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Understanding “Wilshire” Problems In Tractor-Trailer Accidents

By Colin Hatcher
Associate Attorney/Staff
Writer

In tractor-trailer accidents there are often more than one insurance policy covering the matter. In California, working out the risk to the various insurance policies, including trying to predict in which order the policies will be triggered, gives rise to what are called “Wilshire” problems, named after the well known case *Wilshire Ins. Co., Inc. v. Sentry Select Ins. Co.* (2004) 124 Cal.App.4th 27 [21 Cal.Rptr.3d 60].

In *Wilshire*, an insurance company, Wilshire, that insured a tractor owned by Kenway, sought contribution from the insurance company, Sentry, that insured the trailer owned by Statewide, after settling an underlying wrongful death action arising from an accident in which the tractor-trailer rig was involved, resulting in injury and death. Statewide, the owner of the trailer had leased the driver and tractor from Kenway to haul its trailer. The lease agreement required Kenway, the tractor owner, to bear the risk of liability to a third party. Kenway, the tractor owner, purchased liability insurance that covered the Statewide trailer and scheduled the tractor as a vehicle owned by Kenway. Statewide, the trailer owner, meanwhile purchased liability insurance intended to be excess coverage for the

trailer only that scheduled the trailer as vehicle owned by Statewide. Faced with this complex arrangement, the court had to work out which policy came first and which second, and whether on was excess and one primary.

The court held that the insurance policies provided by both Kenway (from Wilshire) and Statewide (from Sentry) applied to the same motor vehicle in an occurrence out of which liability arose because a tractor hauling a semi-trailer is treated as a single motor vehicle. Each insurance policy described or rated either the insured tractor or trailer as an owned automobile,

and since the tractor-trailer rig was treated as a single vehicle, under Ins. Code, § 11580.9, subd. (d), each policy was therefore conclusively presumed to be primary (neither was deemed excess). Each policy had the same limit and the court therefore held that each insurer had an equal obligation to contribute to the loss. The court found that nothing prohibited Ins. Code, § 11580.9, from being interpreted to require concurrent application of the two policies.

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What’s the bottom line? An Analysis of the recovery of medical special damages post Nishihama and Greer

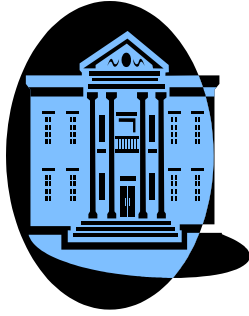
By David Streza
Associate Attorney/Staff Writer

In a world where a plaintiff’s medical expenses can be paid for by insurance or other means, California Courts have clarified exactly what is and isn’t recoverable when insurance and other adjustments satisfy only a portion of the plaintiff’s medical expense charges. In the cases of *Nishihama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298 and *Greer v. Buzgheia*, (2006) 141 Cal. App. 4th 1150, California Courts have outlined what is and isn’t recoverable, and the procedures by which a defendant may challenge awards which include damages for medical charges that have not been satisfied.

In *Nishihama*, a jury awarded the plaintiff \$99,064 in damages for a trip and fall accident. Of that amount, the plaintiff had charges of \$17,168 for her treatment at California Pacific Medical Center. However, based on an agreement the plaintiff’s insurer had with California Pacific Medical Center, only \$3,600 of the charges were actually paid by the insurer. The Court of appeal held that a plaintiff was only allowed to recover the charges actually paid by the insurer, or in that case, \$3,600. The plaintiff’s verdict was consequently reduced.

After *Nishihama*, Courts and practitioners alike were confused as to what medical special evidence was admissible at trial

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One of the key questions facing insurance carriers is which policy is triggered first, which second, which is primary and which is excess?

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Understanding “Wilshire” Problems In Tractor-Trailer Accidents

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Wilshire thus stands for the proposition that where several liability policies cover and describe or rate the same vehicle, each is conclusively presumed to provide concurrent primary coverage, even if one policy states that it is excess to another and notwithstanding any agreement to the contrary by the parties themselves.

From this case a myriad of coverage and liability issues, all invoking Insurance Code section 11580.9. A tractor trailer accident can for example have 2 primary policies and 2 excess policies. One of the key questions facing insurance carriers is: **which policy is triggered first, which second, which is primary and which is excess?**

Here below is a simple guide to these *Wilshire* issues:

Tractor-Trailer Multi-Policy Coverage Flow Chart (Ins. Code Sec. 11580.9 or “Wilshire” Flowchart)

There are three parts to Insurance Code section 11580.9,

each governing different tractor-trailer matters:

1. INS. CODE SECTION 11580.9(a) enquiry: (when one insured sells, services or stores vehicles)
2. INS. CODE SECTION 11580.9(b) enquiry: (when one insured rents or leases vehicles without drivers)
3. INS. CODE SECTION 11580.9(c) enquiry: (when one insured owns, rents or leases the premises upon which loading or unloading occurs)

1. Ins. Code Section 11580.9 (a) enquiry: (when one insured sells, services or stores vehicles)

A. Are there two or more insurance policies covering the tractor-trailer?

If YES, proceed to B.

B. Does one policy afford coverage to a named insured engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing motor vehicles?

If YES, proceed to C; If NO, the policies will be deemed to be CONCURRENT (neither will be primary and neither excess)

C. At the time of loss was the tractor-trailer being operated by any named insured engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing motor vehicles?

If YES, then the policy affording coverage to the named insured engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing motor vehicles will be deemed to be PRIMARY and the other policy will be deemed to be EXCESS

If NO, then the policy affording coverage to the named insured engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing motor vehicles will be deemed to be EXCESS and the other policy will be

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What’s the bottom line? An Analysis of the recovery of medical special damages post *Nishihama* and *Greer*

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when only a portion of the charges have been paid. On the one hand, the decision could be interpreted to stand for the proposition that plaintiffs were precluded from putting on any evidence of charges not paid. On the other hand, the decision could be interpreted as allowing the introduction of all of the charges incurred, with recovery only allowed for those charges actually paid. This issue was clarified in Greer.

In Greer, a jury awarded the plaintiff \$321,500 as damages resulting from a motor vehicle accident. The plaintiff had incurred charges

in excess of \$211,000. However, plaintiff’s counsel had entered into an agreement with the medical lienholder, whereby the lienholder would accept approximately \$134,000 to satisfy the \$211,000 of the charges. In essence, the lienholder agreed to compromise the lien by \$77,000 before any verdict was rendered.

Prior to trial, defendant made a motion in limine to preclude introduction of evidence of \$211,000 in charges, based on Nishihama. The motion was denied but the trial court stated that it would entertain a post-trial motion to determine what offset, if any, would be made

based upon competent evidence showing the amounts charged were greater than the amounts actually paid. Unfortunately, the special verdict form approved by defense counsel and used at trial, did not contain a separate line item for medical expenses. The form had a line item for past economic loss, which included both lost wages and medical expenses. Therefore, the trial court was unable to differentiate and “back out” those medical expense charges awarded by the jury, but which were not paid. As such, the trial court declined to reduce the verdict

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What's the bottom line? *An Analysis of the recovery of medical special*

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after trial.

In upholding the trial court's ruling, the Court of Appeal stated that the trial court properly deferred on making a Nishihama ruling until after trial, stating that evidence of all of the charges incurred, not charges paid, gives the jury a "more complete picture of the extent of a plaintiff's injuries." Greer at 1157. Although the Court of Appeal's ruling is silent as to whether it is the plaintiff or the defendant who has the burden on the post-trial motion, the case suggests that it is the defendant's burden to reduce any

award to the amount of charges actually paid. In fact, after receiving a favorable jury verdict which includes damages not paid, the plaintiff doesn't have to do anything. At that point, the burden is on the defendant to make a motion to reduce the award.

The cases of Nishihama and Greer allow plaintiffs to introduce evidence of all of their medical charges, whether or not those charges have been paid or not. As a practical matter, the cases do not have any impact general damage awards. This is because the juries will base their general damage awards on the amount of charges incurred, which are

higher than the amount of charges actually paid.

The lesson from Greer is that juries will be allowed to award general damages based on the total amount of medical charges. Therefore, a prudent practitioner will ensure the special verdict form contains a separate line item for past medical expenses, in order to preserve a post-trial motion. In the end, it will come down to thorough pre-trial discovery and investigation, as well as skillful lawyering, to prove that a plaintiff's claimed medical specials are something less than what they appear.

Policy Limits Settlements: When is the policy opened?

By Courtney King
Associate Attorney/Staff Writer

Insurance companies are quite familiar with the obligation to accept reasonable offers to settle a lawsuit against an insured by a third party when the offer is within the policy limits. In California, the penalty for failing to accept a reasonable offer within the policy limits is exposure of the insurer to tort liability for the entire judgment even if the amount thereafter exceeds policy limits.

In high value cases, where there is good coverage, but where the Defendants themselves are believed to have no assets and to therefore be fairly "judgment proof," Plaintiffs' attorneys often make an early demand for policy limits, so that if the demand is rejected the policy will be "opened," and so that the insurance carrier ends up responsible for satisfying the full amount of the judgment, notwithstanding the policy limits.

The question then arises, does an insurance company's refusal to accept a settlement demand within policy limits expose that

insurance carrier to tort liability in the context of a bad faith lawsuit? The answer to that question is not necessarily.

In the recent case of *Rappaport-Scott v. Interinsurance Exchange of the Auto. Club* (2007) 146 Cal.App.4th 831, the Second District Court of Appeal affirmed the trial court's decision to sustain with prejudice the demurrer to an insured's cause of action for breach of the implied covenant of good faith and fair dealing. The insured had been injured in an auto accident with an underinsured motorist. The insured sued the underinsured motorist and settled that action for \$25,000, the applicable policy limit. The insured then turned to her insurer, Interinsurance Exchange, for benefits under her underinsured motorist coverage.

The insured demanded arbitration of her claim, the value of which she indicated was \$346,732. and requested an arbitration award of \$75,000, which represented her policy limit of \$100,000 for underinsured motorists, less the \$25,000 paid by the underinsured motorist. The insured also made a "settlement

demand" of \$75,000 in contrast to the \$7,000 offered by Interinsurance Exchange.

The arbitration hearing resulted in a finding that the insured was entitled to an award of \$33,000, based upon \$63,000 in total damages, less the \$25,000 payment by the underinsured motorist and the \$5,000 in previous payments by Interinsurance Exchange.

The suit for breach of the implied covenant of good faith and fair dealing followed, alleging that Interinsurance Exchange had refused to settle the claim for a reasonable amount within the policy limit and that such refusal amounted to an unreasonable delay in the payment of benefits. After the third demurrer by Interinsurance Exchange (to the second amended complaint) was sustained with prejudice, appeal was taken.

On appeal, the Court held that an insurer's liability in tort for failure to accept a reasonable settlement offer can only arise in a third party context. The duty of an insurer in the first

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**failure to accept
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Policy Limits Settlements: When is the policy opened?

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party context is not to unreasonably withhold benefits due under the policy. There is no corresponding duty to accept "reasonable" settlement offers.

The Court further held that although there was a significant difference between the \$7,000 offer by Interinsurance Exchange and the final award of \$33,000, the difference between the \$33,000 award and the \$346,732.64 claimed by the insured demonstrated, as a matter of law, a genuine dispute as to the amount payable on the claim, and that there

was therefore no unreasonable withholding of policy benefits by Interinsurance Exchange. Accordingly, the Court found that the insured had failed to allege facts sufficient to state a cause of action for breach of the implied covenant of good faith and fair dealing and demurrer was therefore proper.

The test then, pursuant to *Rappaport-Scott*, is the "genuine dispute" test.

Insurance carriers should thus be aware that when on trial for a bad faith claim for an alleged

improper refusal to settle for a reasonable amount within the policy limits, the Defendant will need to provide evidence that the dispute was "genuine," i.e. held in good faith. To this end, carriers would be well advised to create well in advance of any litigation solid documentation identifying the good faith and objective basis for their evaluation of the claim at issue, and how that evaluation differs from the settlement demand made by the Plaintiff.

Understanding "Wilshire" Issues In Tractor-Trailer Accidents

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deemed to be **PRIMARY**

2. INS. CODE SECTION

11580.9(b) enquiry: (when one insured rents or leases vehicles without drivers)

A. Are there two or more insurance policies covering the tractor-trailer?
If YES, proceed to B.

B. Does one policy afford coverage to a named insured engaged in the business of renting or leasing motor vehicles without operators?
If YES, proceed to C
If NO, the policies shall be deemed to be **CONCURRENT** (neither will be primary and neither excess)

C. Is the tractor-trailer a Commercial Vehicle?

If YES, proceed to D:
If NO, the policies shall be **CONCURRENT** (neither will be primary and neither excess)

D. Has the tractor-trailer been leased for a term of six months or longer?

If YES, then the insurance afforded by that policy to the named insured engaged in the

business of renting or leasing motor vehicles without operators shall be **PRIMARY**, and the insurance afforded by any other policy to persons other than the named insured or his or her agent or employee, shall be **EXCESS**.

If NO, the policies shall be **CONCURRENT** (neither will be primary and neither excess)

3. INS. CODE SECTION

11580.9(c) enquiry: (when one insured owns, rents or leases the premises upon which loading or unloading occurs)

A. Are there two or more insurance policies covering the tractor-trailer?

If YES, proceed to B.

B. Is one or more of the policies issued to the owner, tenant, or lessee of the premises on which the loading or unloading occurs

If YES, the insurance afforded by the policy covering the owner, tenant, or lessee of the premises on which the loading or unloading occurs

shall be **PRIMARY**, and the other policy shall be **EXCESS**

If NO, the policies shall be **CONCURRENT** (neither will be primary and neither excess)

Thus in any tractor trailer accident, where more than one policy applies, the carrier should be asking the following threshold questions:

1. Does any one of the insureds sell, service or store vehicles?

If yes, examine INS. CODE SECTION 11580.9(a) above.

2. Does any one of the insureds rent or lease vehicles without drivers?

If yes, examine INS. CODE SECTION 11580.9(b) above.

3. Does any one of the insureds own, rent or lease the premises upon which loading or unloading occurs?

If yes, examine INS. CODE SECTION 11580.9(c) above.



Recent Trial Update

DELEAN CARSON WALKER ANOTHER DEFENSE VERDICT FOR CHOLAKIAN & ASSOCIATES

By David J. Streza

Associate Attorney/Staff Writer

Recently the Cholakian firm won yet another impressive Defense verdict in a personal injury and wrongful death lawsuit.

On May 28, 2004, 62 year old Bettye Carson was driving with her 35 year old daughter Delean Carson-Walker and 11 year old granddaughter Avauna Walker to a soccer tournament in Medford, Oregon. As the Carson family was traveling in the fast lane near the City of Willows, at approximately 12:58 p.m., a tractor-trailer traveling in the slow lane began to make a lane change into the lane that the Carson family was traveling in without using its turn signals and apparently not noticing that the Carson vehicle was in its blind spot. The tractor-trailer forced the Carson vehicle, a 1998 Volvo S70, off the road and into the dirt shoulder/median. The Carson vehicle traveled for approximately 400 feet in the dirt shoulder/median before it suddenly lost control and made an abrupt left turn into Oleander bushes, and flipped over. Ms. Carson-Walker testified that she grabbed the steering wheel in order to help her mother control the vehicle as it drove in the dirt shoulder/median. The vehicle rolled one and a half times before coming to a rest on its roof in the southbound lanes of traffic. Bettye Carson was fatally injured as a result of blunt head trauma sustained during the roll. Delean Carson-Walker and Avauna Walker suffered minor personal injuries as a result of the accident.

Prior to the accident, a vehicle driven by Catherine Cappel was following the Carson vehicle. Witnessing the accident, Ms. Cappel continued to follow the truck as it continued North on I-5 and called 911 to report the accident. Ms. Cappel attempted to identify the tractor-trailer and told 911 dispatchers that the tractor-trailer involved in the accident had a dark red or maroon cab, was pulling a flatbed trailer, with green metal objects, and had a license plate with the first three characters of "4AP" and a "0" in the last three characters. The CHP put out an all points bulletin in search of the involved vehicle.

At approximately 41 minutes after the accident., the CHP pulled over defendant Kent Olson near Gyle Road (35 miles from the accident scene), who was driving a Stidham Trucking, Inc. tractor-trailer. The Stidham tractor was maroon with a beige/white stripe pulling a flatbed trailer hauling green metal objects, and had a license plate of "4AP6036," matching the description given by the eye witness. The CHP interviewed Olson, inspected and took photographs of the Stidham truck and released Olson. A few weeks after the accident, the CHP developed a photographic lineup of 6 trucks generally matching the description given by witness Cappel, which included a photograph of the Stidham truck. On June 21, 2004, Ms. Cappel was shown the photographic lineup and indicated that none of the trucks in the CHP lineup was the truck she saw on the date of the accident. Likewise, on July 8, 2004, Delean Carson-Walker and Avauna Walker were shown the CHP photographic lineup and indicated that none of the trucks in the lineup was the truck they saw on the date of the accident. Based on the failure to identify the Stidham truck, the CHP closed its investigation pending receipt of further information.

At trial, plaintiffs, the surviving children and granddaughter of Bettye Carson, claimed that the Stidham vehicle was the truck which caused the accident. Plaintiffs put on evidence that there were only 522 trailers in California which contained license plate characteristics beginning with "4AP" and a "0" in the last three characters and that the likelihood of that truck trailer being at the scene within a 10 minute time period statistically, and not being the truck involved, was near impossible. Plaintiff's contended that Cappel's original call in matched perfectly the description of the Stidham truck, and only later in deposition did she point out differences between the Stidham truck and the truck she contended drove the decedent's vehicle off the road due to "clever" lawyering by defense counsel.

Defendants contended that it was not their truck involved in the accident and pointed to the testimony of eyewitness Cappel in which she was adamant that defendants' truck was not the truck involved in the accident. Defendant's also pointed out that the timing of the pull over didn't match the drivers speed of 60 mph. Defendants also argued that the use of statistics was not appropriate in this case, given the eyewitness testimony, but even if they were, the statistics provided by Plaintiff's expert were faulty and did not take into account the actual likelihood of truck trailer combinations in the statistical pool. Moreover, defendants contended that regardless of who the rogue driver was, the Carson vehicle had the opportunity to pull over and avoid the ensuing roll over, and the only explanation for the vehicle's sudden left turn was the grabbing of the steering wheel by decedent's daughter, Ms. Carson-Walker.

Plaintiffs' counsel asked the jury to award more than \$1,000,000.00, including plaintiffs' wrongful death damages and damages representing the Ms. Carson-Walker's Dillon v. Legg emotional distress damages. Defendants offered plaintiffs \$250,000 per CCP 998, 5 months before trial. After three hours of deliberations, the jury returned a 9-3 verdict in favor of Defendants.



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(NASP)
Chair in California

Trucking Industry Defense
Association (TIDA)

San Francisco Defense
Association
(President)



Cholakian & Associates is listed in Best's Insurance Directory, is AV rated by Martindale-Hubbell, and is retained defense counsel to a dozen major insurance companies doing business in California. This practice includes, though it is not limited to, the representation of carriers regarding commercial and personal lines claims as well as the defense of insureds involved in serious personal injury catastrophic trucking accident litigation, complex commercial litigation, product liability/fire subrogation matters and coverage litigation. This includes defense of matters involving allegations of construction defects, mold related claims, inter and intrastate trucking, commercial landlord/tenant, environmental liability, professional liability, including insurance agents, labor and employment law, officer's and director's liability, and uninsured/underinsured motorist matters. The attorneys in this practice group have significant litigation experience, with emphasis on high exposure cases.

UPCOMING EVENTS

October 18th, 2007– Supreme Court Justice Kathryn Werdergar will be San Francisco Defense Seminar President Kevin Cholakian's guest speaker at a special luncheon.

For more information about these events, please contact Fanny Lay at (415) 467-8200 ext. 200
*Kevin Cholakian is in his fifth term as President of DSA

Kevin K. Cholakian attended North Carolina School of the Arts in Winston-Salem, North Carolina his senior year of high school 1971-72 on a full scholarship. Mr. Cholakian then attended San Francisco Conservatory of Music on a Ford Foundation Scholarship from 1972-1974. He graduated magna cum laude with a B.A. in Philosophy from California State University, in 1977. From 1976 to 1978, he served as Chief Administrative Assistant to California State Senator Rose Ann Vuich (first woman elected to the California State Senate serving Central California). He received his law degree from the University of California, San Francisco Hastings College of the Law in 1981. At Hastings, he was Executive Editor of the Hastings Communications and Entertainment Law Journal. Mr. Cholakian began his legal career practicing with the litigation sections of Littler, Mendelson, Fastiff & Tichy (1981-1983) and McCutchen, Doyle, Brown & Enersen (Bingham-McCutchen) in San Francisco (1983-1987). He managed the defense practice at AV rated 30 attorney civil defense firm Kinder, Wuertel & Cholakian (1988 through 1999). He began Cholakian & Associates in January 2000 and has continued to specialize in high exposure personal injury defense, product liability/fire subrogation matters, construction defect, coverage and employment/housing discrimination matters. Mr. Cholakian regularly defends cases that have exposures in excess of \$1,000,000.00. Mr. Cholakian also specializes in the defense of commercial housing/environmental, landlord-tenant and ADA cases. He has tried and defended more than 20 cases with verdict exposure greater than \$100,000.

Mr. Cholakian is a member of the following organizations: Defense Research Institute (DRI), the International Association of Defense Counsel, the Northern California Association of Defense Counsel, the American Bar Association, the San Mateo Bar Association, Bar Association of San Francisco, the San Francisco Trial Lawyers Association, the California Trial Lawyers Association, National Association of Subrogation Professionals (San Francisco Chapter President) (NASP), and Trucking Industry Defense Association (TIDA). Mr. Cholakian is the current President of the San Francisco Defense Seminar Association, a 40 year old organization comprised of defense litigators. Mr. Cholakian sits on the Executive Committee of the Board of Governors of the City Club of San Francisco.