



California Medical Association
Physicians dedicated to the health of Californians
LEGAL AFFAIRS CASE LIST

CMA's Legal Affairs Case List provides a summary and current status of pending litigation filed to influence health policy in which the California Medical Association was a party or filed a brief as *amicus curiae*, or "friend of the court." Cases marked with an asterisk (*) were filed on behalf of the California Medical Association, California Hospital Association and California Dental Association pursuant to the direction of the CMA-CHA-CDA Amicus Curiae Committee. The Case List is circulated regularly on a monthly basis. For more information on a specific case, please contact the appropriate staff member identified at the end of each litigation summary by e-mail or by calling (916) 444-5532.

MAY 2010

CMA Lawsuits		
Pending cases in which CMA is a named plaintiff	Status	Staff
<p>INGENIX PRICE FIXING SCHEME: <u>AMA, CMA et al. v. Wellpoint/Anthem Blue Cross</u> (U.S. District Court, Central Dist. of California, filed 3/25/09, CV 09-2039, Master Consolidated Case File 2:09-ml-02074); <u>AMA, CMA et al. v. Aetna Health Inc.</u> (Dist. of New Jersey, filed 2/9/09, Master File 2:07-CV-3541); <u>AMA, CMA et al. v. Cigna Health Corp.</u> (Dist. of New Jersey, filed 2/9/09, 09-578) In three separate lawsuits filed in federal courts, the CMA, American Medical Association (AMA), other state medical societies and individual physicians challenged the use of Ingenix by Aetna, Cigna and Blue Cross to underpay physicians for providing out-of-network services to their enrollees. The lawsuits seek to collect past underpayments by the defendants on behalf of a nationwide class of physicians. These lawsuits still remain in the early stages of litigation.</p>	<p>The litigation is in the discovery stage. (The discovery stage is the pre-trial phase in a lawsuit in which each party through the law of civil procedure can request documents and other evidence from other parties and can compel the production of evidence.)</p>	<p>Francisco Silva Long Do</p>
<p>MEDICAL BOARD FURLOUGH: <u>CMA v. Arnold Schwarzenegger, et al.</u> (Court of Appeal, First District, A128172) On October 14, 2009, CMA filed a writ petition in San Francisco Superior Court to enjoin Governor Schwarzenegger's furlough of the Medical Board of California (MBC) and to reverse a provision of the State Budget Act of 2008 that took \$6 million away from the MBC's Contingent Fund to aid the state's General Fund. On March 4, 2010, the San Francisco Superior Court denied CMA's petition. CMA has appealed the judgment and the appeal is pending. (Notably, shortly after the San Francisco decision was issued, the Oakland Superior Court made the opposite decision—holding that the Governor lacked the authority for the furloughs. The Governor appealed the Oakland judgment.) CMA also opposed Governor's Petition in California Supreme Court to consolidate all pending appeals that challenge the furlough. The court denied the Governor's petition to consolidate the appeals and CMA's appeal will move forward.</p>	<p>Appeal Notice filed: 4/8/10</p> <p>CMA is appealing the superior court's judgment before the Court of Appeal. Briefing should commence early summer.</p>	<p>Long Do</p>
<p>MEDI-CAL LITIGATION: <u>CMA et al. v. Shewry</u> (Los Angeles Superior Court, BC390126); <u>ILCS v. Shewry</u> (Ninth Circuit Court of Appeals, 08-56061, 08-56422, 08-56551, 08-56554, 09-55692); <u>CPA, CMA et al. v. Maxwell-Jolly</u> (09-55532) In 2008, a coalition of health care providers led by CMA sued the state of California to stop a 10% cut in Medi-Cal reimbursements. A federal appeals court in 2008 ruled that Medi-Cal providers have standing to challenge the state's rate cut. The same court in 2009 upheld the merits of the 2008 preliminary injunction that forced the state to immediately reverse the cut. The court held that the district court properly issued the injunction "because the Director [of DHCS] failed to rely on responsible cost studies, its own and others . . . in determining the effect of the rate cuts . . . on the statutory factors of efficiency, economy, quality, and access to care before implementing those cuts." The State's petition for rehearing by the full Ninth Circuit was denied in October 2009. On February 17, 2010, the State filed a cert petition with the U.S. Supreme Court.</p>	<p>State's Cert Petition filed: 2/17/10</p> <p>CMA filed an opposition to the cert petition asking the U.S. Supreme Court (09-958) to deny the State's petition to review the case.</p>	<p>Francisco Silva</p>

CMA Lawsuits

Pending cases in which CMA is a named plaintiff

Status

Staff

SCOPE OF PRACTICE: California Society of Anesthesiologists (CSA) and California Medical Association (CMA) v. Arnold Schwarzenegger et al. (San Francisco Superior Court, 10-510191) On February 2, 2010, CMA and CSA filed a writ petition to require that the Governor withdraw his letter dated June 10, 2009 to the Centers for Medicare and Medicaid Services (CMS) where he purported to exercise the option to exempt the State of California from the requirement that CRNAs be supervised by a physician. The lawsuit contends that physician supervision of CRNAs who are administering anesthesia is required under California law and that the Governor's request for exemption ("opt-out") was therefore improper and must be withdrawn.

CMA and CSA Petition filed: 2/2/10

This lawsuit is in its early stages. The Governor answered the petition on 3/23/10 and the court is currently considering a motion to intervene by the California Association of Nurse Anesthetists.

[Francisco Silva](#)

[Long Do](#)

CMA Amicus Curiae Briefs

Pending cases in which CMA filed an amicus brief or letter

Status

Staff

ARBITRATION: Haworth v. Superior Court (Ossakow)* (California Supreme Court, S165906) This case involves a challenge to a published opinion of the California Court of Appeal vacating an arbitration award in a medical malpractice case based on a post-arbitration claim that the neutral party arbitrator failed to disclose an unrelated censure from the Supreme Court that occurred more than ten years prior to the arbitration. CMA, together with other amici, filed an Amicus Letter urging the Supreme Court to grant the Petition for Review. The California Supreme Court granted the Petition for Review, this case is now fully briefed and oral argument before the California Supreme Court is scheduled on May 6, 2010 in San Francisco.

CMA Amicus Letter filed: 11/13/08

Application to file amicus granted: 12/01/08

**Oral Argument: 5/6/2010
9:00 a.m.**

[Alicia From](#)

ARBITRATION: Ruiz v. Podolsky* (California Supreme Court, S175204) In *Ruiz v. Podolsky*, the Appellate Court held that decedent's adult children could not be compelled to arbitrate their wrongful death claims pursuant to the arbitration agreement their father signed at the request of Dr. Podolsky, his orthopedic surgeon. CMA filed a letter requesting depublication of the Appellate Court's decision and a separate letter in support of the petition for review. The California Supreme Court granted the Petition for Review. CMA, together with other amici, filed an Amicus brief on the merits in February 2010. With all briefing now complete, the case should be set for oral argument by fall 2010.

Request for depublication filed: 8/24/09

CMA Amicus Brief filed: 2/3/10

Application to file amicus granted: 2/9/10

Briefing is complete and case should be set for oral argument by fall 2010.

[Alicia From](#)

BUSINESS PROHIBITIONS: National Association of Optometrists & Opticians; Lenscrafters, Inc. v. Lockyer (Ninth Circuit Court of Appeals, 07-15050) In this case, CMA filed an amicus brief at the trial level in support of the state's motion for summary judgment. The trial court (the U.S. District Court, Eastern District of California) ruled in favor of Lenscrafters, invalidating state laws that govern relationships between ophthalmologists, optometrists, and opticians on the grounds they violated the United States Commerce Clause. The state filed an appeal with the Ninth Circuit Court of Appeals. CMA filed an *amicus curiae* brief on the merits in the Ninth Circuit supporting the state on appeal. In September 2009, the Ninth Circuit reversed and remanded the case back to the District Court. On April 28, 2010, the District Court upheld the constitutionality of the statutes, finding that they serve a legitimate government purpose and that the burdens they impose do not outweigh their benefit.

CMA Amicus Brief in district court filed: 1/21/04

Application to file amicus granted: 1/22/04

CMA Amicus Brief in Ninth Circuit filed: 7/2/07

The District Court upheld the constitutionality of the statutes, consistent with CMA's position.

[Astrid Meghriqian](#)

CMA Amicus Curiae Briefs

Pending cases in which CMA filed an amicus brief or letter

Status

Staff

CORPORATE PRACTICE OF MEDICINE & 1206(I) MEDICAL FOUNDATIONS: The Patient-Physician Alliance, Inc., v. The Hospital Committee for the Livermore Pleasanton Area, Inc., et al. (Alameda Superior Court, RG09471909) One of the issues raised by this case is whether the defendant medical foundation is properly constituted pursuant to Health & Safety Code §1206(I). The plaintiff in this case alleges, among other things, that the defendant medical foundation fails to meet the requirements of that statute and is practicing medicine illegally, in violation of California law, including the corporate practice of medicine bar set forth in Business & Professions Code § 2400. In its letter brief, CMA offered the court guidance regarding the corporate bar and the 1206(I) law.

CMA Amicus Letter received: 9/17/09

[Astrid Meghriqian](#)

Hearing on pretrial motions set for July 2010. CMA is continuing to monitor this case.

DAMAGES: Howell v. Hamilton Meats* (California Supreme Court, S179115) This case involves the appropriate measure of damages in a personal injury case and the proper interpretation of “benefits” under the collateral source rule. In a published opinion, the Fourth Appellate District Court ruled that economic damages awarded to a personal injury plaintiff should reflect the full amount of her health care provider’s bills, not the rate the provider accepted as payment in full for the services rendered. Accordingly, CMA, together with other amici, filed a letter in support of the Petition for Review and Request for Depublication of the Court of Appeal’s opinion. On March 10, 2010 the Supreme Court granted review of the Howell decision.

CMA Amicus Letter received: 3/5/10

[Alicia From](#)

This case is currently in the briefing stage before the California Supreme Court. The opening brief was filed on 4/9/10.

HEALTH PLAN REGULATION: California Department of Insurance v. Pacificare Life & Health Insurance Co. (California State Insurance Commissioner) CMA has provided significant assistance to the Department of Insurance (DOI) in its unprecedented prosecution of Pacificare. In 2006, CMA presented a lengthy complaint to the DOI from 40 physician members concerning a variety of problems they encountered with Pacificare. As a result, the DOI conducted a year-long investigation that resulted in findings of hundreds of thousands of violations of the Insurance Code by Pacificare. Pacificare refused to settle and the DOI has been forced to take formal administrative action and seek the full extent of punishment allowable under the Insurance Code.

Trial commenced in early December 2009 and is expected to go into the early summer 2010.

[Long Do](#)

HEALTH CARE REFORM & ERISA: Golden Gate Restaurant Association (GGRA) v. City & County of San Francisco (Ninth Circuit Court of Appeals, 07-17370, 07-17372) CMA and the San Francisco Medical Society filed an amicus brief opposing the petition for en banc review. In this case, the local restaurant association challenged the City’s recently created health care program for uninsured residents. The restaurants argued that the City’s program is preempted under ERISA. The Ninth Circuit held that ERISA does not preempt the San Francisco health care ordinance. GGRA filed a petition for en banc review. CMA’s amicus brief argued that ERISA should not stand in the way of efforts to reform the health care system at the state and local level. On March 9, 2009, the Ninth Circuit ruled on the petition for en banc review, in favor of CMA’s side. GGRA filed a cert petition before the U.S. Supreme Court on June 5, 2009.

CMA and SFMS Amicus Brief filed: 12/15/2008

[Long Do](#)

Cert Petition before U.S. Supreme Court filed: 6/5/09

The case now is pending for writ of certiorari before the U.S. Supreme Court. A decision is expected in its current session, by the beginning of summer 2010.

MEDICAL RECORDS, PRIVACY & CONFIDENTIALITY: McKnight v. Children's Hospital of Oakland (Court of Appeals, First District, A127580) CMA and the California Hospital Association filed an amicus brief in support of petitioner Children’s Hospital of Oakland. The Children’s Hospital seeks to prohibit the State of California Workers’ Compensation Appeals Board (WCAB) from proceeding with a discovery order requiring the Hospital to review medical records and disclose information about HIV infected children who were a part of a physical and occupational therapy program where McKnight worked for almost 20 years. This case is currently pending before the First District of the California Court of Appeal.

CMA Amicus Brief filed: 3/19/10

[Lisa Matsubara](#)

Application to File Amicus Granted: 4/16/10

This case is currently pending before the Court of Appeal.

CMA Amicus Curiae Briefs

Pending cases in which CMA filed an amicus brief or letter

Status

Staff

PEER REVIEW: El-Attar, M.D. v. Hollywood Presbyterian Medical Center

(Court of Appeal, Second District, B209056) In this case, Dr. El-Attar's medical staff privileges were not renewed by the hospital's governing Board. Following a finding by the Medical Executive Committee (MEC) that there was no basis for the hospital to deny Dr. El-Attar's reappointment to the medical staff, the hospital bypassed the MEC and picked its own panel and hearing officer over Dr. El-Attar's objections. CMA filed an amicus brief in support of Dr. El-Attar arguing that medical staffs are required to abide by their bylaws and cannot designate their governing body to act on its behalf, except in rare circumstances.

CMA Amicus Brief filed: 5/19/09

Application to File Amicus
Granted: 6/9/09

This case is currently pending before the California Court of Appeal.

[Astrid Meghrigian](#)

REPRODUCTIVE ISSUES: Hoye v. City of Oakland (Ninth Circuit Court of Appeals, 09-16753) CMA and Alameda-Contra Costa Medical Association joined Planned Parenthood Affiliates of California and Planned Parenthood affiliates in the East Bay on an amicus brief to support the City of Oakland's ordinance creating an eight foot buffer zone or "bubble" around people seeking access to reproductive healthcare centers within 100 feet of such a center.

CMA and ACCMA Amicus Brief filed: 2/23/10

This case is currently pending before the United States Court of Appeals for the Ninth Circuit.

[Lisa Matsubara](#)

TOBACCO CONTROL: Walgreen Co. v. San Francisco (Court of Appeal, First District, A123891) The drug store chain Walgreens challenged San Francisco's ordinance banning tobacco sales in pharmacies. Walgreens claimed the ordinance violates equal protection laws because the ban exempts supermarkets and "big box" retail stores like Costco. CMA and the San Francisco Medical Society filed an amicus brief defending the exemption, telling the court that pharmacies, which market themselves as institutions where customers can receive trustworthy health care advice, should not implicitly endorse cigarette smoking. Oral arguments were held before the Court of Appeal on March 10, 2010.

CMA and SFMS Amicus Brief filed: 7/14/09

Application to File Amicus
Granted: 7/16/09

A decision by the Court of Appeal is expected within 90 days of the 3/10/10 hearing.

[Long Do](#)

VICARIOUS LIABILITY: Allen v. Superior Court (St. Joseph's Hospital)* (Court of Appeal, Fourth District Third Division, G042458) In this case, the trial court granted summary judgment in favor of St. Joseph's Hospital on plaintiff's claim that the hospital was vicariously liable for damages stemming from an x-ray technician's alleged sexual molestation of the patient. CMA, along with other amici, filed an amicus brief supporting the hospital's position that a professional health service provider cannot be held vicariously liable for an employee's alleged sexual misconduct under Civil Code section 51.9. On March 8, 2010, the Court of Appeal issued its unpublished opinion granting the relief requested by plaintiff, made a limited ruling regarding corporate liability, and declined to address the issue of vicarious liability. The petition for review filed by St. Joseph's Hospital before the California Supreme Court is pending (S181899).

CMA Amicus Brief filed: 11/23/09

Application to File Amicus
Granted: 11/25/09

The petition for review before the California Supreme Court is pending (S181899).

[Alicia From](#)

Recently Resolved CMA Cases

CMA cases which have been resolved within the past year

Outcome

Staff

DRUG TREATMENT PROGRAM: Gardner et al. v. Schwarzenegger (Court of Appeal, First District, A122920) CMA and the California Psychiatric Association filed an amicus brief opposing a state law that would undermine the criminal offender drug treatment requirements enacted by Proposition 36, California's landmark drug-treatment-instead-of-incarceration initiative. At issue was Senate Bill 1137, which would radically change Prop. 36 by allowing judges to incarcerate people who suffer drug relapses during treatment and limit the discretion of physicians to determine how drug offenders can best benefit from treatment. The Court of Appeal agreed with CMA and held that the State could not enforce its law to undercut physician discretion and control under Prop. 36.

CMA Amicus Brief filed: 6/12/09

[Long Do](#)

Application to file amicus granted: 6/16/09

Opinion filed: 11/5/09
The Court of Appeal ruled in favor of CMA and the State decided not to further appeal.

HEALTH PLAN RESCISSION: Nieto v. Blue Shield (Court of Appeals, Second District, B214669) CMA filed an amicus letter brief in the California Supreme Court supporting review or depublishation of the Court of Appeals decision to educate the court about harms to providers and patients from retroactive rescission practices and encourage the court to adopt uniform standards for allowing plans to rescind based upon post-claims underwriting practices. The California Supreme Court denied the petition for review and request for depublishation.

CMA Amicus Letter sent: 4/1/10

[Long Do](#)

Case Resolved: 4/28/10
The California Supreme Court denied the petition for review.

HEALTH PLAN RESCISSION: People of the State of California v. Anthem Blue Cross of California (Court of Appeal, Second District, B215035) CMA and the Los Angeles County Medical Association jointly submitted an amicus brief in support of a lawsuit filed against Blue Cross for illegally canceling patients' health insurance policies. The suit, filed by the Los Angeles City Attorney, alleges that Blue Cross sold people false promises of coverage, while systematically canceling policies after policyholders got sick and filed expensive claims. Blue Cross is asking for the case to be dismissed, arguing that the Department of Managed Health Care (DMHC) has exclusive jurisdiction to enforce violations of the Knox-Keene Act. CMA and others in organized medicine strongly reject this argument. On December 15, 2009, the Court of Appeal, in a published opinion (essentially siding with CMA's legal arguments), rejected Blue Cross and DMHC's jurisdictional arguments and held that DMHC does not enjoy exclusive jurisdiction to enforce the Knox-Keene Act and Unfair Competition Laws. Blue Cross filed a petition to the California Supreme Court to review the case which was denied.

CMA Amicus Brief filed: 7/17/09

[Long Do](#)

Application to file amicus granted: 7/28/09

Case Resolved: 3/10/10
The Court of Appeal agreed with CMA and Blue Cross's petition to the California Supreme Court was denied.

INFORMED CONSENT: Bergero v. University of Southern California* (Court of Appeal, Second District, B200595) Plaintiff brought a wrongful life lawsuit against the University of Southern California Keck School of Medicine ("USC") and argued, in part, that USC should be held liable for wrongful life because it purportedly owed a duty to disclose information comparing USC's experience with that of other facilities performing the medical procedure to which Plaintiff's parents consented. The trial court ruled against the Plaintiff and he appealed. CMA submitted an amicus brief to the Court of Appeal urging the Court to recognize that Plaintiff's position seeks to expand beyond reason the doctrine of informed consent by promoting a rule that health care providers must advise patients of specific types of information pertaining to the health care provider's comparative training and experience with respect to other providers and success rates with relevant procedures. Such a rule falls outside the contours of the doctrine of informed consent as developed by the California Supreme Court, is grossly impractical and is not needed to provide due recourse to injured patients. On April 9, 2009, the Court of Appeal affirmed the decision of the lower court. Less than two weeks later, the parties filed a Joint Notice of Settlement.

CMA Amicus Brief filed: 12/8/08

[Alicia From](#)

Application to file amicus granted: 12/19/08

Case Settled: 4/20/09
After the Court of Appeal agreed with CMA and affirmed the trial court's decision, the parties settled.

Recently Resolved CMA Cases

CMA cases which have been resolved within the past year

Outcome

Staff

MICRA: Van Buren v. Evans* (Court of Appeal, Fifth District, F054227) CMA filed an amicus brief to defend the non-economic damages cap in medical malpractice cases. In this case, the plaintiff's personal injury attorneys argued that MICRA's \$250,000 cap on noneconomic damages deprived Mr. Van Buren of his constitutional rights to a jury trial. They also argued that the cap violates constitutional provisions that prohibit the legislature from exercising judicial powers, as well as the equal protection clauses of the state and federal constitutions. CMA's amicus brief opposed this attack on MICRA and argued to the court that MICRA's limit on noneconomic damages is a key component of a complex and balanced legislative plan that has ensured the availability of medical care in California. The Court of Appeal sided with CMA and upheld the constitutionality of California's landmark law, a decision that the California Supreme Court declined to review.

CMA Amicus Brief filed: 10/14/08

[Alicia From](#)

Application to file amicus granted: 10/16/08

Case Resolved: 8/19/09
The Court of Appeal agreed with CMA and upheld MICRA's cap on non-economic damages. The California Supreme Court declined to review the case.

PEER REVIEW: Mileikowsky, M.D. v. West Hills Medical Center (California Supreme Court, S156986) CMA and the American Medical Association (AMA) filed an amicus brief against granting hearing officers the power to terminate a peer review proceeding. In this case, a hearing officer's decree to terminate a peer review hearing led directly to the restriction of the physician's privileges. By doing so, the hearing officer essentially made a medical determination that the physician is medically incompetent to practice at the hospital, thus depriving the physician of a fair hearing before his medical peers. CMA's amicus brief argued forcefully that the granting of such powers to a hearing officer unlawfully deprives physicians of a fair hearing before his medical peers, and deprives patients of access to their physician of choice. The California Supreme Court agreed with CMA, and ruled that peer review hearing officers cannot unlawfully usurp the clinical decisions of a peer review body.

CMA and AMA Amicus Brief filed: 8/26/08

[Astrid Meghriqian](#)

Application to file amicus granted: 8/28/08

Final Opinion filed: 4/6/09
The California Supreme Court agreed with CMA and affirmed the judgment. CMA opposed the petition for rehearing and the Court denied the petition.

TOBACCO CONTROL: Philip Morris USA, Inc. v. City & County of San Francisco (Ninth Circuit Court of Appeals, 08-17649) CMA and the San Francisco Medical Society (SFMS) joined numerous other health and tobacco control advocates on an amicus curiae brief to support the City of San Francisco's ordinance prohibiting the sale of tobacco products in pharmacies. Philip Morris challenged the ordinance in federal court on the basis that it violates the tobacco manufacturer's commercial speech rights. Philip Morris lost at the trial level, and appealed to the Ninth Circuit Court of Appeals. CMA's amicus brief was filed in the appeal. The Ninth Circuit affirmed the trial court's ruling, in favor of CMA's side.

CMA and SFMS Amicus Brief filed: 3/24/09

[Long Do](#)

Case Resolved: 9/9/09
Ninth Circuit affirmed the judgment, in favor of CMA's side.