Defending Against Claims for Future Medical Expense Damages

by H. Thomas Watson and Karen M. Bray

Introduction

Future medical expenses may be one of the largest components of a serious personal injury case, and defense counsel need to take steps to defend against excessive damage awards and to preserve critical damages issues for post-trial motions and appellate review. This article provides tips for defending against future medical expense claims.

A brief summary of the law on the applicable measure of damages

The law regarding past medical expense damages is pretty well settled following the Supreme Court's decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, which holds that the bills of medical service providers are inadmissible because they are not evidence of the reasonable value of medical care since they are grossly inflated, and that plaintiffs may recover only the lesser of (1) the amount accepted as full payment for medical services, or (2) the reasonable value of the services. (See *Howell*, *supra*, 52 Cal.4th at pp. 555-562; ; *State Farm v. Huff* (2013) 216 Cal. App.4th 1463, 1471 [a hospital cannot satisfy its burden of proof to support a lien against the tort plaintiff's recovery by presenting unpaid hospital bills, since unpaid bills are not evidence regarding the value of medical services provided to plaintiff]; *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 135-139 ["unpaid medical bills are not evidence of the reasonable value of the [medical] services provided" to an uninsured plaintiff, and "cannot support an award of damages for past medical expenses"].) As a result, parties often stipulate to the amount of past medical expenses incurred.

However, defense counsel continue to confront difficulties defending against claims for future medical expenses. The law is constantly evolving and new appellate decisions are issuing regularly. Under existing law, strong arguments can be presented to bar future medical expense projections based on current (or future projected) "billed" amounts. (See *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1325-1333 [the amount "billed" (1) "is not relevant to a determination of the reasonable value of future medical services" (2) "is inadmissible for the purpose of proving noneconomic damages" and (3) "cannot support an expert opinion on the reasonable value of future medical services"]; *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050-1051.) Rather, future medical expenses should be calculated based on current market rates for the amounts accepted as full payment (adjusted for inflation) for the services reasonably certain to be incurred in the future.

Retain a life care planner who understands current law and can prepare a plan based upon paid rates

Defense counsel should retain a life care planner who understands current law and can prepare a life care plan based on a projection of the typical amounts that are currently *paid* and *accepted as payment in full* for those medical services that plaintiff will allegedly need. Some life care experts claim that information concerning paid rates is not available because it is confidential and payments are made pursuant to the terms of private health insurance agreements. An expert who uses that reason to rely exclusively on billed amounts that are publicly available in sources such as the Fair Health and Health Systems International database probably does not have sufficient expertise to opine on the *legally relevant* expected cost of future care. Other sources, such as Truven Health Analytics, maintain databases regarding amounts actually accepted as payment in full for healthcare services. Moreover, any life care planner can contact local healthcare providers to inquire about the actual amounts they typically accept in a variety of circumstances as payment in full for their services, without invading individual patient confidentiality.

Ideally, the defense's life care planner will prepare a report comparing the paid amounts against the amounts included in plaintiff's life care plan, because life care planners for plaintiffs typically use *billed* rates instead of *paid* rates. If the trial court rules that plaintiff's expert can present a plan based upon billed rates, the defense expert should be prepared to explain not only that the plaintiff's expert is including the costs of services that are not reasonably necessary (if true), but also why the *rates* for necessary services do not reflect reality. (See section F, *post*.) And if the defense expert's opinion is excluded, the expert's report can be submitted as an offer of proof concerning the prejudice from the trial court's ruling.

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Determine the basis for the future medical expense estimates used by plaintiff's life care planner

Defense counsel should depose the plaintiff's life care expert to determine the basis for all costs included in plaintiff's life care plan. Plaintiffs' experts may be vague in describing costs as "customary" or "reasonable," but when pressed, they may have to admit they are relying on databases containing amounts customarily "billed" or "charged." The deposition should clearly establish every amount in the life care plan that is based on such billed rates (rather than paid amounts).

Furthermore, many life care planners will base their life care plan costs on some amount greater than the *average* amount billed or paid for a particular medical service multiplied times a regional adjustment factor. For example, they may select amounts at the 70th or 80th percentile of rates (i.e., rates higher than the amounts billed by or paid to 70 or 80 percent of care providers) rather than average rates. The plaintiff is entitled to recover only damages that will *probably* be incurred, and plaintiffs usually have no basis for arguing that the actual cost will exceed the *average* amount for each medical service in the region in which plaintiff resides. Any award that exceeds that amount is excessive. (See *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640 ["*The primary object of an award of damages* in a civil action, and the fundamental principle on which it is based, are *just compensation* or indemnity for the loss or injury sustained by the complainant, *and no more* [citations]" (original emphasis)]; *Howell*, *supra*, 52 Cal.4th at p. 555 ["We agree with the *Hanif* court that a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less" (original emphasis)].)

File a motion for summary adjudication and/or a motion in limine, request an Evidence Code section 402 hearing, object during trial to evidence of "billed" or "charged" rates, and consider moving for a nonsuit/ directed verdict

The cost bases of plaintiff's life care plan often is not disclosed until the eve of trial and after the deadline for seeking summary adjudication. However, if defense counsel learns in advance that plaintiff's life care plan is based upon billed rates (perhaps by reference to that expert's testimony in prior cases), counsel should consider filing a motion for summary adjudication on the future medical expense claim, arguing that plaintiff's only supporting evidence is inadmissible. (See *Corenbaum*, *supra*, 215 Cal.App.4th at pp. 1325-1333; *Markow*, *supra*, 3 Cal.App.5th 1027, 1050-1051; see also Code Civ. Proc., § 437c, subd. (f)(1).)

Likewise, the defense should file a motion in limine to bar the life care planner from testifying or presenting evidence of a life care plan that includes costs based on "billed" or "charged" amounts. Counsel should also note, if applicable, that plaintiff's life care plan inflates the amount of probable damages by using something other than the average local rates – e.g., rates charged at the 70th or 80th percentile.

Additionally, defense counsel should consider requesting a hearing under Evidence Code section 402 for the purpose of having the trial court make a preliminary finding of fact regarding whether plaintiff will have insurance covering future medical needs. (See Evid. Code, § 405, subd. (a) ["The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises"].) If the court rules that certain future medical expenses will probably be covered by plaintiff's health insurance, then the evidence the jury hears at trial should be based solely on negotiated insurance rates. The defense should never argue that a plaintiff *must* treat with an in-plan doctor, but can still argue that if plaintiff chooses to go out-of-plan without a medically sound reason for believing proper care cannot be provided in-plan, then the plaintiff will have failed to mitigate his or her damages, such that the extra expense is noncompensable. In other words, the defendant is not dictating plaintiff's doctor-patient relationship, but if plaintiff chooses to incur expenses that plaintiff was not required to incur (such as flying to Paris for

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an MRI, to use an extreme example), the defendant need not pay those expenses.

Plaintiffs frequently contend that it is speculative whether they will have insurance in the future, and they should be entitled to select healthcare providers uninhibited by limitations of insurer networks, and to simply pay cash for such services. But plaintiff is arguably required to maintain insurance if feasible to do so (as part of plaintiff's duty to mitigate). And even if plaintiff were correct that insurance probably will not be available in the future, then plaintiff's future medical expenses should be based upon the lower rates that healthcare providers charge to clients who pay cash.

Plaintiffs also argue that any mention of insurance is improper. Defendants may respond that all experts can and must describe the amounts expected to be incurred by persons in plaintiff's position (i.e., an insured person) without actually mentioning the existence of insurance. This highlights the need for a 402 hearing, explaining to the judge that defense counsel needs to ask plaintiff's expert *outside the presence of the jury* whether the expert has taken into account the availability of insurance, and the amount such an insurer would pay.

If the court nevertheless rules that plaintiff may use billed amounts to project future medical expenses, defense counsel should ask the court to grant a continuing objection to that evidence or, in the alternative, object to the evidence/move to strike it at the time it is presented. Counsel might also consider moving for a partial nonsuit or partial directed verdict at the appropriate time based upon a lack of admissible evidence supporting the future medical expense claim. Such motions are generally not required to preserve the issue for appellate review, but they help remove any dispute over whether the objection was withdrawn.

Propose a jury instruction and a verdict form that prohibit the plaintiff from recovering inflated future medical expense damages.

If the court allows the plaintiff to introduce inflated evidence of future medical expense damages, defense counsel should propose the following revised CACI jury instruction and a verdict form that prohibits an inflated award (revisions to the CACI instruction are in bold type because CACI already uses brackets):

CACI No. 3903A (Modified). Medical Expenses—Past and Future (Economic Damage): [Insert number, e.g., "1."] [Past] [and] [future] medical expenses. [To recover damages for past medical expenses, [name of plaintiff] must prove the reasonable cost of reasonably necessary medical care that [he/ she] has received.] [To recover damages for future medical expenses, [name of plaintiff] must prove the reasonable cost of reasonably necessary medical care that [he/she/they] are is reasonably certain to need in the future.] **Your award[s] of medical expense damages must be based on the market value for such services. This means that the award must be based on the amounts typically accepted as payment in full for those services when rendered to patients in plaintiff's circumstances, and may not be based on amounts that will be billed but not actually paid for such services. You should award plaintiffs an amount of damages that is reasonably necessary to compensate them for any harm caused by defendant, but should award no more than that amount.**

Authorities: *Howell v. Hamilton Meats & Provisions, Inc*. (2011) 52 Cal.4th 541, 555 ("We agree with the *Hanif* court that a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less." (original emphasis)); *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330-1331 (the "full amount billed for past medical services is not relevant to a determination of the reasonable value of *future medical services*" and evidence of billed amounts "cannot support an expert opinion on the reasonable value of *future medical*

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expenses" (emphasis added)); *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050 (*Howell*'s market value approach "applies to the calculation of *future medical expenses*" (emphasis added)); *Hill v. Novartis Pharmaceuticals Corp.* (E.D. Cal. 2013) 944 F.Supp.2d 943, 963-964 (following *Corenbaum* under the Federal Rules of Evidence); see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043 ("[A] person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure.").

Consistent with this proposed instruction, the verdict form should ask the jury to find:

What is the present value of the medical expenses that will likely be paid by or on behalf of plaintiff in the future? $_____

Consider filling the gap in plaintiff's evidence by presenting paid rate evidence

As outlined above, the plaintiff will have arguably failed to present relevant evidence supporting the future medical expense damage claim if plaintiff's expert offers only "billed rate" calculations, and therefore the defense could seek a partial nonsuit or directed verdict, move for a partial JNOV or new trial after an excessive verdict is returned, and seek appellate relief from any final judgment that awards future medical expense damages that are supported only by inadmissible evidence of billed amounts.

On the other hand, California law regarding the admissibility of billed rates is not completely settled, so the ability to prevent or strike anaward based on billed rates is not certain. Moreover, to any extent that procuring and applying discounted paid rates involves damage mitigation principles, the defense bears the burden of proof. (See CACI No. 3930; *Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 97.) Accordingly, defense counsel might reasonably elect to introduce evidence of the *paid* cost of plaintiff's life care plan with a goal of convincing a jury to award the lower cost

instead. And as noted, if the court rejects such testimony, an offer of proof describing what the expert would have said will preserve a claim of prejudicial error in that evidentiary ruling.

File a motion for new trial on the ground of excessive damages if the jury awards future medical expenses based on billed rates.

An excessive damages claim is waived on appeal if it is not presented first to the trial court in a motion for new trial. A claim of legal error that leads to an inflated award is not waived, but it is better to be safe than sorry. Therefore, if the jury returns a verdict awarding plaintiff future medical expense damages based on a life care plan using billed rates, defense counsel should consider filing a notice of intention to move for a new trial listing excessive damages as one of the statutory grounds (Code Civ. Proc., § 657), and backing it up with points and authorities explaining why the damages award exceeds the amount permitted by law.

Conclusion

Defending against claims for future medical expenses requires a thorough understanding of constantly evolving law and a grasp of how experts may manipulate data to inflate their projection of future damages. As outlined above, steps should be taken before, during, and after trial to ensure that future medical expenses are not based upon inflated billed rates, and to ensure that a challenge to an award based on billing rates is preserved for appellate review.

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EDITOR'S NOTE: On April 27, after this article was submitted for publication, the California Court of Appeal reaffirmed that future care costs must be measured by the amounts providers are likely to accept as payment, and reversed a multi-million dollar jury award where the trial court improperly excluded defense evidence of negotiated rates for future medical care costs under Medicaid and through agreements with insurers under the Affordable Care Act. See *Cuevas v. Contra Costa County* (2017) ___ Cal.App.4th ___ [2017 WL 1507913]. The authors of this article were counsel of record on appeal for the defendant/appellant in *Cuevas.*