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## *Stage Set for U.S. Supreme Court Review of Health Care Bill*

By James J. Braze, Esq.



A federal appeals panel in Atlanta, Georgia, struck down the centerpiece of President Obama's sweeping health care overhaul. Thus, moving the argument whether Americans can be required to buy health insurance a step closer to the U.S. Supreme Court.

A divided three-judge panel of the 11th Circuit Court of Appeals concluded Congress overstepped its authority when lawmakers passed the so-called individual mandate, the first such decision by a federal appeals court. Most experts agree the requirement that Americans carry health insurance or face tax penalties is the foundation for other parts of the law.

The court's opinion stated that lawmakers cannot require residents to "enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die."

The one dissenting judge stated other judges ignored the "undeniable fact that Congress' commerce

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# ***THE CONFUSING STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE ACTIONS***

By James J. Braze, Esq.

Most causes of action defined in the State of California have clearly defined statutes of limitations, which is the period within which a person must file suit. Medical negligence on the other hand, has a convoluted statute which no doubt was thought by its drafters to assist health care providers. However, what the legislature has drafted is far from clear.

The applicable statute, California Code of Civil Procedure Section 340.5 provides:

“In an action for injury or death against a health care provider based upon such person’s alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant’s insurer or health care provider has committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.”

## ***FRAUD EXCEPTION***

As can be seen, the statute is littered with fraud exceptions. Fraud can be an intentional misrepresentation of fact, a representation made without a good faith belief that it is true or the suppression of a material fact.

## ***INJURIES TO MINORS***

Minors are definitely treated differently. In every other type of case involving a minor, the statute of limitations does not commence until the minor reaches the age of majority, 18 years old. However, the medical malpractice statute provides “actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period.” In short, actions for medical malpractice on behalf of minors must be brought within three years or before the eighth birthday whichever is longer. In summary an injury to a minor over five years of age must be brought within three years. An injury to a minor under five years of age must be brought before his eighth birthday.

## ***INJURIES AT BIRTH***

California Code of Civil Procedure Section 340.4 provides that “an action by or on behalf of a minor for personal injuries sustained before or in the course of his or her birth must be commenced

within six years after the date of birth . . . .” However, the statute of limitations for professional negligence of a health care provider, rather than this statute, applies to a minor’s cause of action for injuries incurred during birth as a result of medical malpractice. Although the two statutes on their face are equally specific, the statute of limitations for professional negligence of a health care provider is part of an interrelated legislative scheme enacted to deal specifically with all medical malpractice claims.

Therefore contrary to section 340.4, actions by a minor for injuries at birth shall be commenced prior to their eighth birthday

## ***DISCOVERY OF THE INJURY***

Clearly, a malpractice action must be filed within three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. The three year portion of the statute seems clear, but what does “discovers, or through the use of reasonable diligence should have discovered, the injury” mean?

The “discovery” term of the statute has been the subject of considerable litigation and confusing opinions. In one case “discovery” was being told by a doctor that malpractice had been committed. In another, “discovery” occurred when consulting a lawyer about the potential case. (This is somewhat troubling because of the attorney client privilege.)

It appears the one-year statute of limitations commences to run when the plaintiff is or should be aware of the injury and understands it was caused by negligence. This awareness is usually manifested by a suspicion that there is a wrongful cause for the injury combined with the opportunity to conduct a reasonable and diligent investigation. Thus, once the plaintiff has uncovered the facts essential to the cause of action, the potential plaintiff’s statute of limitations will begin accruing.

## ***CONFUSION EXACERBATED***

To add to this confusion, when the statute of limitations was enacted for medical malpractice the statute of limitations for injury to or wrongful death of an individual caused by the wrongful act or neglect of another was also one year. No doubt that is where the one year concept in the malpractice statute came from. However, in 2002 the statute of limitations for personal injury and wrongful death was changed from one year to two years. The statute of limitations for medical malpractice, however, remained unchanged. So we now have a cafeteria plan of statutes of limitation ranging from one year to three years. Most interestingly a personal injury plaintiff can sue for damages caused by the negligence of another long after the statute of limitations for medical malpractice in the treatment of those injuries has expired. Even though the statute of limitations may have expired on plaintiff’s malpractice claim for treatment for the injuries the court of appeal has held the defendant can raise medical malpractice in the treatment of plaintiff as a defense. This is confusing to say the least.



## ***A JURY MAY DECIDE WHETHER A DOCTOR COMMITTED MALPRACTICE, WITHOUT THE DOCTOR BEING A PARTY OR REPRESENTED BY COUNSEL***

By James J. Braze, Esq.

Historically, if a plaintiff was treated by a healthcare provider who committed malpractice, the resulting malpractice damages were the responsibility of the plaintiff.

Also, historically, California law provided that defendants were jointly and severally liable for all damages suffered by plaintiff, both economic and non-economic, despite their relative share of fault.

This situation led to the naming of many defendants which were only peripherally liable in a case with the hopes that a jury would find them 1% responsible and then jointly and severally liable for all of plaintiff's injuries.

This changed when voters passed Proposition 51, which provides that a defendant is jointly and severally liable for a plaintiff's economic damages but with respect to non-economic damages for such items as pain and suffering and emotional distress, a defendant is now only responsible for defendant's proportionate share of responsibility as found by the jury. Thus, the defendant who is only 1% at fault is jointly and severally liable for plaintiff's economic damages but only pays 1% of the non-economic damages



In the case of *Henry v. Superior Court of California (Reinink)* (2008) 160 Cal App. 4th 440, plaintiff was injured by the conduct of the defendant. The defendant claimed the doctor treating plaintiff committed malpractice. Even though the doctor was not a party to the lawsuit, was not called as a witness and was not represented by counsel, the jury was allowed to attribute fault to the doctor who committed the malpractice for the purposes of awarding non-economic damages as to the defendant, who was before the court.

Therefore, a jury is allowed to determine whether a doctor committed malpractice even though he is not a party to the lawsuit. This situation has far reaching complications and implications.

The interesting question arises as to the impact of a jury's finding that a doctor committed malpractice and was responsible for a certain portion of plaintiff's injuries? Is the jury's finding applicable to any other proceedings even though the doctor was not a party?

For instance, what if plaintiff was insured by Kaiser which has an arbitration clause? Could the plaintiff now present a claim to Kaiser and have the jury's finding of professional negligence and percentage of fault finding apply to Kaiser even though there is an arbitration clause? Can the plaintiff file a suit against the doctor and use the jury's finding as collateral estoppel or *res judicata*?



These questions will remain unanswered. But for now it appears the law is that a defendant, when sued by a plaintiff, can assert that the plaintiff's treating doctors and healthcare providers committed malpractice and have the jury determine whether is so and the amount of fault to be attributed to the healthcare providers.

As a practical matter, it is much easier for a defendant to allege and prove medical malpractice when the doctor is not a party and is not represented by counsel.  

## ***FINALLY THE CALIFORNIA SUPREME COURT COMES THROUGH***

By James J. Braze, Esq.

In *Howell v. Hamilton Meats & Provisions Inc.*, (2009) 179 Cal. App. 4th 686, the California Supreme Court ruled that a plaintiff with private health insurance could not recover negotiated rate differential as medical expense. In other words the plaintiff could only recover the amount of medical bills actually paid as opposed to the amount billed.

Plaintiff attorneys have long argued the amounts of health care costs billed are more reflective of the "pain and suffering" experienced by the plaintiff. Defense attorneys on the other hand argue the actual amount paid is the true measure of plaintiff's damages. The impact of the decision should reduce jury verdicts and personal injury settlements. Under California law a personal injury defendant is jointly and severally liable for economic damages. This ruling should act to reduce that exposure.  

### **U.S. Supreme Court Review of Health Bill**



*continued from Page 1*

power has grown exponentially over the past two centuries." He wrote that Congress generally has the constitutional authority to create rules regulating large areas of the national economy.

Attorneys for the White House argued the legislative branch was using a "quintessential" power, its constitutional ability to regulate interstate commerce, including the health care industry, when it passed the overhaul law.

The White House issued a statement that "individuals who choose to go without health insurance are making an economic decision that affects all of us - when people without insurance obtain health care they cannot pay for, those with insurance and taxpayers are often left to pick up the tab."

The 11th Circuit's ruling, which sided with 26 states that have sued to stop the law from taking effect, is the latest contradictory judicial opinion on the health care debate. The federal appeals court in Cincinnati upheld the individual mandate in June, and an appeals court in Richmond has heard similar challenges to the law. Several lower court judges have also issued differing opinions on the debate.

No doubt the case will ultimately land in the Supreme Court, but this ruling could finally force the justices to take the case. The Supreme Court is more likely to take a case where lower courts issue differing opinions.  

**DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF HEALTH CARE LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN HEALTH CARE LAW.**

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