HORVITZ & LEVY LLP

HORVITZ & LEVY LLP
15760 VENTURA BOULEVARD
18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
T 818 995 0800
F 818 995 3157
WWW.HORVITZLEVY.COM

January 22, 2010

VIA FEDEX

Hon. Chief Justice Ronald M. George
and the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600

Re: ***Howell v. Hamilton Meats & Provisions, Inc.***
Supreme Court No. S179115
Amici Curiae Letter in Support of Petition for Review

Dear Chief Justice George and Associate Justices:

Under rule 8.500(g) of the California Rules of Court, amici curiae the Personal Insurance Federation of California (PIFC), the Association of California Insurance Companies (ACIC), Mercury Insurance Group, Farmers Insurance Exchange, and State Farm Mutual Automobile Insurance Company and State Farm General Insurance Company write in support of the Petition for Review in this case.

This is the quintessential case deserving Supreme Court review. It satisfies all requirements under rule 8.500(b)(1). The Court of Appeal's decision in this case (*Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal.App.4th 686) creates a conflict in the case law: the decision expressly disagrees with two published Court of Appeal opinions and is contrary to other opinions — including one authored by a different panel of the very same Court of Appeal — that it doesn't acknowledge. Also, the issue about which there is now a conflict is one that arises in *thousands* of California cases *every year*. Review is thus necessary both "to secure uniformity of decision" and "to settle an important question of law." (Rule 8.500(b)(1).)

AMICI'S INTEREST

PIFC is a California-based trade association that represents insurers selling approximately 60 percent of the personal lines insurance sold in California. PIFC represents the interests of its members on issues affecting homeowners, earthquake, and automobile insurance before government bodies, including the California Legislature, the California Department of Insurance, and the California courts. PIFC's membership includes mutual and stock insurance companies.

ACIC is an affiliate of the Property Casualty Insurers Association of America (PCI) and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 40.5 percent of the property/casualty insurance in California, including personal automobile insurance, commercial automobile insurance, homeowners insurance, commercial multi-peril insurance, and workers compensation insurance. ACIC members include all sizes and types of insurance companies — stocks, mutuals, reciprocals, Lloyds-plan affiliates, as well as excess and surplus line insurers.

Mercury Insurance Group (which does business under Mercury Insurance Company, Mercury Casualty, and California Automobile Insurance Company), Farmers Insurance Exchange, State Farm Mutual Automobile Insurance Company, and State Farm General Insurance Company are major writers of automobile, homeowners, and/or commercial general liability insurance in California.

The issues presented for review are of great interest to all amici. (Indeed, PIFC and ACIC joined in an amici curiae brief that the Court of Appeal in this case accepted for filing.) Every year, amici or their member companies litigate many thousands of cases, and handle a far larger number of claims, that will be greatly impacted by the issue that is the subject of the Petition for Review. The law stated by the Court of Appeal, if allowed to stand, will inflate the amount of premiums that insureds will have to pay. Premiums will rise as a direct result of an enormous increase — required by the Court of Appeal's opinion — in payments by amici or their member companies of medical expense "damages," even though they are "compensation" for phantom medical expenses that no one has paid or ever will pay.

WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeal opinion creates an express conflict in the published case law.

The Court of Appeal here answered affirmatively the question "whether a plaintiff who has private health care insurance in a personal injury case may recover, under the collateral source rule, economic damages for the amount of past medical expenses that her health care providers have billed, but which neither the plaintiff nor her health care insurer is obligated to pay because the providers have agreed, under

contracts into which they have entered with the insurer, to accept — as payment in full — payments in an amount that is less than the amount the providers have billed." (Typed opn., 2.)

The court concluded that limiting the plaintiff's recovery to the amount that the healthcare providers agreed to accept as payment in full "violated the collateral source rule." (Typed opn., 14.) The collateral source rule provides that, "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6.)[1]

The Court of Appeal acknowledged that its application of the collateral source rule created a conflict in the case law.

First, the court stated, "We disagree with th[e] holding in *Nishihama* [*v. City and County of San Francisco* (2001) 93 Cal.App.4th 298] and the reasoning upon which it is based." (Typed opn., 24.) And, indeed, *Nishihama* is contrary to the Court of Appeal's decision here. The *Nishihama* court relied on *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 in holding, "'when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact that it may have been less than the prevailing market rate.'" (*Nishihama*, at p. 306, quoting *Hanif*, at p. 641.)[2]

---

[1] Forty years ago, this court noted that, "[a]lthough the collateral source rule remains generally accepted in the United States, nevertheless many other jurisdictions have restricted or repealed it. In this country most commentators have criticized the rule and called for its early demise." (*Helfend*, *supra*, 2 Cal.3d at pp. 6-7, fns. omitted.) Defendant's petition for review raises the issue whether the collateral source rule should continue in California. A reevaluation of the rule makes sense.

[2] Instead of disagreeing with the *Hanif* opinion, the Court of Appeal here distinguished the case because *Hanif* involved payments on the plaintiff's behalf by Medi-Cal, not a private insurer. (Typed opn., 21-22; see also *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595, 611-612, fn. 16 [Supreme Court "express[es] no opinion on . . . whether *Olszewski v. Scripps Health* (2003) 30 Cal.4th

(continued...)

Second, the court stated, "We disagree with *Greer* [*v. Buzgheia* (2006) 141 Cal.App.4th 1150] to the extent it holds that a trial court in a personal injury action is authorized to hear and grant a defendant's posttrial motion to reduce under *Hanif* and *Nishihama* a privately insured plaintiff's recovery of economic damages for past medical expenses." (Typed opn., 29.) The *Greer* court had found the trial court there "did not abuse its discretion in . . . reserving the propriety of a *Hanif/Nishihama* reduction until after the verdict." (*Greer*, at p. 1157.)

2. The Court of Appeal opinion creates a sub silentio conflict with other published case law.

Although it does not acknowledge the fact, the Court of Appeal's opinion conflicts with published decisions in a separate but related area of law. The collateral source rule, on which the present Court of Appeal opinion is based, applies not only to civil tort actions but also in cases concerning restitution for crime victims. (*People v. Hamilton* (2003) 114 Cal.App.4th 932, 944.) In restitution cases, several Courts of Appeal have expressly rejected the interpretation of the collateral source rule that the Court of Appeal opinion here adopts.

In *People v. Bergin* (2008) 167 Cal.App.4th 1166, 1169, the court evaluated how much a crime victim should be paid for medical expenses under a statute requiring "'full restitution.'" The People contended, in an argument that mirrors the Court of Appeal's holding in the present case, that "the restitution amount should have been . . . the amount billed by [the victim's] medical providers[ ] rather than . . . the amount the medical providers accepted from [the victim's] insurer as full payment for

---

(...continued)
798 . . . and *Hanif* . . . 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"].) *Hanif* itself did not make such a distinction, however. Instead, *Hanif*'s reasoning, including the language quoted in *Nishihama*, is applicable whether healthcare costs are paid from a public or a private source. Similarly, the *Hanif* court stated without qualification, "an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes over-compensation." (*Hanif, supra*, 200 Cal.App.3d at p. 641.) The opinion here thus conflicts with *Hanif* as well as *Nishihama*.

their services, plus the deductible paid by [the victim]." (*Id.* at p. 1168.) The court disagreed. Expressly relying on *Hanif*, the court reasoned that, because "[n]either [the victim] nor her insurers incurred any economic loss beyond the amount identified in the trial court's restitution order," "we find it impossible to see any basis for concluding that [the victim] has not been '100 percent compensated.'" (*Id.* at p. 1172; see also *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1017-1018 [applying *Hanif/Nishihama* rule in juvenile restitution case; restitution "order is not . . . intended to provide the victim with a windfall"].)

Significantly, in not noticing the conflict it was creating with restitution cases, the Court of Appeal here failed to account for a recent decision by a different panel of its own court — *People v. Millard* (2009) 175 Cal.App.4th 7, review denied October 14, 2009. Following *Bergin*, the *Millard* panel rejected the People's argument that the victim should be reimbursed for the amount billed by his medical providers rather than the amount paid by his insurance company, explaining, "To 'fully reimburse' the victim for medical expenses means to reimburse him or her for all out-of-pocket expenses actually paid by the victim or others on the victim's behalf (e.g., the victim's insurance company). The concept of 'reimbursement' of medical expenses generally does not support inclusion of amounts of medical bills in excess of those amounts accepted by medical providers as payment in full." (*Id.* at p. 27.)

3. The issue about which there is a conflict arises in thousands of cases every year.

As explained, the Court of Appeal opinion here creates a conflict in the published case law concerning the appropriate measure of compensation for medical expenses in both civil cases and in crime victim restitution cases. There might not be specific statistics available, but amici's experience and common sense indicate that, every year, the issue arises in thousands of civil cases in which medical expenses are paid, including third-party personal injury cases and uninsured and underinsured motorist cases, and in an even greater number of insurance claims that never go to litigation (at least they did not go to litigation until the present Court of Appeal opinion created uncertainty in the law that makes it more difficult to resolve the claims out of court). The number of criminal restitution cases is likely much smaller, but still considerable.

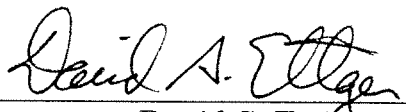
The enormous increase in medical expense damages mandated by the Court of Appeal's opinion (in the present case alone, the Court of Appeal has ordered the plaintiff's medical expense damages to be more than tripled, from under $60,000 to

almost $190,000) will have dramatic adverse effects. Plaintiffs will be "compensated" for medical expenses that neither they nor anyone else have paid or ever will pay. Yet paying these phantom damages will drive up insurance premiums statewide and wreak even greater financial burdens on uninsured and underinsured defendants.

It is thus not surprising that there is great public interest in this important issue. Absent Supreme Court review, the conflict concerning a legal issue that arises with great frequency will cause widespread uncertainty in the handling of personal injury litigation and claims and of crime victim restitution matters. The conflict should not go unresolved. This court should grant review.

Respectfully submitted,

HORVITZ & LEVY LLP
H. THOMAS WATSON
DAVID S. ETTINGER

By: 
David S. Ettinger

Attorneys for Amici Curiae
Personal Insurance Federation of California, the Association of California Insruance Companies, Mercury Insurance Group, Farmers Insurance Exchange, State Farm Mutual Automobile Insurance Company, and State Farm General Insurance Company

cc: See attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On January 22, 2010, I served true copies of the following document(s) described as **AMICI CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 22, 2010, at Encino, California.

Victoria Beebe

SERVICE LIST

Howell v. Hamilton Meats
Court of Appeal Case No. D053620
Supreme Court Case No. S179115

John J. Rice Lafave & Rice 2333 First Avenue, Suite 201 San Diego, CA 92101	Counsel for Plaintiff and Appellant Rebecca Howell
J. Jude Basile Basile Law Firm 755 Santa Rosa Street, Suite 310 San Luis Obispo, CA 93401-1160	Counsel for Plaintiff and Appellant Rebecca Howell
J. Michael Vallee 603 North Highway 101 Suite G Solana Beach, CA 92075	Counsel for Plaintiff and Appellant Rebecca Howell
Robert Francis Tyson Jr. Mark T. Petersen Tyson & Mendes 5661 La Jolla Boulevard La Jolla, CA 92037	Counsel for Defendant and Respondent Hamilton Meats & Provisions Co.
Robert A. Olson Greines, Martin, Stein & Richland LLP 5900 Wilshire Boulevard, 12th Floor Los Angeles, CA 90036	Counsel for Amicus Curiae Association of Southern California Defense Counsel
Scott H.Z. Sumner Hinton Alfert & Sumner 1646 N. California Boulevard, Suite 600 Walnut Creek, CA 94596	Counsel for Amicus Curiae Consumer Attorneys of California
Hon. Adrienne Orfield San Diego Superior Court – North County 325 South Melrose Vista, CA 92081	Case No. GIN053925
Office of the Clerk Court of Appeal Fourth Appellate District Division One 750 "B" Street, Suite 300 San Diego, CA 92101-8198	Case No. D053620