

**PROPOSED LACBA RESOLUTION  
RESOLUTION [LACBA-01-2024]**

**TEXT OF RESOLUTION**

**RESOLVED** that the California Bar Association recommends amending California Civil Code Section 3428 to read as follows:

1       §3428

2               (a) For services rendered on or after January 1, 2001, a health care service plan or  
3 managed care entity, as described in subdivision (f) of Section 1345 of the Health and  
4 Safety Code, shall have a duty of ordinary care to arrange for the provision of medically  
5 necessary health care service to its subscribers and enrollees, where the health care  
6 service is a benefit provided under the plan, and shall be liable for any and all harm  
7 legally caused by its failure to exercise that ordinary care when ~~both~~ all of the following  
8 apply:

9                       (1) The failure to exercise ordinary care resulted in the denial, delay, or  
10 modification of the health care service recommended for, or furnished to, a  
11 subscriber or enrollee.

12                       (2) The subscriber or enrollee suffered substantial harm.

13                       (3) Medically necessary health care shall be defined as legally prescribed  
14 medical care that is reasonable and comports with the medical community  
15 standard.

16               (b) For purposes of this section: (1) substantial harm means loss of life, loss or  
17 significant impairment of limb or bodily function, significant disfigurement, severe and  
18 chronic physical pain, or significant financial loss; (2) health care services need not be  
19 recommended or furnished by an in-plan provider, but may be recommended or furnished  
20 by any health care provider practicing within the scope of his or her practice; and (3)  
21 health care services shall be recommended or furnished at any time prior to the inception  
22 of the action, and the recommendation need not be made prior to the occurrence of  
23 substantial harm.

24               (c) Health care service plans and managed care entities are not health care  
25 providers under any provision of law, including, but not limited to, Section 6146 of the  
26 Business and Professions Code, Sections 3333.1 or 3333.2 of this code, or Sections  
27 340.5, 364, 425.13, 667.7, or 1295 of the Code of Civil Procedure.

28               (d) A health care service plan or managed care entity shall not seek indemnity,  
29 whether contractual or equitable, from a provider for liability imposed under subdivision  
30 (a). Any provision to the contrary in a contract with providers is void and unenforceable.

31               (e) This section shall not create any liability on the part of an employer or an  
32 employer group purchasing organization that purchases coverage or assumes risk on

33       behalf of its employees or on behalf of self-funded employee benefit plans.

34               (f) Any waiver by a subscriber or enrollee of the provisions of this section is  
35       contrary to public policy and shall be unenforceable and void.

36               (g) This section does not create any new or additional liability on the part of a  
37       health care service plan or managed care entity for harm caused that is attributable to the  
38       medical negligence of a treating physician or other treating health care provider.

39               (h) This section does not abrogate or limit any other theory of liability otherwise  
40       available at law.

41               (i) This section shall not apply in instances where subscribers or enrollees receive  
42       treatment by prayer, consistent with the provisions of subdivision (a) of Section 1270 of  
43       the Health and Safety Code, in lieu of medical treatment.

44               (j) Damages recoverable for a violation of this section include, but are not limited  
45       to, those set forth in Section 3333.

46               (k)(1) A person may not maintain a cause of action pursuant to this section against  
47       any entity required to comply with any independent medical review system or  
48       independent review system required by law unless the person or his or her representative  
49       has exhausted the procedures provided by the applicable independent review system.

50               (2) Compliance with paragraph (1) is not required in a case where either of the  
51       following applies:

52                       (A) Substantial harm, as defined in subdivision (b), has occurred prior to  
53                       the completion of the applicable review.

54                       (B) Substantial harm, as defined, in subdivision (b), will imminently occur  
55                       prior to the completion of the applicable review.

56               (3) This subdivision shall become operative only if Senate Bill 189 and Assembly  
57       Bill 55 of the 1999-2000 Regular Session are also enacted and enforceable.

58               (l) If any provision of this section or the application thereof to any person or  
59       circumstance is held to be unconstitutional or otherwise invalid or unenforceable, the  
60       remainder of the section and the application of those provisions to other persons or  
61       circumstances shall not be affected thereby

**PROPOSERS:** Robert Bitonte M.D., J.D., Grace Haddad

## **STATEMENT OF REASONS**

The Problem: Medically necessary care is mandated by California Civil Code Section 3428; however, medically necessary care is not defined in the Health and Safety Code, the Insurance Code, or the Civil Code. We recommend codifying the findings in the California Supreme Court case *Sarchette v. Blue Shield* 43 Cal. 3d1, that stated: “we trust that with doubts respecting coverage...there will be few cases in which the physician’s judgment is so plainly unreasonable, or contrary to good medical practice, that coverage will be refused.”

The Solution: This amendment will clarify and define what medically necessary care is and will prevent payors from creating and drafting their own definitions of medical necessity that might be inconsistent with the California Supreme Court's interpretation of medical necessity.

**IMPACT STATEMENT**

This resolution will affect California Health and Safety Codes, California Insurance Code, and California Civil Code.

**CURRENT OR PRIOR RELATED LEGISLATION**

California Civil Code Section 3428.

**AUTHORS AND/OR PERMANENT CONTACT:**

Robert Bitonte, M.D., J.D., Los Angeles, [rbitonte@aol.com](mailto:rbitonte@aol.com)

Grace Haddad, [gah68@case.edu](mailto:gah68@case.edu)

**RESPONSIBLE FLOOR DELEGATE:** Robert Bitonte, M.D., J.D., Los Angeles,  
[rbitonte@aol.com](mailto:rbitonte@aol.com)