the board to all plaintiffs, including those with private medical insurance, such that the plaintiff shouldn't be allowed to claim as damages an amount greater than that which was paid by their medical insurer and accepted by the provider as payment in full.

As most people know, health care providers that accept medical insurance benefits do routinely discount their bills, but this is due to a plethora of reasons other than the fact that their bill is unreasonable. These other reasons can include certainty of payment, ease and speediness of payment, and other considerations negotiated between health care providers and major medical insurance providers.

Due to several legal decisions occurring post-*Hanif* that misinterpreted the significance of that decision, the CSR was somewhat thrown out the window by insurance companies and trial judges whenever a plaintiff had been fortunate enough to have insurance to cover their medical bills that were incurred only due to the negligence of the defendant.

The end result was that insurance companies had an argument that any given claim wasn't worth that much, as the amount paid by the medical insurance carrier for the medical bills was often far less than the face amount of the bills.

Most plaintiff attorney practitioners have regarded *Hanif* as only being applicable to plaintiffs receiving governmental assistance for their bills, such as Medi-Cal and Medicare recipients.

A reaffirmation of the CSR took place with the November 2009 decision of *Howell vs. Hamilton Meats*, which clearly states that any abrogation of the CSR properly belongs with the legislature, not the courts, that the CSR serves an important societal goal of encouraging people to have the foresight to obtain medical insurance, that defendants shouldn't receive a windfall when they have caused injury to someone, and that *Hanif* is limited on its facts to Medi-Cal recipients.

The *Howell* decision has raised a firestorm of alarm in the insurance industry and with the defense bar, and they have collectively mounted an attack on the decision by requesting the appellate court to rehear the matter and by petitioning the appellate court to depublish the case so it cannot be cited as law.

Because of this opposition to *Howell*, it was depublished and has been accepted for review by the California Supreme Court, which will probably make a ruling sometime in the next two years.

While a depublished case cannot be cited as legal precedent, this writer believes that *Howell* will be affirmed by the Supreme Court as valuable precedent, as it doesn't change the law, it only reasserts the value and pertinence of the CSR.

In the interim, two other appellate court decisions mirroring *Howell* and upholding the CSR from this kind of attack been issued but then depublished pending review to the California Supreme Court, those being ***Yanez vs. Soma Environmental Eng. Inc.*** **(June 24, 2010) 185 Cal.App.4th 1313; and *King v. Willmet* (August 9, 2010) 187 Cal.App.4th 313.**

In the interim, the rationale of *Howell*, *Yanez* and *Willmet* decisions constitute a valuable contribution to the legal position of any deserving plaintiff who carries medical insurance, and their reasoning should be asserted by any attorney representing such a plaintiff, even if the cases can't technically be cited.

Coito v. Superior Court **(March 2010) 182 Cal.App.4th 758, 106 Cal.Rptr.3d 342:** Attorneys in response to discovery proceedings in litigation will almost invariably refuse to disclose witness statements to the opposing side that they have obtained, citing the "work product doctrine". This doctrine normally protects an attorney's work efforts from being disclosed to their adversary.

The *Coito* case has somewhat eroded the applicability of the doctrine to the production of witness statements, holding that such statements are capable of being discovered by an adversary, including lists of witnesses that the attorney may have contacted. For an attorney to object to such disclosure would require a court ruling that the statement shouldn't be produced because the content of the witness interview revealed interpretative, rather than evidentiary information. This ruling represents a major dent in the attorney work product doctrine as it applies to witness statements.

Consumer Protection via the Consumer Legal Remedies Act:

[Note: This article was authored by Lawrence A. Strid and published in the Summer 2010 edition of the Orange County Trial Lawyers journal "The Gavel", to whom it is copyrighted and being republished with its permission.]

In 1971, a potent consumer-orientated law known as the Consumer Legal Remedies Act (CLRA) became effective, as codified at Civil Code secs. 1750 through 1784, inclusive.

In general terms, the CLRA offers a potent range of remedies to consumers who are injured by misleading, deceptive, or overbearing acts of merchants who supply goods or services to the consuming public, either by sale or by lease.

It applies to specified and statutorily defined unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction *intended* to result or which results in the sale or lease of goods or services to a consumer. As such, the act requires an intentional act by the defendant, or at least a transaction which runs afoul of the enumerated unfair practices, in which case intent is in effect concluded or drawn from the nature of the transaction itself. Civil Code sec. 1770 (a).

The act is to be liberally construed, per Civil Code sec. 1760, in order to achieve its purpose of protecting consumers from unfair and deceptive business practices and to provide efficient and economic measures to secure such protection.

Some Definitions:

A "consumer" means an individual who seeks or acquires by purchase or lease any goods or services for personal, family, or household purposes [Civil Code sec. 1761 (d)].

"Services" means labor or work for other than a commercial or business purpose, including services furnished in connection with the sale or repair of goods [Civil Code sec. 1761 (d)].

"Goods" means tangible chattels bought or leased for use primarily for personal, family, or household purposes, including goods that will become fixtures under real property law definitions [Civil Code sec. 1761 (a)].

Prohibited Practices:

There are 24 specifically enumerated acts or practices that run afoul of the CLRA, as contained at Civil Code sec. 1770.

Some of the practices are general in description and would apply to any transaction wherein the quality, quantity, condition, certification, benefits, uses, ingredients, or characteristics of the goods or services would be misrepresented or concealed. See Civil Code sec. 1770 (a) (1) through (18), inclusive.

Some of the practices are more fact particular in nature and deal with definitively defined types of conduct, such as not clearly labeling that furniture is being sold unassembled [Civil Code sec. 1770 (11)(12)]; the insertion of unconscionable provisions into contracts [Civil Code sec. 1770 (19)]; the dissemination of unsolicited prerecorded telephone messages [Civil Code sec. 1770 (22)(A)]; and home solicitation of senior citizens for loan encumbrances that are designed for paying for home improvements [Civil Code sec. 1770 (23)].

Of particular note, Civil Code sec. 1770 (24)(A) specifically deals with the charging of or receiving an "unreasonable fee" to prepare or aid an applicant in attempting to obtain public social services, although attorneys are specifically exempted from this one section of the act, with the consumer's remedy against an attorney being the mandatory fee arbitration provisions that apply to attorney-client fee disputes.

Because it is anticipated that any misrepresentations by a merchant to a consumer would be oral and might contradict what was in a written contract, the parol evidence rule [a rule of law prohibiting evidence of extrinsic verbal agreements that purport to modify or add to a written contract] doesn't apply to causes of action brought under the CLRA. *Wang vs. Massey* (2002) 97 Cal.App.4th 856, 118 Cal.Rptr.2d 770.

Because of the non-applicability of the parol evidence rule, the fact that the CLRA is to be liberally construed [Civil Code sec. 1760], and that any waiver by a consumer of the provisions of the act is unenforceable and void [Civil Code sec. 1751], boilerplate language in a merchant's contract or invoice with a consumer to the effect that "all sales are final", that goods are sold "as is", that there are "no warranties", that the agreement is an integrated agreement and that it contains the entire substance of the terms and conditions of the transaction, or similar disclaimer language; will not be an absolute defense to a consumer action wherein the consumer alleges that misrepresentations about the goods or services as made were contrary to the written language in the sales documents.

Application to Particular "Merchants":

The CLRA is nearly always raised in lemon law cases and is of course applicable to any transaction wherein a consumer claims that they did not receive what they bargained for. Any retail merchant selling goods can run afoul of the act, but professionals who provide services, only, should also be careful.

Of greater concern to some members of the Bar should be its potential for being an adjunct cause of action by a disgruntled client against an attorney when a legal malpractice issue or fee dispute arises. Attorneys (and other professionals) who misrepresent what they are going to do for a client, what the outcome of the matter is going to be, or what the scope of the representation is going to entail, would be particularly vulnerable to a potential CLRA cause of action under Civil Code secs. 1760 (a)(2)(3)(5)(7)(8)(9)(13)(14)(19).

Notwithstanding the potential for such a cause of action against an attorney or other professional who offers services and not goods to a consumer, the case annotations to the CLRA are largely absent with references to reported cases dealing with services provided by professionals, as opposed to situations involving goods sold by merchants.

Remedies and Procedures:

Civil Code sec. 1780 contains a litigant's laundry list of the relief available under the act, including actual damages (never less than $1,000.00 if it is a class action, the mechanics of which are provided for in the act at Civil Code sec. 1781), injunctive relief, restitution, punitive damages, and statutory damages of up to $5,000.00 if the consumer is a senior citizen or disabled person.

The act is not an exclusive remedy, and it is, therefore, not uncommon to see a CLRA cause of action paired with causes of action for breach of contract, fraud, unfair competition, or conversion.

Attorney's Fees:

This is the real "*sword*" in the CLRA, and will constitute the primary motivation for many consumers (and especially their attorneys) in bringing the cause of action in the first instance. Under Civil Code sec. 1780 (e), the court *shall* award attorney's fees to the prevailing consumer plaintiff in a CLRA cause of action. Somewhat akin to the provision provided for under the anti-SLAPP statute contained at C.C.P. sec. 425.16 (c), the prevailing defendant is only entitled to attorney's fees if they can prove that the plaintiff's prosecution of the CLRA action was not in "good faith".

The daunting prospect of a large and mandatory attorney's fees award can often be the impetus for a defendant in agreeing to settle the case for more than what the plaintiff's alleged out of pocket damages may be, much less what the actual likelihood for the plaintiff prevailing in the action may really be.

Pre-Litigation Notice And The Response Thereto:

At least thirty days prior to filing suit, the aggrieved consumer must send to the merchant in writing by certified or registered mail a notice of the alleged unlawful practices under the act, and a demand that the merchant rectify the situation [Civil Code sec. 1782 (a)].

No action for damages may be maintained if the appropriate remedy is given or agreed to be given by the merchant within thirty days after receiving the notice [Civil Code sec. 1782 (b)].

It is the merchant's response to this statutorily required notice that constitutes the "*shield*" aspect of the CLRA from a defendant's standpoint, as a cause of action under the CLRA is one of the few causes of action (if the only one, from the knowledge of this author) wherein evidence of compromise or an attempt to settle is normally admissible during the trial, at least in a limited form.

This is because Civil Code sec. 1782 (e), even though it states that attempts to comply with this code section are inadmissible as evidence pursuant to Evidence Code sec. 1151 (and which generally prohibits offers of compromise as evidence for public policy reasons), provides that "[e]vidence of compliance or attempts to comply with this section may be introduced by a defendant for the purpose of establishing *good faith* or *to show compliance with this section*." (emphasis added).

As most CLRA causes of action will routinely allege a claim for punitive damages, this last cited code section is critical for the defendant who wants to avoid the possibility of punitive damages, and to cast the case in the defense light of a disgruntled "buyer's remorse" situation where the consumer had an opportunity to resolve the matter out of court at minimal expense, but who disregarded that opportunity and decided to enter the litigation lottery instead.

It is therefore incumbent upon the merchant who receives a thirty day CLRA notice letter to respond in writing within thirty days thereafter, offering to do *something* to appease the consumer, even if the merchant does not believe that they are in the wrong. Offers of replacement of the goods, a total or partial refund of the purchase price, an appraisal of the situation by a neutral party or expert, a revision of store policy, a reprimand to an employee, or even just an apology will open the door for introduction of the merchant's response letter as evidence at trial, even if the merchant doesn't offer the consumer exactly what they wanted per the terms of their demand letter.

The defendant's position at trial should be that the trier of fact is the final arbiter of what is a reasonable correction or fix for the complaining consumer, assuming that the consumer declines the proffered remedy.

Moreover, Civil Code sec. 1784, the last code section in the act, provides that no award of damages may be given for any of the prohibited conduct designated in Section 1770 if the merchant proves that such a violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid such an error, and makes an appropriate correction, repair or replacement under subdivisions (b) and (c) of Section 1782 [Civil Code sec. 1782 (c) only applies to class actions under the act].

Statute of Limitations:

Similar to most statutory causes of action, there is a three year statute of limitations applicable to the act in which to file suit. Civil Code sec. 1783.

Conclusion:

An attorney should weigh the prospects of a CLRA cause of action on behalf of any client who believes that they did not receive what they bargained for in the course of a purchase or lease of goods or services.

Likewise, an attorney representing a merchant or professional who has received a thirty day warning letter under the act needs to carefully evaluate the situation and advise the client to make an appropriate offer in writing within thirty days of receiving the notice, with an eye as to how the written response would play out if it were offered into evidence in the course of a trial.