

September 18, 2007



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The Honorable Arnold Schwarzenegger  
Governor, State of California  
State Capitol  
Sacramento, CA 95814

**RE: Request for Veto on SB 93 (Corbett)**

Dear Governor Schwarzenegger:

The Personal Insurance Federation of California (PIFC), representing insurers who write over 50% of all personal lines insurance sold in California, including State Farm, Farmers, Safeco, 21<sup>st</sup> Century, Progressive, and NAMIC, **opposes SB 93** by Senator Corbett. SB 93 is an ill-conceived "solution" to an otherwise legitimate problem related to the public health care system. It is identical in purpose to SB 399 (Escutia), which you vetoed in 2005, and SB 494 (Escutia), which you vetoed in 2004. We urge you to veto this measure as well.

SB 93 would unjustly increase liability costs for individuals, businesses and government entities (including special districts, cities, counties and the State of California) to inflate medical and "pain and suffering" lawsuit recoveries by injured Medi-Cal recipients and their lawyers. SB 93 would use the tort system to force auto and home insurance customers to pay higher rates for plaintiffs and their attorneys, with a supposed (but illusory) benefit to the public health system. This is not sound policy.

Equally distressing are false claims by proponents that SB 93 responds to an invitation to legislate by former California Supreme Court Justice Janice Rogers Brown in the case of *Olszewski v. Scripps Health*, 30 Cal.4<sup>th</sup> 798 (2003). As discussed below, in *Olszewski*, Justice Brown expressed concern about the need for medical providers to receive adequate compensation for treatment of Medi-Cal eligible patients. But nowhere in the *Olszewski* case did Justice Brown approve of or call for SB 93's excessive money grab by lawyers.

**SB 93 Fundamentally Changes How Medical Damages Are Calculated in Lawsuits by Medi-Cal Plaintiffs**

SB 93 is an attempt by plaintiff lawyers to increase dramatically the medical damage recoveries in lawsuits by plaintiffs who already received treatment paid for by the Medi-Cal program. The language of SB 93 is simple:

*The amount paid by Medi-Cal shall not be considered as evidence of past medical damages or for the purpose of reducing the third party's liability to the beneficiary in any third-party action.*

**In short, the plaintiff attorneys pushing SB 93 want to hide evidence of the actual medical damages sustained by plaintiffs (and already paid by the Medi-Cal program) so they can create much larger fictional medical damages in their third party actions.**

The current rules for determining the amount of medical damages in a third party action by a Medi-Cal recipient are governed by *Hanif v. Housing Authority*, 200 Cal.App.3d 635 (1988). The *Hanif* case examined the issue of whether it is appropriate for a Medi-Cal plaintiff, after already receiving treatment paid for by the Medi-Cal program, to sue

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for medical damages even though they owe no medical bills. The *Hanif* court stated the issue was:

whether the "reasonable value" measure of recovery means that an injured plaintiff may recover from the tortfeasor more than the actual amount he paid or for which he incurred liability for past medical care and services. Fundamental principles underlying recovery of compensatory damages in tort actions compel the following answer: no. *Hanif*, 200 Cal.App.3d at 640.

In permitting the Medi-Cal recipient's lawsuit for medical damages against a third-party tortfeasor, the *Hanif* court noted that the third party tortfeasor should not benefit from reduced liability because of a previous medical payment through the Medi-Cal system. Allowing a suit for medical damages would properly align fault because the Medi-Cal program could exert a lien on the recovery and obtain reimbursement of the amounts previously paid for treatment of the Medi-Cal plaintiff. Therefore, the *Hanif* court held that a Medi-Cal recipient is entitled to recover from an at-fault third-party the actual amount expended for past medical services (i.e., payment of the medical provider at the Medi-Cal reimbursement rate). So, in a lawsuit by a Medi-Cal recipient, the third-party tortfeasor is permitted to introduce evidence that medical damages should be calculated at the Medi-Cal reimbursement rate *already paid* on behalf of the injured plaintiff. Permitting any more recovery would be a windfall for the plaintiff and the plaintiff attorney.

**SB 93 would overrule *Hanif* and enable a plaintiff lawyer to hide evidence of the prior full payment of the plaintiff's medical bills by the Medi-Cal program. Then, the plaintiff lawyer could submit evidence of the much higher amounts listed on doctor bills even though the treating doctor accepted the Medi-Cal payment as "payment in full."**

#### **Hanif and Olszewski are Apples and Oranges**

The proponents of SB 93, the plaintiff attorneys, argue that SB 93 simply responds to *Olszewski v. Scripps Health*, 300 Cal.4<sup>th</sup> 798 (2003). This is untrue. Unlike the *Hanif* case, the *Olszewski* case has nothing to do with calculating the measure of medical damages in a lawsuit filed by a Medi-Cal beneficiary. Rather, the *Olszewski* case cited the *Hanif* case as the established law of California and, instead, addressed the issue of whether a doctor could impose a lien upon a Medi-Cal plaintiff's entire medical and non-medical recovery from a third-party tortfeasor, after the Medi-Cal program would get reimbursed for its prior payment.

In *Olszewski*, a doctor treated a Medi-Cal eligible patient and was paid by the Medi-Cal program at the Medi-Cal reimbursement rate. But the doctor was not satisfied with payment at the Medi-Cal reimbursement rate; the doctor desired payment of full "charges." The doctor wanted to "balance bill" the Medi-Cal patient for the difference between full "charges" and the Medi-Cal rate. When the Medi-Cal recipient sued the third-party tortfeasor (with the medical damages determined by the *Hanif* case), the doctor attempted to exert a lien against the *entire judgment* of the plaintiff to recover this "balance billing" amount.

The *Olszewski* court would not permit the "balance billing" doctor's lien because it intruded upon the personal assets of the Medi-Cal plaintiff in violation of federal law (which requires acceptance of Medi-Cal payments as "payment in full" and prohibits Medi-Cal medical providers from balance billing their indigent patients)<sup>1</sup>. Not content to apply the doctor's lien to the medical damages component of the lawsuit, the doctor's lien would have attached to the entire recovery of the Medi-Cal plaintiff. The court held the lien to be overreaching and invalid.

Instead of a lien reaching the entire judgment obtained by a Medi-Cal plaintiff, the court explained that federal law limits provider recovery to the portion of the award specifically allocated to medical expenses. However, this statement by the *Olszewski* court was problematic for doctors because *Hanif* establishes the measure of medical expenses in a lawsuit as the actual amount expended for past medical services (i.e., payment of the medical provider at the Medi-Cal reimbursement rate).

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<sup>1</sup> For a discussion of federal law and state Medicaid programs, see *Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrevocable Trust*, 410 F.3d 304 (6<sup>th</sup> Cir. 2005).

So, the *Olszewski* case limited medical damages in a Medi-Cal plaintiff's third-party action to the Medi-Cal payment, as dictated by *Hanif*, which the Medi-Cal program would receive as reimbursement with nothing left over for the provider. Therefore, the medical provider has a choice: either (1) accept Medi-Cal eligible patients and receive the Medi-Cal reimbursement rate or (2) accept Medi-Cal eligible patients and only submit for Medi-Cal reimbursement when there is no prospect of a third party plaintiff action. In the latter case, whenever a Medi-Cal eligible patient sues a third party and the provider has not received money from the Medi-Cal system, the plaintiff could prove up the case based upon doctor's full "charges" and the doctor's lien could be for the same amount.

### **The Plaintiff Lawyers and Doctors**

Stuck with the limitation imposed upon medical liens by the *Olszewski* decision, the plaintiff lawyers are seeking to overrule *Hanif* and inflate the amount of medical damages available in a lawsuit by a Medi-Cal plaintiff. This is the reason SB 93 was introduced into the Legislature.

The plaintiffs attorneys would like to increase the measure of medical damages up to doctors' full "charges." But, to do this, the proponents of SB 93 need to overrule the *Hanif* case and bar evidence of the previous amounts expended for care of the Medi-Cal plaintiff. Under this scheme, however, doctors and other medical providers receive no benefit. Only the plaintiffs and their plaintiff lawyers would get more money under SB 93. Medical providers would still be limited by federal law because they rendered service and received "payment in full" from Medi-Cal. SB 93 is an obvious windfall for plaintiffs and their attorneys.

**The particularly frustrating aspect of SB 93 is that proponents claim they are "responding" to the 2003 *Olszewski* case when, in reality, they are using the *Olszewski* case as a subterfuge to achieve a goal that was foreclosed in 1988 by the *Hanif* case (which Justice Brown cited as good authority).**

### **At What Cost?**

While SB 93 would help plaintiff lawyers to increase their payouts in lawsuits by Medi-Cal plaintiffs, it would do so at great cost to society. **The problem for society is that SB 93 would punish every person, business or government facing liability costs under the justification that the public health funding system pays doctors an inadequate amount – specifically, Medi-Cal reimbursement rate.** So, proponents of SB 93 say they would like to use the inefficient tort system to transfer considerable resources to the public health system, but only the plaintiffs and plaintiff attorneys will benefit from SB 93.

SB 93 would negatively affect individual drivers or property owners (whether or not covered by auto or homeowners insurance). This would negatively affect businesses which face "slip and fall" claims or have vehicles on the roads. This would negatively affect all types of government entities with vehicles on the road (e.g., police, fire, sheriffs, CHP, CalTrans) or property open to the public (e.g., parks or public buildings).

Just in the case of individual drivers, SB 93 would greatly increase private passenger auto liability costs. Our belief is based upon a study of 500 claims by a major California insurer which compared the amount of doctor "charges" that appeared on doctor bills versus the amount which the doctors actually received when paid according to the *Hanif* case. On average, doctor "charges" would have resulted in payments seven (7) times greater than at the Medi-Cal reimbursement rate. These greater medical payments would have resulted in greater non-economic damages being paid as well, with the end result being dramatically higher auto liability settlements. **Based upon this analysis, a major California insurer estimates that SB 93 would increase auto liability costs by 8% - 10%, which for the average California insurance policy would be an increase of \$80 to \$100 per year. Seldom do we see legislation with such broad and deep consequences upon economic transactions.**

More frustrating is that the increased settlement amounts under SB 93 would go to plaintiffs and their attorneys.

**Wrong Solution to a Problem with the Medi-Cal System**

If medical providers believe that Medi-Cal reimbursement rates are too low, we should discuss the appropriate level for Medi-Cal reimbursement rates. But, we should not allow concern for adequacy of payments to medical providers to be used to support a money grab by plaintiff attorneys. SB 93 would increase payouts to plaintiff lawyers and impose undue costs on governments, individuals and the business community.

For the reasons stated above, **PIFC opposes SB 93 and respectfully requests a Veto.** If you have any questions regarding our position, please contact Rex Frazier at (916) 442-6646.

Sincerely,

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Rex Frazier  
President

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Michael Gunning  
Vice President

cc: The Honorable Ellen Corbett, Author  
Susan P. Kennedy, Chief of Staff  
Mike Proso, Chief Deputy Legislative Secretary, Office of Governor Schwarzenegger  
Cynthia Bryant, Director, Office of Planning and Research  
Kathleen Webb, Office of the Insurance Advisor