Election Countdown: Campaign Ads And Statutory Interpretation

By Allen L. Lanstra

Television commercials for the competitive primary and general election races for state governor and senator have blanketed the air waves for most of the summer and early fall. As we approach the closing weeks leading up to the Nov. 2 election, California voters will undoubtedly see even more ads on those races. However, those television ads for office elections will soon be joined by campaign advertisements directed at the numerous ballot propositions on the statewide ballot in California.

Traditionally, spending on ballot propositions is reserved for the final weeks of a campaign and a substantial portion of such monies are employed for television advertising. This year will be no different. In particular, substantial spending can be expected on Proposition 19 (initiative statute to legalize marijuana under state law and to permit its taxation and regulation), Propositions 20 and 27 (initiative constitutional amendments regarding redistricting), Propositions 22, 25 and 26 (initiative constitutional amendments and statutes concerning state budgeting and distribution of funds), and Proposition 23 (initiative statute to suspend air pollution control law until unemployment drops to 5.5 percent). Any day now, you won't be able to avoid the election.

Somehow, in order to truly ascertain the electorate's intent, courts should consider extrinsic evidence other than the official voter information guide.

The television ads will undoubtedly prompt varying emotions from their audiences — from persuasion to distrust, from anger to pride, from laughter to uneasiness, from intrigue to annoyance. More thoughtful citizens may analyze the effectiveness of a political advertisement in garnering votes and even more sophisticated ones will consider which specific political demographics are being targeted by the advertisement's content, station selection, accompanying television program and time of delivery. "Political junkies" even search for the advertisements on the Internet, as some very notable web sites compile the advertisements for voter review — and for entertainment as well.

As an attorney, however, my mind also analyzes the effect that a campaign advertisement has on the voters' understanding of a ballot proposition. This is because beyond the political goal of attempting to advise the electorate to vote for or against a proposition, a campaign advertisement also has the very real by-product of helping to craft the electorate's understanding of the proposition. In other words, campaign materials help define what the proposition means and, consequently, inform the electorate's *intent* in approving or rejecting the proposition. Television advertising clearly serves, wisely or unwisely, to educate the electorate about the meaning of a ballot proposition. As a practical matter, this cannot be seriously disputed.

As a matter of interpretation by California courts, however, it is not the practice. California courts do *not* openly consider the education and messages delivered by television advertising (and other informal campaign materials) on the electorate's understanding of a proposition. That is, they do not use the single most prominent, memorable and effective communication sent to and received by the electorate to ascertain the electorate's intent in enacting the proposition into law. They simply do not consider campaign advertising.

In this regard, it seems that the rules of interpretation for initiative statutes are incomplete and internally inconsistent. Indeed, case law is replete with recitations that in interpreting an initiative statute, the judiciary's "primary and paramount task" is to ascertain the intent of the electorate so as to effectuate the intent of the initiative.

Although courts commonly repeat that the same rules that govern statutory construction apply when interpreting voter initiatives, there are distinctions with a difference. (In fact, even though reliance remains primarily on the language employed by the initiative statute, it is not uncommon for textualists to be less strict when dealing with direct democracy.)

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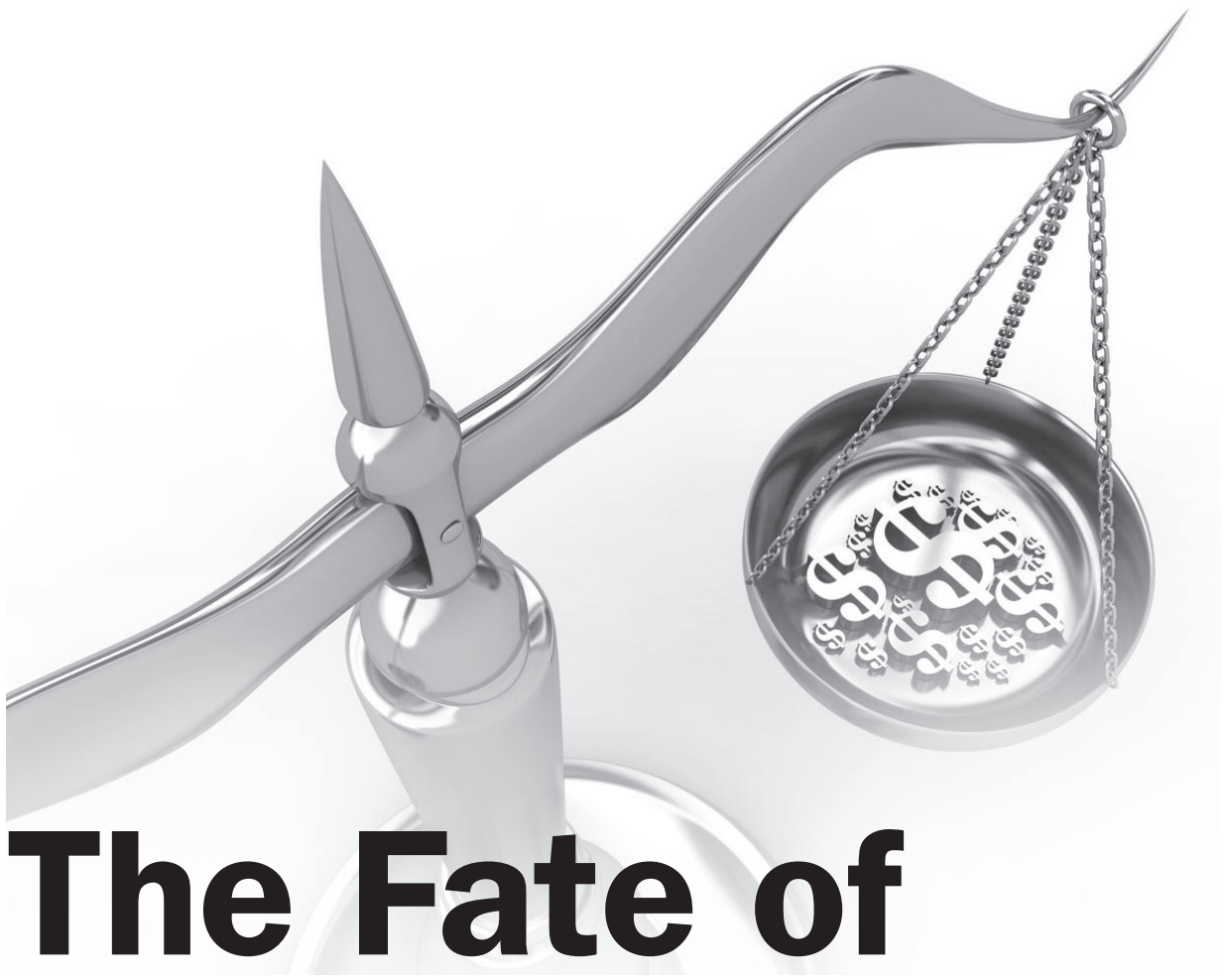
When a court interprets an initiative as opposed to a legislative statute, it seeks to implement not the legislative intent but rather the electorate's intent. Notably, the court does not ascertain the initiative's drafters' intent if it was not presented to the voters, an interpretive position that has itself been the focus of criticism by some commentators. In interpreting a voter initiative, a court's "task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent." *Robert L. v. Superior Court*, 30 Cal.4th 894, 901 (2003). The court at least starts by applying the same principles that govern statutory construction of laws enacted by the legislature, which means looking first at the words and giving them their ordinary meaning.

When the language is ambiguous, however, courts will "refer to other indicia of the voters' intent." California courts have generally limited their consideration of "other indicia of the voters' intent" to the ballot summaries and arguments in the official voter information guide mailed to voters by the Secretary of State. The logical purpose and legislative history are also considered, as well as public policy, but these are not necessarily reflective of the electorate's intent on Election Day if they were not clear to or communicated to the electorate. Thus, it is largely that 100-plus page voter guide, mailed to each voter, that is the only extrinsic evidence that California courts reference as the "other indicia of the voters' intent" where the language of an initiative is susceptible of multiple meanings. To perform your own analysis, I suggest you grab that voter guide off your kitchen counter and consider whether you think that a meaningful share of the electorate is reading it or understands it, or at least appreciates its relevance as to statutory interpretation in a court of law. There are undeniably helpful pages in the official voter information guide which, if read, would inform a voter at least on some subjects and issues concerning the propositions.

In the end, however, the conclusion seems inescapable: Somehow, in order to truly ascertain the electorate's intent, courts should consider extrinsic evidence other than the official voter information guide. Scholars have previously suggested approaches where campaign materials, television and radio advertisements, media coverage, debates and news editorials are taken into consideration, but they have gained little traction in California. Yet, it would seem that "the best way for courts to try to find 'voter intent' is to consult every reasonably reliable source a voter may have used for information. Such an investigation should take into account where voters most often get their information and proceed accordingly." (Stephen Salvucci, "Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California," 71 S. Cal. L. Rev. 871, 886 (1998).) This is not to say that advertising campaigns do not present reliability concerns, given the deception and confusion they present to the electorate and the potential need for evidence on the electorate's exposure to them. But the law deals with reliability issues regularly and, moreover, many of those reliability issues are present in the voter information guide as well. To the extent the electorate's understanding is elementary, perhaps intent gleaned from campaign materials — which are undeniably elementary — could serve as a mere guiding compass for the judiciary. In sum, the television ads that we all know guide the electorate's understanding and decision-making on a proposition are critical to ascertaining intent.

As we enter these closing weeks of the campaign and view ballot proposition television advertisements, we should ask ourselves whether such campaign materials could and should aid our courts' mission in interpreting constitutional amendments and statutes adopted through the initiative power reserved to the people under our state constitution. While there are certainly arguments to favor and disfavor consideration of such unofficial extrinsic evidence, as the custodians of the rule of law and thus the guards of direct democracy, we should revisit the rules of interpretation that we have erected in order to evaluate the electorate's intent. The mission of interpretation is accuracy and, to paraphrase U.S. Supreme Court Justice Felix Frankfurter, the answers to the problems of interpretation are in its exercise.



The Fate of The Collateral Source Rule

By David S. Ettinger

Normally, few people — not even lawyers — get excited about legal remedies issues, but there are exceptions. One major exception is now before the state Supreme Court in *Howell v. Hamilton Meats & Provisions Inc.*, review granted March 10, 2010 (S179115). The fact that hundreds of millions of dollars annually are at stake might have something to do with the intense interest.

The court in *Howell* (a car accident case) will determine the proper measure of damages for medical treatment of a plaintiff's tortiously caused injuries. One amount of damages is not controversial: a plaintiff is of course entitled to be compensated for any reasonable amount she herself paid to a health care provider. Another amount, too, is usually not in dispute: it is generally agreed that a defendant is also liable for medical expenses the plaintiff did not pay, but which her health insurance carrier paid instead. That additional recovery is the result of the common-law collateral source rule, which as stated by the state Supreme Court provides, "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.)

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But, what about a third amount? Does the collateral source rule make the defendant liable not only for medical expenses that the plaintiff's insurance carrier has paid on her behalf, but also for additional amounts that neither the plaintiff nor the insurance carrier (nor anyone else) has paid or ever will pay? Is the plaintiff entitled to recover, as Rebecca Howell contends, the "usual and customary charges" her health care providers unilaterally "billed," even though the providers have accepted much less than those charges as full payment for her medical services under health services contracts the providers negotiated with her insurance carrier? That is what the Supreme Court will decide.

Until the Court of Appeal decision in *Howell* last year, the Courts of Appeal, starting with *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, had consistently held that claims like Howell's were overreaching. The *Hanif* court agreed that the plaintiff there could recover as damages those medical expenses paid by a collateral source (in that case, Medi-Cal), but held that any award above "the actual amount paid" by the collateral source was "over compensation." *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 306, later applied *Hanif* where the collateral source paying for the medical care was private health insurance. So did the court in *People v. Bergin* (2008) 167 Cal.App.4th 1166, 1169-1172, a crime victim restitution case.

For the time being, *Hanif* and *Nishihama* state the law that *must* be applied in California's trial courts. When the Supreme Court granted review in *Howell* and in two later related cases — *Yanez v. SOMA Environmental Engineering Inc.*, (review granted and briefing deferred Sept. 1, 2010, S184846) and *King v. Willmett*, (review granted and briefing deferred Oct. 13, 2010, S186151), the Court of Appeal opinions in those cases ceased to be citable precedent. (California Rules of Court 8.1105(e)(1), 8.1115(a).) Thus, while the California legal world waits breathlessly (figuratively, and only partially exaggerated) for the Supreme Court's *Howell* decision, the Superior Courts are required to follow *Hanif* and *Nishihama*. (*Auto Equity Sales Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 *"Decisions of every division of the District Courts of Appeal are binding...upon all the superior courts of this state."*)

A Superior Court should follow *Hanif* and *Nishihama* not just because it has to, but because those cases provide the better-reasoned rule.

In stating the collateral source rule, the Supreme Court has focused on ensuring that tort damages include *compensation paid* to or on behalf of a plaintiff by a collateral source. As seen, the court in *Helfend* said that "payment" by a collateral source should not be deducted from a plaintiff's damages. An amount that a health care provider may have unilaterally stated on its bill as "usual and customary charges," over and above what the provider had contracted to accept as full payment from a plaintiff's health insurer, is not a "payment." That amount was not paid by anyone.

Underlying the desire to award more than actual payments made by a collateral source is a feeling that not doing so would somehow shortchange plaintiffs and allow defendants to get away with not paying for all the detriment they caused. Advocates of this position say the additional damages are necessary to fulfill the collateral source rule's principles "that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift [and that] [t]he tortfeasor should not garner the benefits of his victim's providence." (*Helfend*, 2 Cal.3d at pp. 9-10.) *Hanif* and *Nishihama* honor those principles, however.

Under *Hanif* and *Nishihama*, a plaintiff *is* receiving the benefits of her investment in health insurance — she is recovering the amounts that her insurer paid on her behalf. If she were not receiving the benefits of her thrift, she would recover as damages only the amount that she herself had paid to the health care providers and not any payments made by her insurer.

When a health care provider has agreed with the plaintiff's health insurance carrier to prices lower than the provider's "usual and customary" charges, that's not a benefit to the plaintiff. If it is a benefit to anyone, it is a benefit to the insurance carrier. By paying less for the medical services provided to its insureds, the carrier's overall costs are lowered. For the insured, on the other hand, all that matters is that her carrier is paying for her treatment; the price that the carrier pays, whether high or low, is of little consequence to her.

The lower costs might allow the carrier to reduce its premiums, but that's not a benefit under the collateral source rule. The rule applies only when "an injured party receives some compensation [from a collateral source] for his injuries" (*Helfend,* 2 Cal.3d at p. 6) and an insured "receives" the benefit of a lower premium not as an injured party and not for an injury, but before, and unconnected to, any injury or medical treatment.

By including in recoverable damages, the actual payments made by a collateral source gives a plaintiff, not the defendant, "the benefits of her thrift." On the other hand, allowing additional recovery of "usual and customary" charges that no one pays surely creates a windfall for plaintiffs and their lawyers.

Significantly, damages awarded for additional amounts "billed" *by* health care providers will not actually go *to* the health care providers. Instead, the money will go only to plaintiffs and their attorneys. This is because providers do not collect any more than the amounts they have agreed to accept from plaintiffs' health insurance as full payment. (See *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595, 609.)

Thus, under Howell's proposed rule, her health care providers will still get no more than the amount they negotiated with her health insurer, but she will recover as damages the larger amounts "billed" by the providers even though neither she nor anyone else has paid or ever will pay the "bill." And that recovery will be on top of what Howell already will have recovered under the traditional collateral source rule for the amounts her insurer actually did pay to the providers. This is a windfall under any definition of the word.

Not long ago, a different plaintiff laid claim to compensation for what she asserted were two separate types of collateral source benefits. The Court of Appeal there, however, rejected the attempt to recover for both. Relying on "equity and common sense," the court reasoned that, although it was acceptable for the collateral source rule to "result in a double recovery," there was "no reason to award yet another level of recovery." (*Rotolo Chevrolet v. Superior Court* (2003) 105 Cal.App.4th 242, 247, 248.) Similarly, when a plaintiff is already being awarded damages for collateral source payments made by her health insurance, "equity and common sense" counsel against giving her "yet another level of recovery."