**Overcoming Sticker Price:**
**The Emergence of the Reasonable Value Approach**

## I. The Reasonable Value Overview

### A. Attacking Billed Medical Rates in Damages Projections

Traditionally, the courts have permitted plaintiffs to control the damages discussion. The damages defense is characteristically viewed as a concession to liability, which creates a damages floor. Our presentation offers an alternative to this view. And posits that defense attorneys can successfully attack billed medical rates in damages projections without conceding liability to plaintiffs.

#### 1. Billed v. Paid Rates

By equating the reasonable value of future medical expenses to the billed rate – i.e., usual, customary and reasonable, usual and customary, reasonable and customary, chargemaster, allowable amount, etc. – the plaintiffs' bar is attempting to divorce what is paid in the market from the reasonable value of medical expenses. In fact, billed rates, such as usual, customary, and reasonable fees, can be considered 'phantom or illusory' because they are never paid by market participants.

The defense bar has seen plaintiffs over-value future medical damages based on the confusion surrounding billed rates and whether they represent the reasonable value of medical expenses. To overcome this confusion, a strong damages defense must put forward a case, which maintains that the reasonable value of medical expenses must be based on pricing data derived from credible, verifiable, reliable, and (most importantly) objective payment data – i.e.., 'trustworthy information'. Moreover, the defense must be willing to demonstrate that any analysis that relies on limited or arbitrarily chosen billing rates is inherently weak, and fundamentally less reasonable than one which relies on trustworthy information.

#### 2. Understanding the collateral source rule

In general, the Collateral Source Rule (Rule) as a legal doctrine maintains that any compensation an injured person receives from a source other than the legally responsible party (the defendant) may not be used to reduce the liability for medical damages recoverable from the defendant. Exceptions to the doctrine are generally triggered by alternative legal arguments, which do not conflict with the collateral source rule. Two alternative legal arguments have garnered attention as of late and created room for discussion about exceptions to the Rule. The first argument suggests that the Affordable Care Act (ACA) has created an exception to the Collateral Source Rule because the law eliminates its need. The second argument puts forward the notion that collateral sources must be considered when determining the reasonable value of medical expenses in the market. Both arguments have been effective in various forms when facing the oft-troubling Collateral Source Rule.

3. The need for cohesive and specific expertise

Attacking the plaintiff's interpretation of reasonable value as the billed medical rate begins with the defense arguing why those rates do not reflect reasonable value. Successfully articulating this argument hinges on finding an expert willing to explain: 1) Why market pressures lead to more than one price for medical goods and services; 2) Why the valuation of medical expenses must take into consideration market variation and provide certainty; 3) Why pricing is unique in the United States healthcare market; and 4) why regulation, stakeholders, and locale influence pricing in the marketplace. In other words, finding an expert who can correctly explain reasonable value. The primary advantage offered to the defense when employing this tactic is the opportunity to educate the jury about the healthcare market. For example, the value of medical goods and services is driven by what consumers are willing to pay, and providers expect to be that amount.

4. Leave political persuasions at the door

It is never useful to discuss politics when exploring the question of damages. Discussions about future medical damages and reasonable value are no different. Many plaintiff attorneys are under the misconception that the ACA opened the discussion of damages to political considerations. This is not true. Rather, the ACA brought renewed attention to the question of cost and how value is determined. Whether the ACA exist does not limit the ability of the defense to attack billed rates as reasonable.

## B. The Carrier/Claims View on the Need for Damages Defenses

1. Decrease in overall lawsuits nationally

In the medical professional liability line of business, claim frequency has either decreased or remained static year over year for a period of many years. The number of claims across the board is down from previous levels and this is true in other lines of business as well. This decrease in frequency has increased competition among the plaintiffs' bar for the "best" cases and has resulted in consolidation of these cases with the more capable, well-funded law firms.

2. Higher verdict awards overall

These law firms sometimes work across state lines and are experts at driving up damage values by employing "reptile" tactics and utilizing experts to present highly inflated, grossly exaggerated life care plans. These dynamics have contributed to the increasing verdict severity trend nationwide. In the past two years, the industry has seen an increase in the number of verdicts above $10M, above $25M, and across all major thresholds. These verdicts have been awarded in some venues typically associated with "mega" verdicts, but also in venues that have not traditionally experienced significant seven figure or eight figure verdicts.

3. Only defending half the case

In conducting post-mortems on some of these and other cases involving large verdicts, it is not uncommon to see the defense focus almost entirely on the liability phase of the case. Many times, there is a perfunctory damages defense that begins very late in discovery, sometimes immediately before trial. This approach increases the advantage to plaintiffs in a contest that is already lopsided once they are able to hurdle the liability bar.

4. Carriers are driving the issue to their lawyers

In response to this rise in claim severity, some in the industry are taking a step back to revisit the approach to damages defense in high stakes claims. They are challenging defense counsel to counter the traditional paradigm in which the collateral source rule is reflexively cited as a bar to introducing evidence of plaintiffs' insurance coverage and/or government benefits. The industry is looking to defense counsel to be creative in attempting to demonstrate through admissible evidence, the vast discrepancy between billed v. paid rates for past medical expenses and also the reasonable value of future medical services that a plaintiff may require.

5. The excess insurance and reinsurance markets are invested

This challenge to the status quo is endorsed by excess insurance and reinsurance markets as these players have been squeezed between the continuation of soft market pricing and an increase in payments at high capacity levels. Many of these parties believe the plaintiffs' bar has gained the upper hand in recent years through a coordinated strategy to continually set new benchmarks by introducing ever more overpriced care plans for catastrophically injured plaintiffs. This is particularly so in venues with hard general damage caps where case values are driven almost entirely by economic damages. A coordinated strategy among all participants on the defense side to present reality-based values for past and future medical services is necessary to help moderate settlements and jury awards moving forward.

## II. Nuts and Bolts of Reasonable Value

### A. Building it from the Ground Up In Tough Venues

1. Pleadings and Discovery Practice

The presentation of a complete damages defense should begin at the outset of any case. Each jurisdiction has procedural rules governing the use of affirmative defenses and limitations on interrogatories. Thus, a judicious use of these items may be necessary. Nonetheless, it is an opportunity to begin to develop a record, place your opponent on open notice of your intentions, and gather damages based information throughout the case.

a. Affirmative Defenses

Affirmative defenses offer the opportunity to identify for your opponent that you intended to pursue non-traditional defenses in your case. An affirmative defense that identifies identifies your intention to recalibrate future medical damages may include such model (but not required) language as: "The future medical damages claimed by the Plaintiff must reflect the reasonable value of reasonably necessary medical treatment and projections and may incorporate the market based pricing that incorporate public and private reimbursement models that more accurately reflect market rates for future medical services." This is subject to local rules and limitations and should be checked against such procedural rules in a given jurisdiction.

b. Targeted Interrogatories

Interrogatories and document requests ought to aggressively pursue and demand discoverable information on the following topics: 1) Plaintiff's current health insurance; 2) Whether Plaintiff has had any contact, conversations or correspondence with the entities that administer Medicaid, Medicare, private insurance and/or employer based insurance; 3) Whether the Plaintiff has taken any steps to preserve coverage for Medicaid or Medicare now and into the future through the use of trusts or trust accounts; 4) Whether the Plaintiff has appointed any type of guardian or trustee (both personal or corporate representatives); 5) Whether the Plaintiff has secured any third party litigation funding for the lawsuit; 6) Itemized documentation and any and all outstanding liens; and 7) Whether the Plaintiff has had any letters of protection secured for any medical treatment that is deemed related to the matter.

2. Early Depositions

Medical pricing costs and medical projections ought to be a subject of even the earliest depositions. A Plaintiff, Plaintiff's primary caregivers or representative family members, and treating physicians ought to be questioned on current health insurance for the Plaintiff, what is being paid out of pocket to retain that insurance, and what is being reimbursed to the medical providers for a given service.

The treating physicians and providers in particular should be asked such pointed questions as what they charge for an office visit, a therapy visit, an injection or other treatment option and then followed up with what they actually receive as payment for those services to lay the groundwork for future projections.

3. Experts and Expert Consultation

The use of expert testimony on damages has to go beyond the traditional response to a life care planner or an economist's projections for future medical damages. The defense industry is seeing a rightful increase in the use of medical billing experts, economists more specifically versed in healthcare reimbursement rates, case managers, health policy expert witnesses and those versed in the public and private insurance sectors to more accurately price medical damages.

4. Selecting an insurance method for your case based on the evidence

One of the most critical data points in any damages analysis is for the defendant to fully understand and have documentary evidence regarding the Plaintiff's current health insurance scheme. With this in hand, and in tandem with expert consultation, it becomes incumbent on the Defendant to understand the best future insurance framework for the Plaintiff to understand the reasonable value of that Plaintiff's needs for the future. This can be a unique choice in each case to determine if a Plaintiff must utilize Medicaid, Medicare, private insurance, or some combination and these results can vary from case to case thus necessitating the expert consultation.

Moreover, in some matters, it becomes necessary to simply project the average market based reimbursement rates across the spectrum of third party payors without specific reference to one insurance framework or another. This most exemplifies the current status of the reasonable value approach.

5. Mediation Presentations

A thoughtful and researched damages presentation can and should be made directly to the Plaintiffs whenever possible at a mediation. This is a front line for damages presentations with the majority of matters resolving prior to trial. A full explanation to the Plaintiffs that there life and the future medical projections has been researched, vetted with experts, and reflects real world experience beyond the fiction of courtroom damages is a powerful resolution tool being used with increased frequency and effectiveness.

This process brings forth topics that are often not discussed or addressed until after the conclusion of a settlement or verdict. It is imperative that this conversation is planned for a mediation and happens prior to a settlement agreement in order to effectuate changes in damages discussions and calculations.

6. Pre-trial Motion Practice

It is recommend that strong analysis and strategy be employed at the Motion in Limine phase for a successful damages presentation. It is typically fatal to the reasonable value defense to simply try and present it in a surprise or last minute fashion. The defense is more successful if it is open, clear, and has a foundation that began early in the matter.

Motions in limine of interest may include attacking the Plaintiff's experts for their methodology in failing to consider the reasonable value of services and solely basing their projections on billed medical rates. The motions may also include asking the Court to take notice of applicable laws surrounding applicable insurance, applicable market based analysis of medical projections, taking judicial notice of laws surrounding healthcare economics, fiduciary duty based laws, and trusts. Finally, a motion in limine may expressly request the Court to grant the Defendant the authority to pursue these

topics in both the presentation of their own experts and in the cross examination of the Plaintiff's witnesses.

All of these options have the strategic import of advising the Court of your express intentions to reduce the element of surprise, create settlement leverage, and preserve issues for appeal.

**B. Results on Reasonable Value Matters**

1. Success and failure from each of the panelists

This section will include accounts of real cases, real depositions, real mediations, and real results where these issues either prevailed or were unsuccessful.

2. National observations from California, Texas, Florida, Pennsylvania

It important to know that the topics raised by these strategic suggestions can vary based on the laws of a given venue and that certain approaches are more favored in a jurisdiction such as California and certain approaches are found to be more difficult in a jurisdiction like Pennsylvania. We have chosen populous states with significant claims to represent a cross section of experiences.

3. Perspective of the Reasonable Value Expert in a Deposition or on the Stand

Our panelist, Thomas Dawson, J.D. is a nationally recognized expert who has been a frequent expert witness in a variety of cases across the country. He will share highlights of his experiences in both deposition and trial practice as it pertains to reasonable value.

4. A discussion on what mistakes are most commonly seen

The panelists have had the opportunity to both observe success and mistakes on implementing reasonable value approaches into their cases. There are oft repeated mistakes make that this program is hoping to minimize across the country in order to make the presentation of these defenses to be more cohesive and positive.