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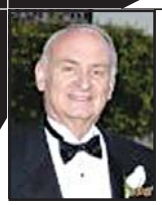

By Hon. Thomas I. McKnew

Thomas C. Zaret

# Life with *Nishihama*: Getting medical specials

There is presently a disparity in the state of the law between the collateral source rule and the ruling in *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 [112 Cal.Rptr.2d 861]. Under the collateral source rule, a defendant may not claim an offset for payments made by plaintiff's health insurance carrier. Yet in *Nishihama*, without confronting the collateral source rule, the Court of Appeals held the most plaintiff may recover for medical expenses is the reduced rate which a health-care provider accepts notwithstanding the fact that the reduced rate is ultimately due to insurance premiums paid by the plaintiff.

The significance of the above is obvious. If an injured party incurs $100,000 in medical bills and if a medical provider has contracted with plaintiff's health insurance company to accept $10,000 on those bills, whether the plaintiff is able to present $10,000 or $100,000 in medical specials will affect how a jury will view the size of the case.

## History

The case of *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 [246 Cal.Rptr. 192] set the table for the *Nishihama* court. In *Hanif*, the plaintiff offered into evidence the amount paid by Medi-Cal and still wanted to recover the full amount of the billed charges. The *Hanif* trial court awarded plaintiff the reasonable value of medical services including the amount written-off. The appellate court ruled that plaintiff was overcompensated that "[a] plaintiff is entitled to recover up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable." (*Id.* at 643.)

Post *Hanif* but before *Nishihama*, plaintiffs had been able to confine the *Hanif* rule of limiting plaintiff's recovery to the "actual amount expended or incurred for past medical services" to cases involving Medi-Cal or Medi-Care. The rationale of this limitation is that Medi-Cal and Medi-Care involve situations in which the plaintiff did not pay for years of insurance premiums which accounted for the reduced medical charges (the foundation of the collateral source rule.)

## *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 112 Cal.Rptr.2d 861

In 2001, the First District Court of Appeal, in *Nishihama* extended *Hanif's* rule of limiting plaintiff's medical specials beyond Medi-Cal to include *private health insurance* reductions. The *Nishihama* decision quotes liberally from the *Hanif* case. In *Nishihama,* the injured plaintiff sought recovery of medical expenses which had been paid for by her employer-obtained medical insurer (Blue Cross). That insurer had negotiated for reduced rates (i.e. rates below what is ordinarily charged) at the facility where the plaintiff was treated.

After concluding the hospital (which was not then before the court) could not assert a lien for more than the amount it contracted with the plaintiff's insurer to accept as full payment, the court held:

> [w]e therefore conclude that the trial court erred in permitting the jury to award plaintiff $17,168 instead of $3,600 for CPMC's services. We do not agree with the City, however, that this error requires remand, because the jury somehow received a false impression of the extent of plaintiff's injuries by learning the usual rates charged to treat those injuries. *There is no reason to assume that the usual rates provided a less accurate indicator of the extent of plaintiff's injuries than did the specially negotiated rates obtained by Blue Cross. Indeed, the opposite is more likely to be true*. We therefore will simply modify the judgment to reduce the amount awarded as costs for medical care."

(*Id.* at 309 [Emphasis added].)

## Practical application

*Pre-Litigation*

It is becoming more common for insurance companies to bring up a *Nishihama* reduction before a lawsuit is filed. When appropriate, plaintiff's counsel may point out that the collateral source rule bars a reduction in medical specials in cases where plaintiff paid insurance premiums for the health-care coverage. As stated by our California Supreme Court in *Lund v. San Joaquin Railroad* (2003) 31 Cal.4th 1, 10:

> California has adopted the collateral source rule. [citations] As we have explained: The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities.... If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance."

Plaintiff's counsel may wish to redact collateral source payments when sending out a specials/demand letter. If there is a lien for the full amount of the bill beyond what health insurance has paid, then clearly a *Nishihama* reduction would not apply since plaintiff's obligation would be greater than the insurance rates.

*Litigation*

It is the burden of the defense attorney to raise the *Nishihama* reduction and establish the reduced agreed-upon insurance rate. It is critical that plaintiff's counsel impress upon the trial court that, if the court is going to apply a *Nishihama* reduction, the trial court allow plaintiff to

*See McKnew & Zaret, Next Page*

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
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present the full amount of the bills at trial and the trial court "will simply modify the judgment to reduce the amount awarded as costs for medical care." (*Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 309 [112 Cal.Rptr.2d 861, 868].) According to the *Nishihama* court, presenting the jury with the full bill and not the reduced contract rate will be a more "accurate indicator of the extent of plaintiff's injuries ...." (*Ibid*..)

*Collateral Source Rule*

*Nishihama* is an appellate court decision which is an anomaly to the California Supreme Court decisions of *Hrnjak v. Graymar, Inc*. (1971) 4 Cal.3d 725 [94 Cal.Rptr. 623, 474 P.2d 599] and *Helfend v. Southern Cal. Transit. Dist*. (1970) 2 Cal.3d 1, [84 Cal.Rtpr. 184], which unequivocally confirmed the application of the collateral source rule in California. The disparity in law should ultimately be decided by the California Supreme Court or legislature. The California Supreme Court declined to address the issue in the recent decision of *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595 [26 Cal.Rptr. 569], which noted that:

> Because our holding relies solely on the absence of a debt underlying the lien, we do not reach, and express no opinion on, the following issues: (1) whether *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, [135 Cal.Rptr.2d 1], and *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 [246 Cal.Rptr. 192], apply outside the Medicaid context and limit a patient's tort recovery for medical expenses to the amount actually paid by the patient notwithstanding the collateral source rule...."

(*Id.* at 611, fn. 16.)

**Endnote:**

[1] The recommendations on how to handle *Nishihama* are the opinion of Mr. Zaret and not that of Judge McKnew.

*Hon. Thomas I. McKnew, Jr. was appointed to the Los Angeles County Superior Court by Governor Pete Wilson in April 1995. He serves as an all-purpose judge, primarily trying civil cases in the Southeast District Courthouse in Norwalk. He serves on several court committees and will be a faculty member training judges to better manage and successfully conduct settlement conferences. He is past president of the International Academy of Trial Judges and a board member of the Ball-Hunt Inn, American Inns of Court.*

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