IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

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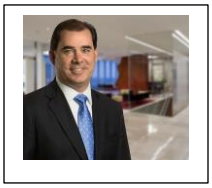
IN THIS ISSUE

In this article, Scott Kozak and Nicolas Cejas discuss the collateral source rule, and the effect of past and new "tort reform" legislation affecting its application in personal injury, and particularly medical malpractice cases. The article discusses the basic elements of the collateral source rule, explores the different ways it is applied in different jurisdictions, and identifies best discovery practices for defense attorneys in medical defense cases.

Re-Thinking the Collateral Source Rule

ABOUT THE AUTHORS



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With Republican majorities in both the House and Senate, newly-elected Republican Governor Eric Greitens has made tort reform a top priority in the State of Missouri.[1] Such calls for change in state judicial systems following an election are nothing new. Since the 2014 mid-term elections altered the partisan composition of many state legislative and executive branches, twenty-six states have enacted at least one piece of tort reform legislation.[2]

One popular target of the tort reform movement has been the collateral source rule, which, generally speaking, prevents a tortfeasor from reducing his or her liability to an injured party by introducing evidence of collateral source payments.[3] Collateral source payments are payments by third parties to an injured party or to a medical provider on the injured party's behalf as a result of injuries the tortfeasor caused.[4] Most often, these payments are based upon a public or private insurance program or some other contract to pay for or reimburse the cost of hospital, medical, dental or other health care services.

Every state has adopted the collateral source rule in some form.[5] However, in recent years, many state legislatures have taken steps to limit the scope of this rule or to abrogate it completely.[6] In states which still strictly adhere to the collateral source rule, juries are not permitted to hear evidence of payments made by a plaintiff's insurer for her medical care or treatment. Likewise, these payments cannot be used by the defendant to reduce any damages rendered against it. Proponents of a "pure" collateral source rule argue it is necessary to deter potential wrongdoing and to ensure tortfeasors do not benefit from a plaintiff's choice to maintain insurance coverage.[7] Detractors, on the other hand, argue the collateral source rule often allows plaintiffs to recover twice for their injuries: once from a primary insurer and again from the tortfeasor.[8]

This article provides a brief overview of the measures state legislatures have taken to curtail or, in some cases, completely abrogate the collateral source rule. A discussion of how these reforms could affect the defense of

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[1] Kurt Erickson, Celeste Bott, & Austin Huguelet, *Gov. Greitens Outlines GOP-Led Reforms, Ethic Overhaul in First State of the State Address*, ST. LOUIS POST-DISPATCH, January 18, 2017, http://www.stltoday.com/news/local/govt-and-politics/gov-greitens-outlines-gop-led-reforms-ethics-overhaul-in-first/article_b8886711-8c35-53c8-98fb-95bd83dd470c.html.

[2] *See State Tort Reform Enactments*, THE AMERICAN TORT REFORM ASSOCIATION, HTTP://WWW.ATRA.ORG/RESOURCES/STATE-TORT-REFORM-ENACTMENTS/.

[3] *See, e.g., Deck v. Teasley*, 322 S.W.3d 536, 538 (Mo. 2010).

[4] Ann S. Levin, *The Fate of the Collateral Source Rule After Healthcare Reform*, 60 UCLA L. Rev. 736, 743 (2013).

[5] Rebecca Levenson, *Allocating the Costs of Harm to Whom They Are Due: Modifying the Collateral Source Rule After Health Care Reform*, 160 U. Pa. L. Rev. 922, 925 (2012).

[6] *Id.* at 925-26.

[7] J. Zachary Balasko, *A Return to Reasonability: Modifying the Collateral Source Rule in Light of Artificially Inflated Damage Awards*, 72 Wash. & Lee L. Rev. Online 16, 20-21 (2015).

[8] Levenson, *supra* note 5, at 931.

personal injury claims, especially those for medical malpractice, follows.

Evidence of Medical Damages

Health care providers often enter into negotiated discount agreements with private insurance companies.[9] Government health programs such as Medicare and Medicaid also secure medical services for their insureds at discounted rates.[10] Therefore, the only patients typically asked to pay the stated charges for medical care are the uninsured;[11] as a result, there is often a discrepancy between the amount charged by the health care provider and the amount accepted by the health care provider as payment in full for the care rendered. The difference between these two figures is written-off by the health care provider.

Courts have struggled with the question of whether the written-off portion of a medical bill is a collateral source.[12] In some jurisdictions, courts have held a discount is a collateral-source benefit and prohibited defendants from introducing evidence that the provider accepted an amount lower than the one billed as payment in full.[13] These jurisdictions reason the amount paid is more a function of the bargaining power of the insurer than the reasonable value of the provider's medical services.[14] However, by limiting evidence of the plaintiff's medical specials to the amount billed, juries are led to believe the plaintiff's medical damages are greater than those he or she actually suffered.

Given this potential inflation in damages awards, state legislatures have viewed this area as ripe for tort reform. Some states have passed legislation which curtails the collateral source rule by allowing evidence of both the paid and billed amounts to aid the jury in determining the reasonable value of services rendered. Other states have gone a step further by limiting evidence of past medical expenses to only the amount paid.

Jurisdictions Which Allow Evidence of Both the Paid and Billed Amounts

In 2005, the State of Missouri passed § 490.715 of the Missouri Revised Statutes as part of tort reform legislation.[15] The statute codified the common law collateral source rule and modified it in certain respects.[16] Subsection 2 of § 490.715 permits a defendant who personally has, or by an insurer or representative, paid all or any part of a plaintiff's special damages to introduce evidence someone other than the plaintiff paid the amount, but the defendant cannot identify any source of the payment.[17] The

[9] Balasko, *supra* note 7, at 27.
[10] *See Lagerstrom v. Myrtle Werth Hos. Mayo Health System*, 700 N.W.2d 201, 238-39 (Wis. 2005).
[11] *Law v. Griffith*, 930 N.E.2d 126, 133 (Mass. 2010).
[12] *See, e.g., Swanson v. Brewster*, 784 N.W.2d 264, 270-71 (Minn. 2010).
[13] *Id.* at 270-71 (citing *Leitinger v. DBart, Inc.*, 736 NW.2d 1, 18 (Wis. 2007)); *see also Law*, 930 N.E.2d at 135.
[14] *See Law*, 930 N.E.2d at 134.
[15] *See Hill v. Fikes Truck Line, LLC*, No. 4:11-CV-816 CAS, 2012 WL 5258753, at *5 (E.D. Mo. Oct. 24, 2012).
[16] *See Deck v. Teasley*, 322 S.W.3d 536, 538 (Mo. 2010).
[17] *See id.*; *see also* MO. REV. STAT. § 490.715.2.

statute also allows evidence of the dollar amount necessary to satisfy the financial obligation to health care providers to be presented at trial and creates a rebuttable presumption that such amount represents the value of the medical treatment rendered. A party seeking to rebut this presumption must present substantial evidence that the value of medical treatment rendered is an amount different from the dollar amount necessary to satisfy the financial obligation to health care providers. If the court determines such presumption is rebutted, the party's other evidence of value including the amount billed, as well as the amount necessary to satisfy the financial obligations, is admitted at trial as if no presumption exists. The jury must then decide the value of the medical treatment rendered.[18]

Courts in several other states, including Ohio and Indiana, have adopted a similar rule, allowing the jury to consider both the amount billed and amount paid in determining the reasonable value of medical services.[19]

Jurisdictions Which Limit Evidence to the Amount Paid

The legislatures in North Carolina and Oklahoma recently enacted legislation to limit evidence of past medical expenses to evidence of the amount necessary to satisfy the financial obligation to the plaintiff's health care providers.[20] The Republican-controlled Missouri legislature is currently considering a bill which would amend § 490.715 of the Missouri Revised Statutes in a similar fashion.[21]

North Carolina Rule of Evidence 414 provides "[e]vidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied."[22] Likewise, Oklahoma's statute "limits admissibility of evidence concerning medical costs in personal injury litigation to what has actually been paid or is owed for a party's medical treatment, rather than the amount billed for that treatment."[23] By limiting evidence of past medical expenses to what has actually been paid or is owed for a party's

[18] *See id.* at 539; *see also* MO. REV. STAT. § 490.715.5.

[19] *See, e.g., Robinson v. Bates*, 857 N.E2d 1195, 1200 (Ohio 2006) ("The jury may decide the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment, or some amount in between."); *Stanley v. Walker*, 906 N.E.2d 852, 858 (Ind. 2009) ("The collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services. To the extent the adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed.").

[20] *See* North Carolina Rule of Evidence 414*;* OKLA. STAT. TIT. 12, § 3009.1.

[21] *See Collateral Source Set to Mark Start of Tort Reform Effort*, THE MISSOURI TIMES, January 16, 2017, http://themissouritimes.com/37066/collateral-source-set-mark-start-tort-reform-effort/; *see also* Missouri Senate Bill No. 31.

[22] North Carolina Rule of Evidence 414.

[23] *Lee v. Bueno*, 381 P.3d 736, 741 (Okla. 2016).

medical treatment, these state legislatures have effectively determined injured parties cannot recover damages for amounts written-off by their medical providers.[24]

Reduction of Jury Awards

Instead of limiting evidence of past medical specials, some states have sought to reduce inflated damages awards by more or less abrogating the collateral source rule entirely. For example, in Florida, any damages awarded in a personal injury lawsuit are reduced "by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources," provided no right of subrogation exists.[25] Therefore, the jury determines the total amount of damages and the court then determines the amount of collateral source benefits and deducts that amount from the jury's verdict.

Several other states have adopted a similar rule, including Connecticut, Minnesota, and Michigan.[26] These states all reduce damages awards by collateral source payments, but offset that reduction by insurance premiums paid by the plaintiff.[27]

What to Do

Especially in states which have modified or abrogated the collateral source rule, it is important to conduct discovery of collateral source benefits from the outset of the lawsuit. Therefore, defense counsel should serve plaintiffs written discovery asking them to identify the medical providers from whom they sought treatment for their claimed injuries, to state whether they receive Medicare, Medicaid, or Social Security disability benefits, and to provide authorizations which allow defense counsel to collect records and bills from the same.

If the plaintiffs object to any of these requests on the grounds they invade the collateral source rule, defense counsel has two primary arguments. First, this information is reasonably calculated to lead to the discovery of admissible evidence as it allows the defendant to ascertain its potential exposure. Second, plaintiffs' medical bills as well as their Medicare, Medicaid, and Social Security records will identify medical providers and treatment rendered which plaintiff might not have previously identified.

After collecting these records and identifying the amount billed by the plaintiffs' providers and the amount those providers accepted or

[24] *Id.* at 752.

[25] FLA. STAT. § 768.76.1. For purposes of this statute, a collateral source is defined as any federal, state, or local disability payment; any insurance benefits other than those provided by a life insurance policy; any contract or agreement to provide, pay for, or reimburse the costs of health care services; and/or any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability. *Id.* at § 768.76.2(a). Benefits under Medicare, Medicaid, or Workers' Compensation Law are specifically excluded from this definition. *Id.* at § 768.76.2(b).

[26] Levin, *supra* note 4, at 758.

[27] *Id.*

will accept as payment in full, defense counsel should consider serving plaintiffs with requests for admission in order to conclusively establish the amounts billed, paid, and still owed as well as the total of all collateral source payments.

Finally, in jurisdictions which limit evidence of past medical damages to what has actually been paid or is owed for a party's medical treatment, defense counsel should consider filing a motion in limine to preclude evidence of any greater amount billed but written-off by the plaintiffs' medical providers.

Conclusion

The collateral source rule has been a popular target of tort reform legislation in recent years. Therefore, defense counsel needs to be cognizant of the applicable common law and statutory framework in their jurisdictions. If a jurisdiction has modified or abrogated the collateral source rule, defense counsel should make every effort to limit evidence of the injured party's past medical damages to the lowest number possible.

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