

ALSTON & BIRD

90 Park Avenue
New York, NY 10016
212-210-9400 | Fax: 212-210-9444

David Venderbush

Direct Dial: 212-210-9532

Email: david.venderbush@alston.com

July 13, 2018



U.S. Chamber of Commerce



The Honorable Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102

Re: *Pebley v. Santa Clara Organics, LLC*, No. S249399

Dear Chief Justice Cantil-Sakauye and Associate Justices:

In accordance with California Rule of Court 8.500(g), I file this letter-brief on behalf of *amici* the Chamber of Commerce of the United States of America and the American Tort Reform Association (ATRA). They support Santa Clara Organics' petition for review.

AMICI'S STATEMENT OF INTEREST¹

The Chamber is the largest business federation in the world. It represents 300,000 members and the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. One of the Chamber's important functions is representing the interests of its members in matters before Congress, the executive branch, and

¹ In accordance with California Rule of Court 8.520(f), the Chamber and ATRA certify that no party or party's counsel authored this letter-brief in whole or in part and that no person except the Chamber, ATRA, their respective members, or their counsel funded the letter-brief.

the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases of concern to the nation's business community.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases addressing important liability issues.

This case is one of them. With some frequency, the Chamber's and ATRA's members face lawsuits in which medical expenses represent a portion of claimed damages. They have a strong interest in ensuring that damages awarded for medical expenses reflect market realities, not made-up numbers.

The decision below encourages the latter. It breaks from this Court's decision in *Howell v. Hamilton Meats and Provisions, Inc.*, 52 Cal. 4th 541 (2011), and other decisions from the Court of Appeal recognizing that a medical provider's billed charges generally present an inaccurate measure of medical services' value. The Court of Appeal below conjured a special rule that allows an insured plaintiff to recover medical damages based on billed charges when the plaintiff chooses (in this case, likely at counsel's direction) to receive treatment from a provider that takes a lien on tort recovery instead of seeking reimbursement from the plaintiff's insurer. In those circumstances, the Court of Appeal held, the plaintiff must "be considered uninsured, as opposed to insured, for the purpose of determining economic damages" (Typed Op. 2.), which (according to the Court of Appeal) justifies using billed charges to calculate medical costs. *Id.*

Any legal rule that requires suspending reality—in this case, treating an insured plaintiff as uninsured—is bound to produce confusion and mischief. In its petition, Santa Clara chronicles the post-*Howell* chaos in the lower courts and argues that the decision below will only add to the mess. *Amici* agree with Santa Clara. In ruling as it did below, the Court of Appeal ignored not only this Court's settled teaching that billed charges are irrelevant to calculating medical damages but also numerous industry and government reports supporting that conclusion. The goal in awarding medical damages is to compensate for harm suffered. Awarding damages based on inflated billed charges does not compensate; it provides the plaintiff a windfall recovery—in some cases, many multiples of the damages that would make the plaintiff whole.

ARGUMENT

In its petition, Santa Clara explains that the Court of Appeal's decision below makes mincemeat of *Howell* and entrenches a split about the propriety of using

billed charges to calculate medical damages. *See* Pet. 26-32; *compare* *Corenbaum v. Lampkin*, 215 Cal. App. 4th 1308, 1326 (2013) (following *Howell* and holding that “the full amount billed by medical providers is not an accurate measure of the value of medical services”), and *Ochoa v. Dorado*, 228 Cal. App. 4th 120, 136 (2014) (in lien case, following *Howell* and *Corenbaum* to hold that “medical bills were not evidence of the reasonableness of the amounts charged”), *with* *Bermudez v. Ciolek*, 237 Cal. App. 4th 1311, 1333 n.5 (2015) (in case involving uninsured plaintiff, concluding that *Howell* “did not actually hold that medical charges are inadmissible”); Typed Op. 2. Suffice it to say that the post-*Howell* case law is all over the map. This Court should weigh in to confirm that billed charges are not a reasonable measure of value.

That is what *Howell* teaches. After analyzing the issue at some length, this Court concluded in *Howell* that billed medical charges don’t reflect fair-market values. “Because so many patients, insured, uninsured, and recipients under government health care programs, pay discounted rates,” the Court explained, “hospital bills have been called ‘insincere, in the sense that they would yield truly enormous profits if those prices were actually paid.’” *Howell*, 52 Cal. 4th at 561 (citing Reinhardt, *Pricing of U.S. Hospital Services* at 63). “[P]rices for a given [medical] service can vary tremendously, sometimes by a factor of five or more, from hospital to hospital in California.” *Id.* (citing Reinhardt, *Pricing of U.S. Hospital Services* at 58). In light of that reality, this Court concluded that “the relationship between the value or cost of medical services and the amounts providers bill for them . . . is not a close one” and that “it is not possible to say generally that providers’ full bills represent the real value of their service.” *Id.* at 562. Because the “pricing of medical services is highly complex,” the Court went on, it makes more sense to look to negotiated rates—not full billed amounts—to assess the value of medical services. *Howell*’s reasoning didn’t turn on whether the plaintiff is insured or uninsured; in either case, billed charges don’t represent a reasonable measure of medical services’ value.

Pricing and economic data support that conclusion. Studies show that billed medical charges outstrip paid amounts (whether Medicaid or private insurance), often by orders of magnitude. *See, e.g.*, America’s Health Insurance Plans (AHIP), *Charges Billed by Out-of-Network Providers: Implications for Affordability* at 5 (Sept. 2015) (using the Fair Health database, among other resources, the “study identified a pattern of average billed charges submitted by out-of-network providers that far exceeded Medicare reimbursement for the same service performed in the geographic area”); AHIP, *Survey of Charges Billed by Out-of-Network Providers: A Hidden Threat to Affordability* (Jan. 2013) (similar findings).

Data also show that billed charges often vary wildly within the same region, with the highest rates often exceeding the lowest rates by over 1,000 percent. AHIP, *Charges Billed by Out-of-Network Providers: Implications for Affordability* at 5, 8. A 2012 Consumer Reports feature explained that most consumers “have no clue that prices can vary so much within a network,” illustrating the point by comparing colonoscopy rates in a single city. CONSUMER REPORTS MAGAZINE, *That CT scan costs how much?* (July 2012). The rates ranged from \$840 at a freestanding clinic to \$4,481 at an academic medical center. *Id.* Another industry study concluded that, for a common MRI, “the most expensive hospital in the nation has prices twelve times as high as the least expensive hospital. What is more, this price variation occurs across and within geographic areas.” Zack Cooper et al., *The Price Ain’t Right? Hospital Prices and Health Spending on the Privately Insured*, The Health Care Pricing Project (Dec. 2015).

In many cases, the numbers are shocking. The 2013 AHIP study revealed huge disparities between provider charges and Medicare reimbursement rates. One provider, for instance, charged \$34,366 for arthroscopic knee surgery; Medicare reimburses \$718 for the same procedure. AHIP, *Survey of Charges Billed by Out-of-Network Providers: A Hidden Threat to Affordability* at 2. The 2015 AHIP study found that, on average, providers billed an “electrocardiogram (ECG)/monitoring and analysis” at \$2,407—1,382% of the average amount (\$174) that Medicare reimburses for the same procedure. AHIP, *Charges Billed by Out-of-Network Providers: Implications for Affordability* at 5, 8. The 2015 study also “revealed wide variation in the out-of-network charges from different providers for the same procedure”: “[B]illed charges for ‘muscle-skin graft trunk’ ranged from the \$3,565 for the 25th percentile to \$14,998 for the 75th percentile.” *Id.* Similar statistics have featured in press coverage about medical billing. See, e.g., CaliforniaHealthline, *A Baby Was Treated With a Nap and a Bottle of Formula. The Bill was \$18,000* (July 9, 2018), available at <https://californiahealthline.org/news/a-baby-was-treated-with-a-nap-and-a-bottle-of-formula-the-bill-was-18000/>; Chad Terhune & Sandra Poindexter, *Price of a Common Surgery Varies from \$39,000 to \$237,000 in L.A.*, L.A. TIMES (June 2, 2015), available at <http://www.latimes.com/business/la-fi-medicare-payment-hospitals-20150602-story.html>; Barry Meier, Jo Craven McGinty, & Julie Creswell, *Hospital Billing Varies Wildly, Government Data Shows*, N.Y. TIMES (May 8, 2013), available at <http://www.nytimes.com/2013/05/08/business/hospital-billing-varies-wildly-us-data-shows.html>; Peter Frost & Cynthia Dizikes, *Hospital Fees Vary for Same Treatment, U.S. Data Show*, CHICAGO TRIBUNE (May 9, 2013), available at http://articles.chicagotribune.com/2013-05-09/business/ct-biz-0509-hospital-prices-20130509_1_high-cost-hospitals-u-s-data-health-care.

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Which brings us to the nub of it: Reversing the judgment below is not just a matter of applying *Howell*. It is also a matter of aligning the law with economic reality.

CONCLUSION

This Court should grant Santa Clara's petition and, having done that, should reverse the decision below.

Respectfully,

David Venderbush
California Bar No. 141301
D. Andrew Hatchett
ALSTON & BIRD LLP
90 Park Avenue
New York, NY 10016
(212) 210-9400

*Counsel for the Chamber and
ATRA*

PROOF OF SERVICE

STATE OF NEW YORK, COUNTY OF NEW YORK

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 New York, State of New York. My business address is Alston & Bird LLP, 90 Park Ave. New York, NY 10016.

On July 13, 2018, I served true copies of the following document(s) described as **AMICUS LETTER/REQUEST FOR DEPUBLICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on July 13, 2018, at New York, New York.

/S/

David Venderbush

SERVICE LIST
Pebley v. Estrada
B277893

Greyson M. Goody
The Simon Law Group, LLP
34 Hermosa Ave.
Hermosa Beach, CA 90254
(310) 372-7368
greyson@thesimonlawgroup.com

Attorneys for Plaintiff and
Respondent
DAVE PEBLEY

Jeffrey I. Ehrlich
The Ehrlich Law Firm
237 W 4th Street
Claremont, CA 91711-4710
(909) 625-5565
jehrich@ehrlichfirm.com

Attorneys for Plaintiff and
Respondent
DAVE PEBLEY

Lisa Perrochet
Steven S. Fleischman
Horvitz & Levy LLP
3601 West Olive Avenue, 8th
Floor
Burbank, CA 91505
(818) 995-0800
lperrochet@horvitzlevy.com
sfleischman@horvitzlevy.com

Attorneys for Defendants and
Appellants
JOSE PULIDO ESTRADA,
NELSON SOMERS, BARBARA
SOMERS and SANTA CLARA
ORGANICS, LLC

Kevin M. McCormick
Panda L. Kroll
Benton, Orr, Duval &
Buckingham
39 N. California Street
Ventura, CA 93001
(805) 648-5111
kmccormick@bentonorr.com
pkroll@bentonorr.com

Attorneys for Defendants and
Appellants
JOSE PULIDO ESTRADA,
NELSON SOMERS, BARBARA
SOMERS and SANTA CLARA
ORGANICS, LLC