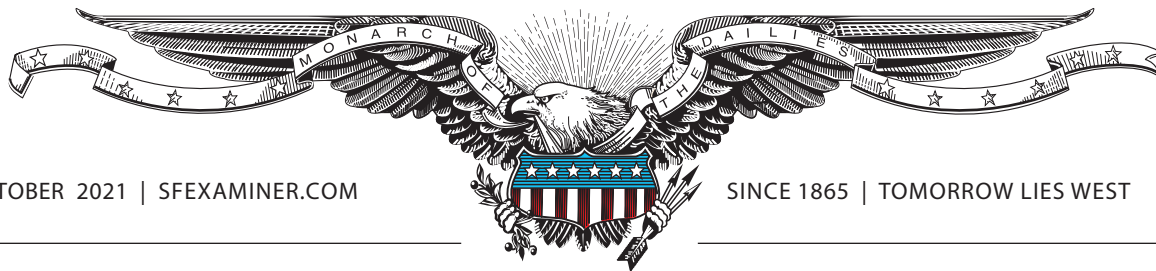


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Navigating Insurance Claims: Hit and Run or Uninsured/Underinsured Motorist

By Christopher B. Dolan and Kimberly E. Levy

This week's question comes from Kate R. from Oakland:

I was rear-ended on the freeway a few days ago and the driver that hit me fled the scene. The police took a report but have not been able to identify the other driver. I ended up in the hospital with some serious injuries. I am not going to be able to go back to work for a few weeks, at least. The bills for my medical care are going to start piling up. I have no idea what to do. Please help.

Thank you for reaching out, Kate. We're sorry to hear about what happened to you and hope that you make a speedy recovery. Navigating the claim process for a hit and run case can be complicated. The good news is that you may have purchased several types of insurance coverages that can help you through this difficult time.

Uninsured/Underinsured Motorist Bodily Injury Coverage ("UM/UIM"):

What is it? Uninsured/underinsured motorist coverage applies when another driver is at fault for a collision but either has no insurance or not enough insurance to cover the injured person's medical bills and other damages. Importantly, this coverage also applies in hit and run cases, such as yours, when the identity of the at fault driver cannot be ascertained.

In order to protect yourself against hit and run drivers, uninsured drivers, and drivers carrying the minimum amount of liability insurance (which is \$15,000 in California), it is best to make sure you protect yourself with uninsured/underinsured coverage.

How does it work? With this coverage, your own insurance company covers your losses as if it were the at-fault driver—the insurance company steps into the shoes of the at-fault driver. In a UM/UIM case, you will make a claim against your own insurance company up to the amount of your purchased coverage. In some ways, UM/UIM cases are advantageous. Because you are in a contract with your insurance company, your insurance company has a duty to treat you fairly and regard your interests equally as its own interests. Unfortunately, you

will not be entitled to a jury trial on these cases. UM/UIM cases are typically resolved by settlement or through an arbitration process (trial in front of a neutral "judge" agreed upon by the parties).

If you are injured in a hit and run accident, specific rules apply in order to trigger UM coverage. First, there must have been contact between your vehicle and the hit and run vehicle. Second, within 24 hours after the accident, it must be reported to the police for the jurisdiction in which the accident happened. Third, within 30 days of the accident, you must provide your insurance company with a sworn statement that you were injured and that the person causing injury is unknown. Facts explaining the same must be provided in the sworn statement. Typically, a copy of the police report showing hit and run will be sufficient to meet this requirement. These requirements are set forth in California Insurance Code section 11580.2(b)(1) and (2).

Will making a claim increase my insurance premiums? In California, it is illegal for an insurance company to raise rates when a policyholder brings a claim and was not at fault. (California Insurance Code Section 491). As long as the other driver was the cause of the accident, your premiums should not increase. If there is an increase in the cost of your coverage based on claims activity made necessary by the fault of another, this should be reported to the California Department of Insurance.

Do not concern yourself with the fact that payment is coming from your own insurance company versus the adverse driver or his/her/their insurance company. This is coverage that you have paid for and the insurance company is best equipped to bear the loss. The insurance company is free to seek reimbursement from an uninsured driver should that be feasible.

How long do I have to resolve my case? Generally, in a UM case, you have two years from the date of the incident to either settle your claim or make a "demand for arbitration" – a process where you formally notify your insurance company that you would like to resolve your case by arbitration. Your insurance company has an obligation to keep you informed of these deadlines and requirements throughout the process.

So often, we think of insurance as a means to protect our assets and property. It is equally important, however, to remember to protect yourself against uninsured and underinsured motorists who may cause you harm. Review your insurance policy to see if you have the applicable coverage.

Christopher B. Dolan is the owner of the Dolan Law Firm, PC. Megan Irish is a Senior Associate Attorney based in our Oakland CA office. We serve clients throughout the San Francisco Bay Area and California from our offices in San Francisco, Oakland and Los Angeles. Email questions and topics for future articles to: help@dolanlawfirm.com. Each situation is different and this column does not constitute legal advice. We recommend that you consult with an experienced trial attorney to fully understand your rights.



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Medical Injury Compensation Reform Act and Medical Malpractice Cases

By Christopher Dolan and Casey Hultin



This week's question comes from Pam from San Mateo:

A good friend of mine's child recently passed away. My friend believes that a doctor's error caused her child's death. Do you have any advice? How can the doctor be held accountable?

Dear Pam: I am so sorry to hear your friend is going through this. What you are describing is called medical negligence or medical malpractice. Medical error is far too common and hundreds of thousands of Americans die each year as a result. Unfortunately, in the state of California, the options for recovery for the errors of medical providers and the ability to hold them accountable is extremely limited because of the Medical Injury Compensation Reform Act of 1975, otherwise known as "MICRA."

MICRA was signed into law in 1975 and limits compensation for what are called "non-economic" damages, including things like pain and suffering and wrongful death damages for the loss of a loved one such as a parent, child, or spouse, or other impacts on quality of life such as the loss of a limb or cognitive function. MICRA limited the maximum recovery for non-economic damages for preventable medical negligence at no more than \$250,000. This amount has not changed since 1975. With inflation, the \$250,000 cap now would equate to approximately \$50,000 in 1975. Roughly speaking, had this cap kept up with inflation, the cap would

now be approximately \$1.2 million.

Medical malpractice cases are long and difficult and often require the retention of expert witnesses. Costs to successfully hold a medical services provider accountable for negligence can exceed \$100,000. While there are ways to potentially recover these costs through a jury trial, doing so is time consuming, stressful, and not a guarantee. As a result, there are not many lawyers that take on these cases, nor is this often something that people potentially want to pursue because of the small amount of net recovery once litigation costs and attorney fees are paid. Many plaintiffs go through multiple years of stressful, invasive litigation in medical malpractice cases. Medical malpractice cases are more costly than other personal injury cases such as automobile accidents, because defense attorneys and the insurance companies paying for them will take as many steps as possible to whittle down the already smaller pot for recovery. Jurors who decide these cases are not informed of the cap, and only find out after the verdict that the plaintiff's recovery is limited to \$250,000.

While your friend is thinking through whether to pursue a medical malpractice case, it is important to remember that there is a one-year statute of limitations on medical malpractice claims in California. The clock begins running when the plaintiff knew or had reason to know of the medical malpractice. This determination is case specific and not always easy to determine. If you are ever considering

bringing a medical malpractice case, it is important to have your case evaluated as soon as possible. Evaluation of your case by a medical malpractice attorney also often involves an initial review of all available medical records by a doctor or other expert, so gathering all the medical records from the treatment at issue as expeditiously as possible will also help.

Economic damages are still recoverable under MICRA. Unfortunately, for the death of a child or someone who is not employed, economic damages will be relatively minimal, essentially limited to funeral expenses. When the injured person survives and has ongoing medical expenses related to the doctor's error, the injured person can also recover for those medical expenses, with some limitations.

Another important thing to note about MICRA is that MICRA does not just limit what most people think of as medical malpractice, it also impacts recovery against other health care providers such as massage therapists.

California voters will have the opportunity to change the law in the November 2022 election when the Fairness for Injured Patients Act is on the ballot. The Fairness for Injured Patients Act will adjust for inflation the maximum \$250,000 compensation cap set on quality of life and wrongful death survivor damages to approximately \$1.2 million. It will also allow judges and jurors to decide that compensation above the cap is appropriate in the cases of catastrophic injury or death. Jurors will also be informed of the cap. Additionally, the Fairness for Injured Patients Act will adjust the limitations on economic damages recovery for medical malpractice cases so that insurance companies cannot shift the costs back onto parties that are not at fault.

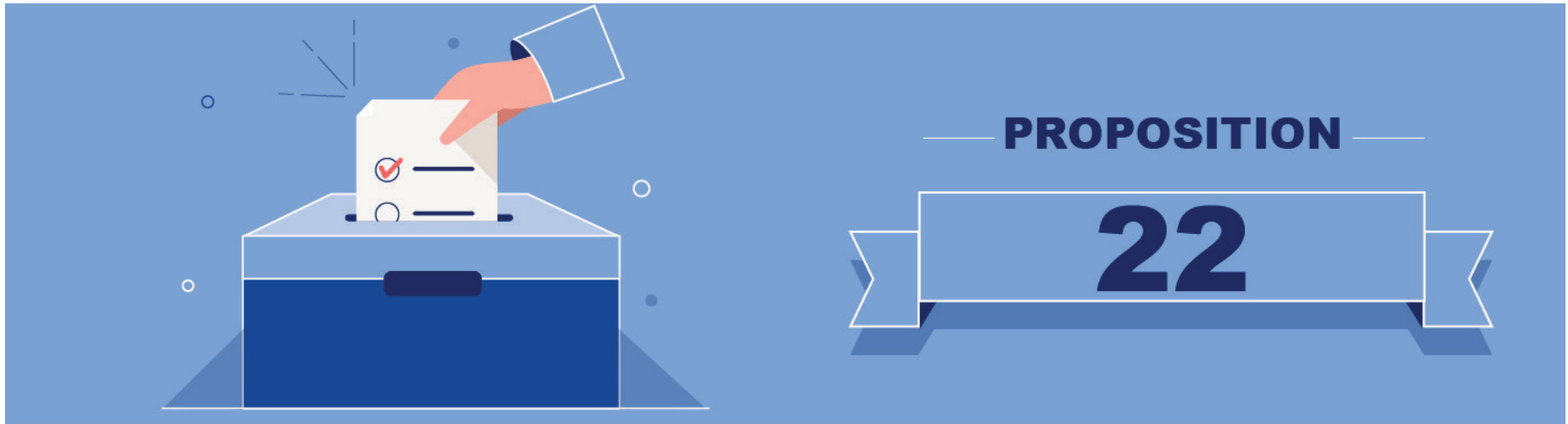
Additionally, the Fairness for Injured Patients Act will extend the time to bring a claim for medical malpractice to two years instead of one year, which is more in line with the time to bring a claim for other personal injury causes of action.

I am again so sorry for your friend's loss. They are lucky to have a friend like you supporting them in their time of need.

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Ruling Finds Proposition 22 To Be Unconstitutional

By Christopher B. Dolan and Matt Gramly



This week's question comes from Josh D. from Marin County

With our current 24-hour news cycle it's hard to keep up with all the important issues in our daily lives. It seems like Proposition 22 was an initiative constantly discussed 5 years ago that went away. Did Proposition 22 ever take effect?

Thanks for reaching out Josh. Many people may have forgotten about Proposition 22. On August 20, 2021, Alameda County Superior Court Judge Frank Roesch ruled Proposition 22 to be unconstitutional. Recall that Proposition 22, a ballot initiative passed by California voters in 2019 permitted many gig economy companies such as Uber, Lyft and Door Dash to classify their drivers as independent contractors instead of employees of those companies. These companies and others poured over \$200 million into the campaign to pass Proposition 22. The benefit to these companies in classifying their drivers as independent contractors (not employees of the companies) is that these companies can then evade almost every regulation in place governing how companies treat their employees as well as virtually every cost associated with having employees such as health insurance benefits, minimum wage laws, safety regulations, workers compensation insurance, etc.

Proposition 22 was far reaching and expansive in its language and in the sheer number of components it included. For instance, it also contained language that would prohibit drivers from forming a union. For that reason, as well, Judge Roesch wrote, Proposition 22 violated the Constitutional requirement

that ballot initiatives be limited to a single subject. Relative to this component prohibiting unionization, Judge Roesch wrote that this prohibition, "appears to only protect the economic interests of the network companies in having a divided, un-unionized workforce, which is not a stated legal goal of the legislation." Judge Roesch is saying that the drafters of Proposition 22 overreached both on process and in substance.

Proposition 22 itself was created as a ballot initiative by these companies as a direct response to Assembly Bill 5, a law passed by the California State Legislature and signed by Governor Gavin Newsom. AB 5 would have required these types of companies to classify their drivers as employees and conferring upon those employees such benefits as minimum wage protections, workers compensation insurance, overtime pay, etc. Much of the basis for Judge Roesch's ruling in finding Proposition 22 to be unconstitutional rests largely on the idea that in California, in accordance with the California State Constitution, only the State Legislature can, for example, regulate compensation for workers' injuries. That goal cannot be accomplished through a ballot initiative process because the Constitution grants that right exclusively to the Legislature. In essence Judge Roesch said that Proposition 22 took that power away from the Legislature, thereby violating the State Constitution. In his ruling, Judge Roesch did say that the voters of California do have the power to make such a change to the State Constitution, but "If the people wish to use their (ballot) initiative power to restrict or qualify a plenary and unlimited power granted to the Legislature, they must do so by (a ballot) initiative constitutional amendment, not by

(a ballot) initiative statute." Voters would have to amend the Constitution first, amending it to permit, in effect, the passage of legislation through ballot initiatives. Neither the voters nor the Legislature have thus far amended the State Constitution in such a manner. The State Legislature had followed the Constitution in properly passing AB 5 through the legislative process as dictated by the Constitution. The backers and authors of Proposition 22 had not, thereby violating the State Constitution.

A spokesperson for ride sharing company Uber said that the company will file an appeal of Judge Roesch's ruling imminently. Uber has since filed their appeal and requested a stay on Judge Roesch's ruling until their appeal is complete. That means that while Uber's appeal is pending, Judge Roesch's order does not yet take effect, thereby leaving Proposition 22 in effect unless and until the appellate court hears the case and issues a ruling. So, for now, at least, these companies do not yet have to classify their drivers as employees and can continue to classify them as independent contractors, saving companies like Uber, Lyft and Door Dash billions of dollars in costs in the meantime, to the detriment of their drivers.

Christopher B. Dolan is the owner of Dolan Law Firm, PC. Matt Gramly is a Senior Litigation Attorney in our San Francisco Office. We serve clients throughout the San Francisco Bay Area and California from our offices in San Francisco, Oakland and Los Angeles. Email questions and topics for future articles to: help@dolanlawfirm.com. Each situation is different, and this column does not constitute legal advice. We recommend that you consult with an experienced trial attorney to fully understand your rights.



In The Zone of Danger: Witnessing a Loved One suffer Severe Injuries

By Christopher B. Dolan and Corinne Orquiola



This week's question comes from Travis from the East Bay:

My wife of 43 years and I were crossing the street in San Francisco. She was just a few steps ahead of me when a car ran the red light and hit my wife! The vehicle struck her with such force that she became airborne before collapsing on the ground. I was stunned and horrified. She was lying there, and for a minute, I thought she might have died. She had lost consciousness and was not moving. Fortunately, she lived, but she sustained two fractured legs and a significant head injury. She had to stay in the hospital for a few weeks. I thought I had lost her. She is the love of my life, and the thought of losing her was terrifying. Watching her get hit like that was incredibly scary- I think I stopped breathing. Since then, I have become

increasingly anxious and unable to sleep as the image of her getting hit is on constant replay in my mind. I've had to seek therapy. I know she can file a lawsuit for her injuries, but what about me?

I am so sorry this happened and that you had to witness it. It appears that you are suffering from emotional distress as a result of this incident. You certainly do have a claim for negligent infliction of emotional distress. In California, the law of Negligent Infliction of Emotional distress can flow from two different theories: Bystander Theory and Direct Victim Theory. The Bystander theory requires that the plaintiff contemporaneously observe the injury-causing event. *Thing vs. Chusa* (1989) 48 Cal.3d 644. The difference between the

bystander and the direct victim cases is that the direct victim cases seek emotional distress damages based on the breach of the duty owed to the plaintiff that is "assumed by the Defendant or imposed on the defendant or imposed on the defendant as a matter of law that arises out of a relationship between the two." *Marlene F. v. Affiliated Psychiatric Medical Clinic*, (1989) 48 Cal. 3d 583, 588, 257.

You could recover under the bystander theory. To prove negligent infliction of emotional distress as a bystander, you must show: 1) that you are closely related to the victim, 2) the defendant's conduct negligently caused injury or death to the victim, 3) that you were present at the scene of the injury ("zone of danger") when it occurred and were aware that the victim was being injured, and 4) as a result of the injury, you reasonably suffered severe emotional distress beyond that which would be anticipated in a disinterested witness. *Dillon v. Legg* (1968) 68 Cal.2d 728.

In your case, you witnessed your wife suffer life-threatening injuries as a result of the negligent driver who ran the red light. You were in the zone of danger as you were present when the collision occurred and are experiencing severe emotional distress as a result. Thus, you can recover any medical bills, bills for psychological counseling, lost wages, and pain and suffering because of the accident.

We hope you and your spouse continue to get better.

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