

Can Judges Fix American Healthcare?

WHILE MOST ADVANCED COUNTRIES have a single-payer healthcare system with guaranteed care, American hospitals negotiate with many private insurance companies. As a result, the cost of a procedure can vary widely based on which insurance company pays for it. Hospitals are required to make their basic charges available to the public, but these prices usually bear no relationship to what insurance companies negotiate. The California Court of Appeal for the Fourth District recently issued a pair of decisions on whether this system is fair to the uninsured. One case holds, in effect, that an uninsured patient may be entitled to be treated as if he or she were insured. The other case does not. Both cases involve the same hospital.

In recent years, a host of lawsuits have made the claim that it is unfair for hospitals to charge their uninsured patients more for services and procedures than what insurance companies pay. Nearly all of these cases have failed. A judge in New York who heard such a case reasoned that plaintiffs were seeking a political solution in a judicial forum: “Plaintiffs here have lost their way; they need to consult a map or a compass or a Constitution because Plaintiffs have come to the judicial branch for relief that may only be granted by the legislative branch.”¹

In the two California decisions involving the same hospital, the facts are similar, but an allegation concerning the patient’s “expectation” is all that was needed to permit one of the cases to proceed beyond the pleadings. In *Durell v. Sharp Healthcare*,² the court affirmed the sustaining of a demurrer to a claim that it is unfair for a hospital to charge an uninsured patient more than what an insured patient pays. On the same day, in *Hale v. Sharp Healthcare*,³ the same panel partially reversed the same trial court’s sustaining of a demurrer. In both cases, an uninsured patient sought healthcare and signed an admission form promising to pay the “customary charge” or “regular rates.” In both cases the patient filed a class action under California’s unfair competition law.

Pleading for Fairness

The court concluded that Durell failed to plead “actual reliance.” But in *Hale*, the court deemed that there had been reliance that was based on a claimed expectation: “The [complaint] alleges...‘at the time of signing the contract, she was *expecting* to be charged “regular rates.”’”⁴ The court offered no factual basis to explain why this expectation was reasonable.

The hospital argued that the patient could not have relied on the admission agreement before coming to the hospital. But the court theorized, “It is possible, however, for a person who has arrived at the hospital to rely on the Admission Agreement in deciding whether to proceed with treatment.”⁵ Based on the “expectation” and an assumption about what was “possible,” *Hale* concludes that the unfair competition claim was adequately pleaded.

Hale endorses talismanic pleading, in which charmed words—such as “expecting”—suffice to allege the required elements. The *Hale* court also misunderstood that these suits are not about fraud. The actual beef of uninsured plaintiffs is not that they were misled but that they were charged more than what insurers negotiated. No one can believe that had the plaintiffs been handed the price list as they entered the hospital they would have turned around and left. These cases are not about truthful advertising; they are about a medical insurance system that plaintiffs think is substantively unfair.

It is. Not even Senator Mitch McConnell thinks the American

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health insurance system is equitable. But should airlines be forbidden to charge passengers different prices and stores not be permitted to offer discounts?

If *Hale* must be charged the same as someone who has paid insurance premiums, why pay the premiums? Under *Hale*, anyone who “expected” to pay less than what he or she was billed can require a hospital to treat persons who are not similarly situated as if they were. As the judge in the New York case pointed out, the reform of complex social policies is a matter for democracy, not the courts. *Hale* disregards precedent that cautions courts not to tread beyond their authority and expertise.⁶

One wishes to help uninsured patients caught between sickness and financial ruin. But *Hale* upends a system that, however flawed, supports millions of insurance agreements, each of which defines and protects expectations far more justified—and bargained for—than the “expectancy” pleaded by *Hale*. *Hale* is an anomaly that promulgates a superficial rule for pleading reliance and fails to recognize the limits of judicial competence. ■

¹ Kolari v. New York-Presbyterian Hosp., 382 F. Supp. 2d 562, 565 (S.D. N.Y. 2005), *vacated on other grounds*, 455 F. 3d 118 (2d Cir. 2006). *See also* Grant v. Trinity Health-Mich., 390 F. Supp. 2d 643, 647-48, n. 6 (E.D. Mich. 2005) (collecting 29 similar cases dismissed by courts).

² Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350 (2010).

³ Hale v. Sharp Healthcare, 183 Cal. App. 4th 1373 (2010).

⁴ *Id.* at 1385 (italics in original).

⁵ *Id.* at 1386.

⁶ *See* Alvarado v. Selma Convalescent Hosp., 153 Cal. App. 4th 1292, 1303-04 (2007); Desert Healthcare Dist. v. PacifiCare, FHP, Inc., 94 Cal. App. 4th 781, 795-96 (2001).

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