

Plaintiffs' Attorneys Pursue Legislative Agenda

Bills Target Binding Arbitration, Harmful Drugs, Avoiding Trial, Civil-Suit Backlogs

By Linda Rapattoni
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ROBERT LEVINS / Daily Journal

The Internet has complicated matters by making drugs available to the public without a visit to a doctor, according to Christine Spagnoli, Consumer Attorneys of California legislative chairman and president-elect.

SACRAMENTO — Kathryn Stebner's clients are old or dead. They've jumped out windows, died in fires or suffocated, or their bones have been exposed through dying flesh. They were neglected.

They paid someone to cook for them, clean for them and help them get through the daily tasks most people take for granted. And then they paid with their lives.

Stebner cited three examples: a demented woman twice tried to jump out of an unlocked window and succeeded the second time. Another woman died of smoke inhalation because bed rails prevented her from escaping a fire. A third, on oxygen, had a new level administered, and the care facility didn't check on her. All of them died.

Their families were surprised to learn they can't sue the caregivers, Stebner said. They missed the pre-dispute binding arbitration clause in the stack of 20 papers they signed to get their parents into a residential care home.

Stebner, a San Francisco lawyer, wants to make it so no one has to agree to sign away his or her rights to a jury trial as a condition of being able to move into an assisted-care home.

She's closely watching a bill, AB2947 by Mike Eng, D-Monterey Park. It's one of four measures the

Consumer Attorneys of California are pushing in the Legislature this year. The bill comes up for its first hearing Tuesday.

Other bills would hold drug companies liable for failing to warn patients about harmful drugs, break up backlogs of civil cases, and resolve disputes valued under \$30,000 without going to court.

Owners of residential care facilities don't like Eng's bill.

Heather Harrison, vice president of public policy for California Assisted Living Association, said changing the arbitration clause isn't going to reduce or deter elder abuse.

"It's amending the arbitration act to single out residential care

facilities for the elderly," Harrison said.

Arbitration is cheaper than going to court, she said. It keeps costs down, savings that are passed on to residents, she said.

California has a wide variety of elder care homes, so families can shop for the one that's right for their loved ones, Harrison said. If they don't like the arbitration clause, they can go somewhere else, she said.

That's not always possible, said Stebner, who specializes in elder abuse cases. Small communities sometimes have only one assisted-care home.

And arbitration can be expensive, especially when complicated issues take an average of a month

to resolve, she said.

Nevertheless, the California Dispute Resolution Council, comprising alternative dispute resolution neutrals, contends the proposed ban on binding arbitration is pre-empted by federal law.

The organization's lobbyist, Donne Brownsey, said the neutrals would support the measure if it simply stated that limiting the forum for resolution would not be allowable in these kinds of contracts.

The plaintiffs' lawyers tried but failed in 2003 to bar pre-dispute binding arbitration clauses in contracts for elder home care. Former Sen. Joe Dunn, D-Santa Ana, had to remove the ban to win approval

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or his bill, SB211, which increased disclosure requirements by caregivers.

The lawyers can expect another battle with SB2690 by Paul Krekorian, D-Burbank. It would require makers of prescription drugs to warn consumers of the risks and side effects of their products.

Right now, that warning is directed to the doctors who prescribe the drugs. Now that drug makers are marketing their products directly to consumers through broadcast, print and digital media, plaintiffs' lawyers insist their warnings should be directed to the public.

San Francisco lawyer Thomas Brandi represents a 77-year-old man who saw a television advertisement for Vioxx that he thought would help him solve his arthritis. He asked his doctor for a prescription and suffered a heart attack five months later that he blamed on the drug. *Arrigale v. Merck*, 05CC03136 (L.A. Super. Ct. 2007). The drug was taken off the market after a study showed it doubled the risk of heart attacks in patients who took it.

Brandi argued during the trial that Merck knew about the cardiovascular problems the drug caused but that the company did not tell doctors about it.

"A change in the law would protect doctors from unnecessary lawsuits," Brandi said. "It's a question of access to information and fundamental fairness."

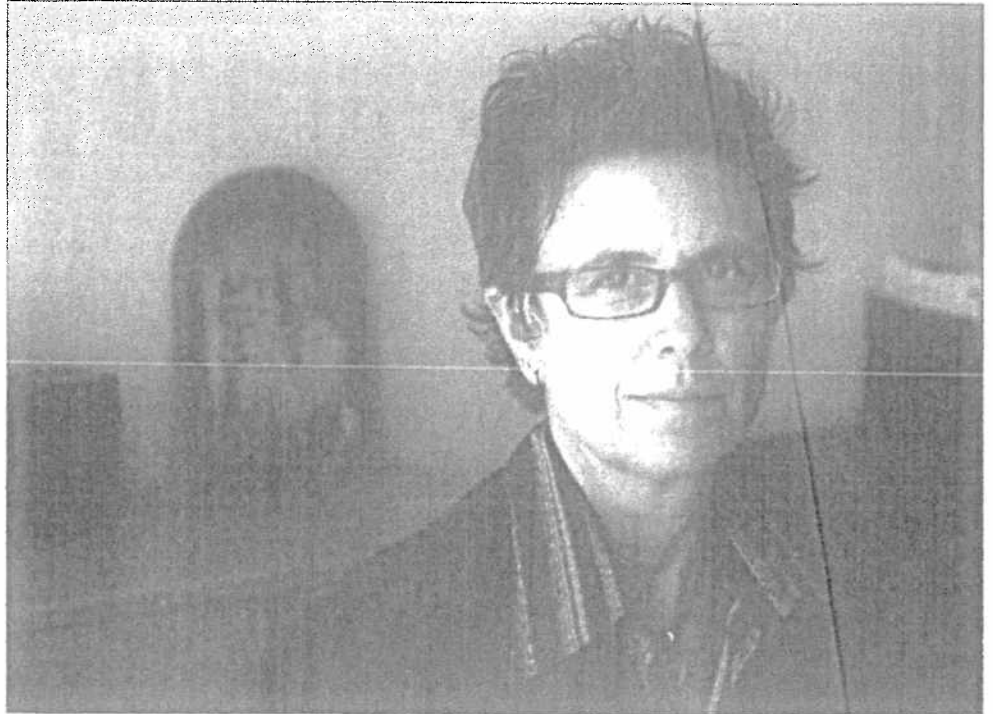
The Internet has complicated matters by making drugs available to the public without a visit to a doctor, said Christine Spagnoli, the consumer attorneys' legislative chairman and president-elect.

The California Medical Association has not taken a position on the bill, said spokesman Ned Wigglesworth. But the Pharmaceutical Research and Manufacturers of America opposes it.

In a letter to Kerkorian, Merrill Jacobs, deputy vice president of state government affairs for PhRMA, said courts have recognized in 49 states that a patient can't sue a drug maker as long as the company gave appropriate warnings to the physician. The doctor is the one who has to determine whether the product is right for a patient, Jacobs said.

Explaining all of the potential risks in language a consumer could understand isn't possible, said Marjorie E. Powell, senior assistant general counsel for PhRMA.

"I'd end up giving patients 100-page documents that explain there's a one in 1,000 risk of some rare side effect," Powell said.



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Attorney Kathryn Stebner, who specializes in elder-abuse cases, wants to make it so no one has to agree to sign away his or her rights to a jury trial as a condition of being able to move into an assisted-care home.

She characterized the measure as a "business development bill" for personal injury lawyers.

"They are trying to create in California a basis for suing that doesn't exist in the other states," she said.

At the same time, consumer lawyers are struggling to get the cases they filed before a judge.

In Riverside County, the Superior Court has had to close its doors to civil cases for months at a time to meet the constitution's requirement of a speedy trial for criminal defendants.

A husband with several young children spent three years bouncing around homeless shelters while waiting for their wrongful-death lawsuit to be set for trial, Spagnoli said. The two children saw their mother die in a car accident caused by another motorist.

The case settled two weeks after it was set for trial, providing the means for the family to settle into a new home, she said.

The plaintiffs' lawyers are sponsoring SB1630, by Sen. Ellen Corbett, D-San Leandro, to allow courts to transfer languishing civil cases to courthouses in neighboring counties.

Just how and when the transfers would work is

the subject of current negotiations, according to Darby Kernan, Corbett's spokeswoman.

Kernan said no one has voiced opposition to the measure.

Also under negotiation is a bill to encourage defendants, like insurance companies, to settle claims valued at less than \$30,000 before they go to court. Assemblyman Charles Calderon, D-Whittier, has introduced AB2619 as a starting point for the measure.

The cases are too big to qualify as small claims but too small to entice lawyers to take them, Spagnoli said.

Some insurance carriers try to scare motorists away by refusing to respond to claims, then hire expensive expert witnesses after a suit is filed, Spagnoli said.

The solution might be to bring in a jury for one day before a judge pro-tem to determine a fair settlement or to require respondents to a settlement offer to pay costs if they reject it and don't win something bigger, she said.

The Personal Insurance Federation, which represents property-casualty insurance companies, did not return several calls requesting a response.