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Summaries and full texts appear in insert

HEALTH CARE

Robert Levins / Daily Journal

Dr. Albert Fuchs stopped accepting traditional health insurance and opted for a direct primary care practice.

New Direct Primary Care Plans Bypass Insurers and Regulators

Practices Bring Concierge-Style Medical Services To The Middle Market

By Emma Gallegos
Daily Journal Staff Writer

Dr. Albert Fuchs was a successful physician by any measure. But as his Beverly Hills practice grew to more than 2,000 patients, he found himself headed for a burnout.

Thanks to stagnated insurance reimbursement rates and the ever-growing administrative demands on primary care doctors, who typically earn much less than specialists, Fuchs found himself cramming as many patients in as possible.

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"I hated the volume, and my patients hated the volume," he said.

Rather than quit medicine, Fuchs joined a growing number of physicians who have stopped accepting health insurance entirely.

Instead, his patients enroll as members of his practice and, as with a gym membership, they pay a flat monthly rate of $210 per month, whether or not they see him. In return, they have a doctor available on retainer, and an assurance that all their routine care is covered.

This kind of "direct primary care" practice isn't just a Beverly Hills phenomenon. Solo ventures like Fuchs' are switching to cash-only practices across the state in Palo Alto, Long Beach, Fresno and elsewhere. It's unclear how many independent physicians have gone this direction because they have operated under the radar of state regulators so far. But that's likely to change, health care legal experts said, as the trend catches up with larger-scale, established services and drives this new wave of health care providers to tap the expertise of California attorneys to navigate the state's regulatory scrutiny.

One such firm already operating in this arena is Qliance, a Seattle-based company looking to expand its practice into California. The firm consulted with health care attorneys as well as state regulators to determine what kind of license, if any, a company should have if it takes on some of the risk traditionally handled by insurance companies.

Direct primary care is an outgrowth of what's known as "concierge" practices. Concierge practices target wealthy clientele, who pay a doctor a retainer on top of their regular insurance for top-of-the-line primary care, home visits and a spa-like atmosphere.

Direct primary care, with its lower rates and traditional medical services, is considered the middle-class version.

Qliance co-founder Norman Wu said the company's membership approach replaces the need to have expensive health insurance just to cover basic, preventative medical care, such as medical screenings and annual check-ups.

"Imagine if we had to use car insurance to pay for new batteries, tires and oil changes, how much more expensive all of those things would be," Wu said.

Qliance, which opened its first clinic in 2007, now has three clinics and 12 practicing physicians in the Seattle area. It is looking at California, Texas and Massachusetts, Wu said. Like Fuchs, Qliance physicians charge patients from $44 to $84 each month.

Direct primary care also got a boost from lawmakers last year. Under the federal health reform law, these kinds of memberships can sell their coverage alongside traditional health plans in 2014, when the controversial mandate to buy insurance takes effect. California will be creating its own exchanges — marketplaces where individuals and small businesses that aren't insured can buy health coverage.

Being allowed to participate in health reform is key for Qliance to expand, Wu said.

But questions about how these practices should be regulated still remain. "We're not insurance, but we need to be sure we don't trip insurance regulations," Wu said.

In Washington state, lawmakers passed special legislation so direct primary care practices don't require oversight from insur-

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GUEST COLUMN

The medical staff peer review system is growing towards a procedural paralysis that will endanger patient safety. By **Lowell Brown** of Arent Fox LLP.

Day after day, hospitals throughout the United States conduct medical staff peer reviews. Most Americans have no idea that this is going on, even though these reviews are vital to the quality of hospital care they will receive. To paraphrase Winston Churchill, never have so many known so little about something so important. Yet that process seems to be moving steadily towards a kind of procedural paralysis that will endanger patient safety while consuming precious resources that would be better directed elsewhere.

How did that happen? The problem stems from laudable efforts to balance two concerns: patient safety, on the one hand; and physician rights, on the other. Where to strike that balance has been the subject of a decades-long debate, and recent years have seen the balance tipping away from patient protection towards protection of physicians' procedural rights.

In California, physicians, who are almost never hospital employees, conduct medical staff peer reviews. They are members of the facility's medical staff with privileges to provide medical care to patients. The physicians review one another's care to determine that community standards are being met and high-quality, appropriate care is being provided.

A body of law has developed around this process, and nowhere in America is the law more complex than in California. This is not surprising; the consequences of adverse peer review decisions are serious. A physician whose medical staff privileges have been limited or removed is reported not only to the Medical Board of California, but also to the National Practitioner Data Bank, a federal repository of such information. The existence of the Medical Board report is publicly available on its Web site, and the Medical Board and Data Bank will disseminate both reports to any hospital where the physician holds privileges, including those where he may seek privileges in the future. The Data Bank reports will follow the physician for the rest of his or her career, in every state in the Union.

As a result, physicians have the right to what is called "fair procedure," or the common law analogue to due process. (*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657.) Fair procedure entails notice of the complaints against

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State High Court Rules Warrantless Search OK

By Laura Ernde
Daily Journal Staff Writer

Police acted lawfully when they burst into a Sacramento County man's locked bedroom without a warrant and found marijuana, a divided state Supreme Court ruled Tuesday.

Faced with a chaotic crime scene, including a shooting victim lying on a porch, police had good reason to believe there might be more victims inside the house. As a result, police were covered by the emergency-aid exception to the Fourth Amendment's protections against unreasonable search and seizure, the court ruled 5-2. *People v. Troyer,* 2011 DJDAR 2726.

"The possibility that immediate police action will prevent injury or death outweighs the affront to privacy when police enter the home under the reasonable but mistaken belief that an emergency exists," Justice Marvin R. Baxter wrote for the majority.

Although defendant Albert Troyer lost the appeal, the ruling might help other defendants in search and seizure cases because of the standard the high court adopted in making the decision, one defense lawyer said.

Trial court judges evaluating police searches must look at whether police had an objectively reasonable basis to believe there was an emergency, said Ronald Richards of Ronald Richards & Associates, who filed a friend-of-the-court brief in the case.

In *People v. Ray* (1999) 21 Cal.4th 464, former Supreme Court Justice Janice Rogers Brown had suggested that an officer's state of mind factored into the analysis. Under that standard, police could justify conducting an emergency-aid search without a warrant when there was any possibility of danger.

"It was a bad standard. If the officer had good motives, even though there was no objective basis, this was giving the state wiggle room," said Richards, who represents

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Plaintiffs' Lawyers Cry Foul On Zoran Deal

By Craig Anderson
Daily Journal Staff Writer

PALO ALTO — Silicon Valley mergers and acquisitions lawyers sat on both sides of the table as U.K. wireless company CSR PLC acquired Sunnyvale-based technology company Zoran Corp. in a stock deal valued at $679 million.

Wilson Sonsini Goodrich & Rosati P.C., led by partner David J. Segre, represented CSR. Jones Day, led by partner Daniel R. Mitz, represented Zoran.

Under the deal, announced Monday, CSR would issue 1.85 new shares for each Zoran share, a 39 percent premium on Zoran's closing price of $9.32 on Friday.

CSR also announced it plans to buy back $240 million of its own shares during the next 12 months.

Zoran's shares rose 15 percent on Tuesday, the first day the markets were open after the deal was announced.

But one of Zoran's largest shareholders, Ramius LLP, which acts as an investment adviser to U.S. hedge funds, expressed concern the proposed deal undervalues Zoran and undermines an attempt by the fund to replace a majority of the company's board of directors. Several plaintiffs' law firms announced investigations Tuesday into alleged breaches of fiduciary duty by members of the Zoran board.

Zoran's has grown quickly, acquiring Texas-based Microtune Inc. for $166 million last September. Jones Day, with Mitz leading the outside deal team, represented Zoran in that deal.

Mitz, who was traveling Tuesday, could not be reached for comment.

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MORE NEWS

Nominations

The Daily Journal is accepting nominations for our annual lists of Top Intellectual Property Lawyers and Top Women Lawyers. To receive nomination forms for these lists, email: nominations@dailyjourn

Litigation

Alameda County Superior Court Judge Paul A. Delucchi is the same on and off the bench — and he can take a joke. **Judicial Profile, Page 2**

Several oil companies were hit with a class action, alleging they illegally requested the ZIP codes of consumers using credit cards, a new twist to the flurry of litigation following a state Supreme Court ruling. **Page 4**

A relatively small-time patent dispute over a deep fryer will provide the U.S. Supreme Court the big-time opportunity to impact legal fees in the innovation industry. **Page 4**

Sheppard, Mullin must turn over privileged communications between the firm and council members of the city of Cudahy related to a 2001 corruption probe by district attorney. **Page 5**

Funding for federal regulators and legal aid for the poor were among the broad swath of government outlays slashed by the Republican's austerity-focused spending bill. **Page 6**

Patients and plaintiffs' lawyers are inciting a new wave of health care class actions. By Andrew H. Selesnick and Jason O. Cheuk of Michelman & Robinson. **Page 7**


Daily Journal
REAL ESTATE
DEALMAKERS 2011
Real Estate Investment Returns

The Daily Journal recognizes 20 top California real estate transaction attorneys in its inaugural Dealmakers feature and examines some of the latest transactional trends and news in its quarterly real estate supplement.

Several Regulators, Legal Services Targeted by House GOP Budget Cuts

Proposed $61 billion reduction sets the stage for government shutdown.

By Robert Iafolla
Daily Journal Staff Writer

WASHINGTON — Funding for federal regulators and legal aid for the poor were among the broad swath of government outlays slashed by the House Republicans' austerity-focused spending bill passed in the predawn hours Saturday.

The bill, which would pay for the government until October, includes $61 billion in cuts. Not a single Democrat voted for the measure; three of the chamber's 241 Republicans opposed it.

Congress must pass spending legislation by March 4, when the current funding agreement runs out, to prevent a government shutdown. Both chambers are recessed until Monday, giving lawmakers one business week to reach a deal. Congress' failure to pass a budget last year set the stage for the current standoff.

House Minority Leader Nancy Pelosi, D-Calif., offered a proposal Friday to freeze funding at current levels until March 31 to give Congress time to negotiate, but Republican leadership has promised to reject anything that does not immediately reduce spending.

With the political parties at loggerheads over the scope of budget cuts, and the deadline swiftly approaching for the Democratic-controlled Senate and GOP-dominated House to reach an accord, a shutdown may be in the offing.

The House bill calls for a $70 million reduction to the $395 million budget for Legal Services Corp., the quasi-governmental organization that distributes grants to 136 legal nonprofits nationwide, including 11 in California.

Legal Services Corp. estimated the cuts would prevent roughly 160,000 people from receiving legal aid, force layoffs of approximately 370 staff attorneys at nonprofits receiving federal funding, and shut down some offices in rural areas.

"The impact of the proposed reduction would be devastating to these LSC programs," organization head James J. Sandman said in a statement.

Legal Services Corp. survived a GOP-sponsored amendment that would have cut its budget by $324 million. It fell on a 171-259 tally, with 68 Republicans joining the Democrats to defeat the measure.

The spending bill would also slash funding for federal regulators policing financial law compliance, cutting $25 million from the Securities and Exchange Commission's $1.1 billion budget, $57 million from the Commodity Futures Trading Commission's $169 million budget and $285 million from the Internal Revenue Service's $5.5 billion enforcement budget.

The bill also strikes at the Environmental Protection Agency, which would see a $3 billion cut from its $10.3 billion budget. In addition to the 29 percent funding cut, Republicans passed a series of amendments to pare the agency's regulatory authority, blocking its power to police greenhouse gasses, coal ash, and mercury in cement.

In other law-related cuts, the House approved an amendment to stop the attorney-fee payouts for successful suits against the federal government as mandated by the Equal Access to Justice Act.

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Obama to Appeal Ruling Against Bush-Era Wiretaps

By John Roemer
Daily Journal Staff Writer

The Obama administration will contest a San Francisco district court ruling that agents of President George W. Bush illegally wiretapped a suspected Islamic terrorist organization based in Oregon, according to a notice of appeal filed late Friday.

The appeal will likely test the executive branch's state secret privilege arguments against rules set forth by Congress in the Foreign Intelligence Surveillance Act.

The administration defended the now-defunct Al-Haramain Islamic Foundation's lawsuit over the wiretaps in court, but had not said whether it would take the case to the 9th U.S. Circuit Court of Appeals.

U.S. Department of Justice spokesman Charles Miller declined to comment on the development.

Former Chief U.S. District Judge Vaughn R. Walker ruled last March that the state secrets privilege did not apply, and that warrantless surveillance — even if authorized by the executive branch — is unlawful. *Al-Haramain Islamic Foundation Inc. v. Bush*, 07-0109.

> 'I think the Obama administration has been tied in knots over this case.'
>
> — *Jon B. Eisenberg*

The litigation included an unusual government blunder in which federal officials inadvertently sent Al-Haramain classified papers that revealed U.S. agents eavesdropped on the group's lawyers.

The 9th Circuit ruled that Al-Haramain's lawyers could not testify about their memory of having seen the documents as evidence of surveillance. But Walker found the group presented enough public evidence to demonstrate it had been wiretapped.

In December, Walker ruled the plaintiffs should recover more than $2.5 million in damages and attorney fees from the government.

The suit claimed that the Terrorist Surveillance Program, instituted by Bush following the attacks of Sept. 11, 2001, was illegal under the terms of the Foreign Intelligence Surveillance Act, which governs judicial and congressional oversight of the executive branch's spying activities.

Walker agreed. "Under defendants' theory," he wrote in a 45-page ruling, "executive branch officials may treat FISA as optional and freely employ the [state secrets privilege] to evade FISA, a statute enacted specifically to rein in and create a judicial check for executive-branch abuses of surveillance authority."

Obama's decision to appeal was no shock to the plaintiffs' lead lawyer, Jon B. Eisenberg of Oakland's Eisenberg & Hancock LLP. "Unwise, but no surprise," Eisenberg said Tuesday. "I think the Obama administration has been tied in knots over this case. Perhaps when the [justice department's] appellate team takes a closer, cooler look, there could be a change of direction.

"But in the worst case, it could be that Obama and [Attorney General Eric] Holder are just fine with Bush's power grab."

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Direct Care Plans Seek to Fly Below State Regulators' Radar

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ance regulators. In California, none of the agencies that regulate health plans have any guidelines for dealing with these practices.

The California Department of Managed Health Care is reviewing whether Qliance might require a license like other managed care plans in the state. The state scrutinizes these plans and regulates them heavily to make sure they have enough money in reserves to pay for the services they promise patients, who pay up front.

"The requirement for any licensure proceedings would hinge on the company's acceptance of prepaid fees in return for arranging for health care services," said Lynne Randolph, a spokeswoman for the Department of Managed Health Care.

How the state responds to Qliance will set a precedent for other groups and small physician practices.

"There are other providers that are definitely operating in California dealing with these issues, and they're not on the radar," said Jill Gordon, a partner at Davis Wright Tremaine LLP.

Gordon is working with Qliance to help them deal with regulatory issues in California.

"The question becomes as the department starts thinking more about alternative providers and payment models, do they bring more [practices like these] under their scope of jurisdiction?" she said.

Marian Mulkey, director of the Health Reform and Public Programs Initiative at the California Health Care Foundation, said state regulators may scrutinize firms like Qliance with an eye toward problems state regulators had with medical groups in the late 1990s and early 2000s.

At that time, groups of physicians tried to shoulder more financial responsibility for patients' care, taking on the roles traditionally performed by insurance companies. Under that system, health plans paid the doctors' groups' a fixed amount to care for members. The problem was many medical groups snapped under the pressure of that risk and more than 700,000 patients were abandoned in the middle of care. After that experience, California created stricter financial regulations to make sure medical groups are financially prepared to take on risk.

> 'There are other providers that are definitely operating in California dealing with these issues, and they're not on the radar.'
>
> — *Jill Gordon*

Regulators are likely to be concerned about whether these new direct primary care practices have the financial stability to go forward, especially if they were to be marketed as part of a high-deductible health insurance product, Mulkey and other experts said.

As for solo physicians like Fuchs, for now they are focused on keeping it simple.

Fuchs said both he and his patients are much more satisfied with his new practice.

The Beverly Hills physician has reduced his workload down from around 2,000 to 400 patients, and he offers same-day appointments. Because he only sees a dozen patients in a day, he can afford to sit down with a patient for a leisurely half-hour or more.

He even does something that terrifies the typical primary care doctor. He gives patients his cell phone number.

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The Growing Crisis in Medical Staff Peer Review Law

Continued from page 1

the physician, and an opportunity for the physician to be heard. A robust body of fair procedure case law was developed in the late 20th century, culminating in 1990 in Business & Professions Code Sections 809 et seq., which codified and expanded the related rights and rules.

And therein are the roots of today's growing procedural paralysis. As peer review law has developed, so have the rights of physicians. We have reached a point where medical staff peer review hearings, once intraprofessional inquiries conducted primarily by physicians, are now mini-trials with the ever-growing procedural burdens inherent in any court trial. Today, an accused physician who has the funds and the will to do so can force any medical staff and hospital seeking to take action against him to endure a long, expensive and burdensome process. Engulfed in all the procedural rules and maneuvers, patient protection — the reason for medical staff peer review — is losing its place as the top priority.

> Most Americans have no idea that this is going on, even though these reviews are vital to the quality of hospital care they will receive.

As a result, fewer physicians volunteer to serve in peer review hearings. Most have no taste for the unpleasant aspects of doing so, including sitting through lengthy legal proceedings and facing threats of litigation by the accused physician.

Attorneys who have been practicing in this area for a number of years have watched the medical staff peer review process become increasingly frustrating. Historically, the fair procedure hearing was held before a panel of physicians acting something like a quasi-jury. A hearing officer, almost always an attorney, was present to ensure that the proper procedure was followed and the rights of the participants were protected. Although each side in the matter always had every right to an attorney's guidance outside the hearing room, attorneys were seldom present in the hearings themselves. In exceptional cases, attorneys were full participants.

Now, increasingly, a case in which attorneys are not full participants is the exception. Although not statutorily or legally required, a majority of the medical staff peer review bar probably believe attorneys belong in fair procedure hearings. Consequently, the hearings tend to have all the trappings of such formal proceedings: delay, procedural jousting among the attorneys, suspension of the hearing while judicial review is sought, "law and motion" type proceedings before the hearing officer between hearing sessions and so forth. Thus, hearings that once were concluded within 60 to 90 days after the initial adverse action against the physician now often last a year or two, and sometimes longer. One well-known California peer review dispute has spawned at least nine lawsuits and six appellate opinions — so far.

The California Medical Association (CMA), the trade association representing many physicians in California, is now pushing for statutory guarantee of full-scale attorney participation in the fair procedure hearings. AB1235, for example, providing such a guarantee, was introduced in the 2010 legislative session and passed easily. Only a veto by Gov. Arnold Schwarzenegger prevented the measure from becoming law. CMA introduced the same legislation in 2009; Schwarzenegger vetoed it then as well. Now, with Gov. Jerry Brown in office, another veto is unlikely and we may well see full-scale attorney participation enshrined in statute.

Perhaps the greatest challenge arising from the quasi-court trial aspects of fair procedure hearings is that it is almost always in the accused physician's best interests to delay the hearing's outcome. By doing so, the physician forestalls the filing of the reports to the Medical Board and the National Practitioner Data Bank, and thus delays the impact of the resulting damage to his or her reputation. If there is a long delay, the physician can claim that with the passage of time he or she has reformed, and action is no longer necessary.

Delay can create havoc in the hearing process itself. For example, hearing panel attrition has become an increasing problem. The volunteer physician hearing panels that decide these matters serve in the evenings, usually from 6:00 pm to 9:00 pm. Most busy practicing physicians are not willing to meet several evenings a week while the process drags out over 12 to 24 months. Exhausted and frustrated, many withdraw from the panel, sometimes causing the equivalent of a mistrial. Seeking to cause such attrition is a tactic of some attorneys representing physicians in the hearings.

Once such a horror story unfolds, word spreads quickly among the hospital's medical staff, and recruiting panel members for future hearings becomes even more difficult. In a growing trend, hospitals are paying physicians for their time in serving on hearing panels, but it remains to be seen if that approach will increase the doctors' willingness to participate. The hearing officer serves as a judicial officer in the peer procedure hearings, but is relatively powerless in comparison to a Superior Court judge or arbitrator. Section 809 gives the hearing officer little real authority other than to resolve evidentiary disputes. This weakness was confirmed in *Mileikowsky v. West Hills Hospital Medical Center*, (2009), 45 Cal. 4th 1259, when the state Supreme Court held that a hearing officer lacks the authority to impose terminating sanctions on a physician who refuses to cooperate in the fair procedure process, no matter how egregious his behavior. AB1235 would have further disabled the hearing officer.

All of this results in long, difficult hearings that are primarily controlled by the parties' attorneys themselves. Sometimes counsel on both sides can agree to proceed in a collegial and respectful manner. When they cannot do so, however, the process can run amok.

Clearly, formalizing and "lawyering up" the medical staff peer review process has not improved it. Attorneys who represent medical staffs in disciplinary matters know how physician leaders struggle to do the right thing in an environment filled with roadblocks to taking needed action. The Legislature and all the stakeholders — medical staffs, hospitals, the Medical Board, CMA, the California Hospital Association, and yes, the public — need to find ways to protect patients from substandard physicians while still protecting physicians' rights, without plunging the entire process in legal quicksand. The role of attorneys in hearings should be reduced, not increased. Hearing officers should get real authority to control the process, which should be redesigned to avoid needless delay.

This can be done. Seemingly, all that is lacking is the will to do it.

Lowell Brown is a partner in the Los Angeles office of Arent Fox LLP, where he chairs the firm's national health care law practice group. He has been practicing health care law in California since 1985.

BRIEFLY

Dewey & LeBoeuf LLP and Wilson Sonsini Goodrich & Rosati PC landed the deal work for Gilead Sciences Inc.'s $375 million cash acquisition of Calistoga Pharmaceuticals Inc., announced Tuesday. Mergers and acquisitions partner Jane Ross led Dewey's deal team for Gilead. M&A partner Richard E. Climan connected Gilead with the firm. Both lawyers are based in Dewey's East Palo Alto office. Gilead lawyer Jason A. Okazaki managed the deal internally. San Francisco-based M&A partners Robert T. Ishii and O. Denny Kwon led the Wilson Sonsini team for Calistoga alongside Palo Alto-based partner Kenneth A. Clark. New York-based Dewey partner Stanton J. Lovenworth and associate William MacDonald contributed intellectual property expertise to the deal. Staff attorney Gabriel Shapiro worked on its M&A aspects. Wilson Sonsini's team included Seattle associate John M. Brust, San Francisco associate Alexander P. Kingsley and Palo Alto associates Melissa A. Schmelzer and Alice C. Hsieh. Seattle-based Calistoga could earn an additional $225 million if it meets certain milestones. The privately held biotechnology company is developing medicines for treating cancer and inflammatory diseases. Gilead is a Foster City-based biopharmaceutical company that develops drugs to treat health problems such as HIV, liver disease and cardiovascular and respiratory conditions. The companies expect the deal to close in the second quarter of 2011.

Disney is under fire for requiring its workers to use identification cards that embed their social security number in a barcode — which can be scanned and expose employees to identity theft, according to a lawsuit filed Tuesday in Los Angeles federal court. The proposed class action was brought by three Disney employees who are members of Unite Here Local 11, the union representing hospitality workers that has been in contract negotiations with Disney for three years. The complaint, which seeks injunctive relief, cites a state law that makes it illegal to publicly post or display an individual's social security number, or embed a social security number on a card or document. Disney spokeswoman Suzi Brown said the company disagrees with the lawsuits' legal premise, and has taken measures to protect employee privacy. She added that union leaders were "sensationalizing" the issue to divert attention away from Disney's offer for wage increases and the choice for workers to remain on a union-provided health plan or switch to Disney's plan. The plaintiffs are represented by employee rights firm Hadsell Stormer Keeny Richardson and Renick.