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BAKERSFIELD BUSINESS CONFERENCE HEALTHCARE PANEL DRAWS HUGE CROWD

By James J. Braze, Esq.



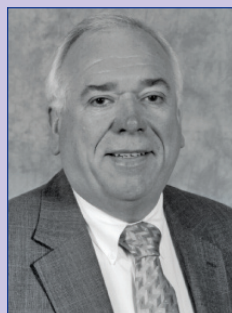
A panel comprised of three of the highest ranking healthcare executives drew a huge crowd at the Bakersfield Business Conference. The panel was moderated by Borton Petrini, LLP Partner Jim Braze and addressed the changes in healthcare proposed by recent legislation. The main focus of the panel was to determine what to do with the nation's new healthcare bill. The panel members consisted of Robert J. O'Keefe, Chief Executive Officer of Bakersfield Family Medical Center, Jon Van Boening, President and Chief Executive Officer of Bakersfield Memorial Hospital and Robert (Bob) J. Beehler, President and Chief Executive Officer of San Joaquin Community Hospital.

Mr. O'Keefe indicated that he felt that we needed to have a more outcome based healthcare system, as the present system is an encounter based system with no particular emphasis on results. It is his opinion the new system needs to focus more on results and reward physicians and patients who are compliant and achieve the desired outcome. He cited an instance in a small town in Texas which had all the latest medical equipment but the resulting healthcare statistics were no better than that of any other location.

Mr. Van Boening cited his recent investigation into the

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James J. Braze is a Partner in the Bakersfield Office of Borton Petrini, LLP. Mr. Braze did his undergraduate work at the University of Southern California. He did his graduate work at the University of Alaska and received his J.D. from Loyola Law School. Mr. Braze is a Martindale-Hubble AV® Peer Review Rated attorney.

He has been a litigation and trial attorney for over thirty years representing health care providers such as doctors, nurses, therapists, hospitals, skilled nursing facilities and residential care facilities for the elderly. He has tried several professional negligence actions and is one of less than twenty attorneys in the state to have tried an elder abuse case to verdict.

MICRA STILL PROVIDES DETERRENT TO THE FILING OF MEDICAL MALPRACTICE ACTIONS


By James J. Braze

One of the issues brought forth by the debate on the Obama administration healthcare plan was the need for tort reform.

We already have tort reform in California. In 1975, the California Legislature passed the Medical Crisis Reform Act (MICRA). This Act, in response to the inability of healthcare professionals to obtain affordable professional liability insurance, placed several restrictions on medical malpractice actions which still have a deterrent affect today.

These provisions can largely be found in the California Civil Code section 3333.1 et seq. They provide that a plaintiff can recover a maximum of \$250,000 for non-economic damages in a medical malpractice action. Non-economic damages include pain and suffering, emotional distress, embarrassment, etc. There is no limitation on the recovery of economic damages which include out-of-pocket expenses for medical care, lost wages, etc. It should be noted, however, that the traditional rule of non-admissibility of payments of medical bills from collateral sources is also eliminated by this legislation.

In the normal personal injury action, the defendant is not allowed to introduce evidence that the plaintiff received payments for medical care from an outside source such as health insurance. This is not true in a medical malpractice action. The defense may, in fact, introduce evidence that all of plaintiff's medical bills were paid for by insurance and that the plaintiff should not be able to recover those from the healthcare professional. Evidence of payments for loss of income is also admissible and the source of any collateral payments (i.e., insurance company) may not seek reimbursement.

Since its passage in 1975 and despite inflationary trends indicating otherwise, MICRA has not seen an increase in non-economic damages limitation for more then 35 years. No doubt the plaintiff's bar will continue to pressure the California Legislature to increase this cap. 

WHERE DO AWARDS FOR ELDER ABUSE GO?

In order to advance the needs of the elderly, the California Legislature enacted the Elder Abuse Act.

By way of history in a personal injury action, a plaintiff can recover economic or non-economic damages as the result of the conduct of another or a healthcare facility. If, however, the person died, the cause of action for personal injury or professional negligence dies with the person and the sole remedy was an action by the heirs to recover for the loss of a loved one. Considering the advanced age of elders who experienced medical malpractice or oppressive treatment, the recovery was not very large and as a result lawsuits on behalf of elders who were abused by healthcare providers or others were not promoted.

The California Legislature passed the Elder Abuse Act which added enhanced remedies including recovery of pre-mortem pain and

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MICRA DOES NOT AFFORD PROTECTION FOR RESIDENTIAL CARE FACILITIES FOR THE ELDERLY


By James J. Braze

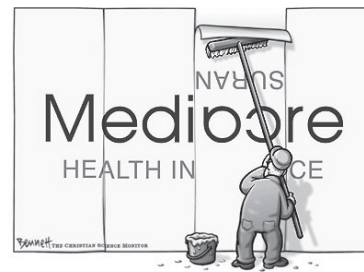
One of the recent trends in the area of elder care is the increasing acuity level of patients.

In the past, patients were transferred from hospitals to skilled nursing facilities (SNF) for their post-acute care. However, since the environment of residential care facilities for the elderly (RCFE) are more desirable, more and more patients are going to RCFEs. This increases the burden placed on the facility, as well as its legal exposure.

For example, if a patient is injured while being treated at a skilled nursing facility and a suit for negligence is brought against them, the facility is subject to the provisions set forth by MICRA. MICRA recognized the facility as a healthcare provider and thus subject to a \$250,000 cap on non-economic damages.

This, however, is not true with relation to the residential care facility. Pursuant to the law, a RCFE is not a healthcare provider and as such the protection of MICRA does not apply. Therefore, the exposure of the residential care facility for treating high acuity patients is dramatically increasing.

In the past many residential care facilities were not able to handle dementia patients, however, those restrictions have since been eased. The only restriction placed on these facilities is that of a bed bound patient. A RCFE cannot handle bed bound patients as that term is defined in the Code. A bed bound patient is basically one who is unable to reposition oneself in a bed. This means the person can be up in a wheelchair but still be considered bed bound. 




MEDICARE/MEDICAL REPAYMENT SCHEME HITS SNAG

Recent legislation has required all personal injury claims which involve Medicare or Medi-Cal to reimburse these entities for any medical expenses before any such claim is settled.

This new system places tremendous burden on insurance companies and attorneys by requiring a non-settlement of personal injury claims without the satisfaction of any liens by these entities.

Unfortunately, while conceptually a good idea, in practice, this resulted in enormous delays and the resolution of these claims because of the identification of the amount of the liens and the ability to satisfy them. Failure to do so resulted in penalties on insurance companies and attorneys.

As a result of the burden to the system, a temporary moratorium has been placed on this so that some of the snags can be worked out of the system. 

Insurance Coverage

By James J. Braze

SUPREME COURT WATCH: HOWELL V. HOWELL V. HAMILTON MEATS & PROVISIONS

A most important case is pending before the California Supreme Court which will dramatically impact the litigation of plaintiff's personal injury cases and the healthcare industry.

For the last 30 years, it has been the law in the State of California that in a personal injury action, a plaintiff can only recover the amount of medical bills actually paid as opposed to the amount billed for healthcare services.

Initially, the difference between these two numbers was not necessarily dramatic and of little importance. However, in recent years, the discrepancy between the amount billed for medical care and the amount paid by insurance companies or other sources has significantly grown.

At the outset of every trial, there has been a battle as to what the jury would hear as to how much was paid for plaintiff's medical treatment.

Most recently, courts in the Third District have ruled that a person paying for insurance should have the benefit of the bargain negotiated by the insurance company and that benefit of bargain is a collateral source and therefore the jury should hear the amount of medical bills as opposed to the amount actually paid for those medical bills.

Another issue, of course, arises when the plaintiff is covered by Medicare or Medi-Cal because these sources dramatically discount the amount they pay for medical billing.

If the court rules that a plaintiff is entitled to introduce into evidence the amount of medical bills as opposed to the amount paid, this will dramatically increase plaintiffs' personal injury verdicts in the State of California and most casualty insurance rates.

Of course, an interesting question arises as to who is entitled to the jury's award of the difference between the amount billed and the amount paid.

In other words, if a hospital bills a larger amount and then an insurance company pays a smaller amount, is the plaintiff entitled to keep the difference or should this go back to the hospital?

BBC - Healthcare Panel Draws Crowd


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healthcare system in Massachusetts which has adopted a plan similar to that proposed by President Obama. Massachusetts had very negative results including doctors leaving for other states and patients not receiving the necessary care.

Mr. Beeler referenced statistics that show the vast majority of Medicare dollars are spent for end of life treatment. It is his opinion that in order to preserve our medical care system, we need to educate patients on how palliative care will actually provide a better quality of life and in many cases prolong it.


Despite the large amount of resources spent by the different factions of the healthcare industry (hospitals, doctors, drug companies, medical device manufacturers, etc.), none of the desired outcomes proposed by these factions became part of the healthcare legislation. As a result, we have a healthcare bill which was drafted largely by politicians.

One of the premises of the healthcare bill is that the United States has a large number of uninsured Americans. This is no entirely true as healthcare is available to anyone by simply dialing 911 from their phone. Also, patients are treated in emergency rooms by merely showing up. Although these patients are receiving medical care, this is a very inefficient method of and results in a burden placed on local hospitals and emergency rooms. Mr. Beeler also cited, only a fraction of Medicare billing for these "drop-in" patients is actually reimbursed.

The bottom line of the panel was this: The healthcare system needs to change, but the desired change does not come from this new legislation. Different ideas need to be considered, including outcome based medical care and emphasis on palliative care for end of life decisions. 

Elder Abuse *continued from page 2*

suffering and attorneys' fees where a plaintiff or their representative could prove elder abuse.

The question, however, becomes since most elders are being cared for by Medicare dollars or even worse Medi-Cal dollars, where does this recovery go? In concept, any proceeds received on behalf of the patient would act to stop any benefits received from Medicare or Medi-Cal for the patient. Therefore, it would seem that the recovery would be a little benefit and in fact act to not motivate such actions. Considering the fact that all efforts must be made now to satisfy Medicare or Medi-Cal liens for treatment, this would seem to further deter any elder abuse actions. It would seem that the only benefit would be for the attorneys or for the heirs who were able to secrete the funds from Medicare or Medi-Cal. 

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