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Medical Discounts and the Collateral Source Rule

By H. Thomas Watson

When tortious conduct causes injuries, the plaintiff is allowed to recover as special damages the "reasonable value" of the medical services needed to treat the injury. Today, determining what is the "reasonable value" of health care services is becoming a more challenging task.

In the United States, an ever increasing number of people are covered by various forms of private and public medical insurance that provides medical services at negotiated or group rates below providers' so-called "prevailing" or "usual and customary" rates. *See* William R. Jones, Jr., *Managed Care and the Tort System: Are We Paying Unnecessary Billions?* 63 DEF. COUNS. J. 74, 75 (1996) ("[R]esearch discloses that, depending on geographical area, as many as 80 percent of providers are estimated to be rendering health care under managed care plans of one type or another" and "[a]t least half of all health care in the United States now is provided under some type of managed care plan."). With so many people covered by managed care plans, only a small number of people are actually paying what medical care providers claim as their standard rates. Insurers are paying only the discounted rates negotiated under their contracts, with health care providers basically having to forgive the remainder sought. Thus, the amount healthcare providers state on their invoices are no longer the prevailing, usual, typical, normal, customary or most common rates. Such rates are, in fact, *un*usual and almost never actually paid. Rather, the lower contractual rates are more commonly paid. *See* Chris Middleton, Pac. Research Inst., *Hospitals Are Just Playing the Medicare Game*, Vol. 1 no. 12 HEALTH POL'Y PERSCRIPTIONS, Dec. 2002, *available at* http://www.pacificresearch.org /pub/hpp/2002/hpp_02-12.html (last viewed Mar. 7, 2007) ("Akin to the manufacturer's suggested retail price on automobiles, hospital retail charges are inflated prices that don't reflect what they are actually paid. In fact, the differential is even greater for hospitals than for automobiles. Medicare and private insurers pay only a fraction of hospital charges."); Jones, *supra*, at 75 ("The difference between the managed care fixed rate and the provider's billed charges is often as much as 600 to 800 percent.").

Although health care providers may charge their purported "prevailing" or "usual and customary" fees to a minority of patients who, for whatever reason, fail to qualify for the more favorable negotiated rates available to most other patients, it is difficult to see why that circumstance makes these charges more reasonable than the lower, more common negotiated rates. For this reason, allowing a plaintiff in a tort action to recover medical damages in any amount beyond what was actually paid for the plaintiff's medical care arguably results in impermissible overcompensation that is at odds with the fundamental purpose of the tort system to make the plaintiff whole. That fundamental purpose is not served by awarding the plaintiff windfall damages that more then compensates for the harm actually caused. This, however, is what is happening across the country.

THE COLLATERAL SOURCE RULE

The collateral source rule bars the defendant from seeking to reduce the plaintiff's recovery by introducing evidence of payments to the plaintiff from sources unrelated to the defendant. A majority of state Supreme Courts addressing the issue have held that this rule applies to bar evidence of any reduction in a healthcare provider's billed charges that may result from Medicare or private healthcare insurance contracts. These are a few representative cases to illustrate the point:

Baptist Healthcare Sys. Inc. v. Miller, 177 S.W.3d 676, 683-84 (Ky. 2005) ("[I]t is absurd to suggest that the tortfeasor should receive a benefit from a contractual arrangement between Medicare and the health care provider … [t]herefore, we hold that evidence of collateral source payments or contractual allowances was properly withheld from the jury."); *Bynum v. Magno*, 101 P.3d 1149, 1156-63 (Haw. 2004) ("[T]he collateral source rule applies to prevent the reduction of a plaintiff's award of damages to the discounted amount paid by Medicare/Medicaid" and the "receipt of such payments should not be admitted into evidence to reduce damages."); *Covington v. George,* 597 S.E.2d 142, 144 (S.C. 2004) (under the collateral source rule, a party cannot "introduce evidence of the actual payment amount to challenge the reasonableness of the medical expense sought by the plaintiff"); *Radvany v. Davis*, 551 S.E.2d 347, 348 (Va. 2001) ("Payments made to a medical provider by an insurance carrier on behalf of an insured and amounts accepted by medical providers are … payments made by a collateral source and, thus, are not admissible in evidence for that reason … Furthermore,

such amounts are not evidence of whether the medical bills are 'reasonable, *i.e.*, not excessive in amount, considering the prevailing cost of such services.'"); *Koffman v. Leichtfuss*, 630 N.W.2d 201, 204-05, 209-10 (Wis. 2001) ("[T]he plaintiff may seek recovery of the reasonable value of medical services rendered, without limitation to the amounts actually paid by the plaintiff's insurers," and evidence of the amount paid is inadmissible under the collateral source rule); *Montgomery Ward & Co. v. Anderson*, 976 S.W.2d 382, 383-85 (Ark. 1998) ("[G]ratuitous or discounted medical services are a collateral source not to be considered in assessing the damages due a personal-injury plaintiff."); *see also Bozeman v. Louisiana*, 879 So.2d 692, 704 (La. 2004) ("plaintiffs who have paid some consideration for the collateral source benefits, including the 'write-off'" may recover the full amount billed for their medical services, but a Medicaid recipient may not recover the "write-off" amount).

In some cases, courts have held that the plaintiff can present evidence of the full-billed amount as representing the reasonable value of the medical services, while not specifically addressing whether the defendant was barred from introducing evidence of the discount. *See Mitchell v. Haldar*, 883 A.2d 32, 40 (Del. 2005) ("[T]he portions of medical expenses that health care providers write off constitute 'compensation or indemnity received by a tort victim from a source collateral to the tortfeasor.' The result is the same whether the write off is generated by a cash payment … or … because of a reduction attributable to a health insurance contract for which the tortfeasor paid no compensation. Consequently, [the plaintiff] was entitled to present evidence of the full amount of his medical expenses without any reduction for the amounts written off by his health care providers because of their contracts with [the plaintiff's] health insurance carrier."); *Wal-Mart Stores, Inc. v. Frierson*, 818 So.2d 1135, 1139-40 (Miss. 2002) (under the collateral source rule, trial court properly admitted the full billed amount of medical expenses that were later written off pursuant to Medicare and Medicaid regulations).

The Other Side

On the other side of the ledger, the Pennsylvania Supreme Court refused to allow plaintiffs to recover more than the amount actually billed for their medical services. *See Moorehead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 789-91 (Pa. 2001) (a plaintiff's recovery for past medical expenses is limited to the amounts actually paid and accepted as payment in full by the healthcare providers). The Supreme Court of Kansas reached the same result where the defendant was the health care provider that treated the plaintiff's injury. S*ee Rose v. Via Christi Health Sys. Inc.*, 113 P.3d 241, 246-48 (Kan. 2005) ("Under the facts of this case, the source of the $154,000 of medical services not reimbursed by Medicare was Via Christi, the tortfeasor, not an independent source."). And in two other cases, state Supreme Courts have agreed that the medical discounts were a collateral source, but they were compelled to set off of that collateral source amount under state statute. *See Goble v. Frohman*, 901 So.2d 830, 832-33 (Fla. 2005) (contractual discount of plaintiff's medical expense is a collateral source that should be set off against plaintiff's award of compensatory damages under state statute); *Slack v. Kelleher*, 104 P.3d 958, 967 (Idaho 2004).

The Ohio Supreme Court allowed *both* the billed amount and the amount accepted as payment in full for medical services to be presented to the jury as evidence of the reasonable value of the medical services the plaintiff received. *Robinson v. Bates*, 857 N.E.2d 1195, 1200 (Ohio 2006). The *Robinson* Court held that "[t]he collateral-source rule does not apply to write-offs of expenses that are never paid. … Because no one pays the write-off, it cannot possibly constitute *payment* of any benefit from a collateral source. Because no one pays the negotiated reduction, admitting evidence of write-offs does not violate the purpose behind the collateral-source rule." *Id.* (citations omitted). Consequently, stated the court, "the fairest approach is to make the defendant liable for the reasonable value of plaintiff's medical treatment. Due to the realities of today's insurance and reimbursement system, in any given case, that determination is not necessarily the amount of the original bill or the amount paid. Instead, the reasonable value of medical services is a matter for the jury to determine from all relevant evidence. Both the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care." *Id.*; *see also Arthur v. Catour*, 833 N.E.2d 847, 853-54 (Ill. 2005) (plaintiffs may present evidence of the billed amount of their medical services and defendants may challenge the reasonableness of the billed amount, but the court did not specify what evidence the defendant could introduce to challenge the billed amount); *Lagerstrom v. Myrtle Werth Hosp.-Mayo Health Sys.*, 700 N.W.2d 201, 219-20 (Wis. 2005) (where statute allows medical malpractice defendant to present evidence of plaintiff's collateral source benefits, "evidence of collateral source payments may be used by the jury to determine the reasonable value of medical services").

In Some States, the Jury Is Still Out

Supreme Courts in many jurisdictions have yet to address this issue or have expressly left aspects of the issue open for future consideration. *See, e.g.*, *Parnell v. Adventist Health Sys./West*, 109 P.3d 69, 80 n.15 (Cal. 2005); *Rose v. Via Christi Health Sys., Inc.*, 113 P.3d at 248. Lower courts in such jurisdictions are struggling to determine what evidence to admit to

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allow the jury to fairly assess the reasonable value of medical services. *See, e.g., Lindholm v. Hassan*, 369 F.Supp.2d 1104, 1112 n.9 (D.S.D. 2005) (after ruling that the amount of the discount for medical services was a collateral source, the district court suggested that experts could nevertheless "testify, in what would appear to the jury to be hypothetically, what a variety of plans would pay, as being some evidence of what was the value of the professional services. If the actual collateral source payment was presented as one of a number of hypothetical payments in support of some expert opinion on the reasonable value of those services – then that evidence would not violate the collateral source rule.").

Until these issues are squarely addressed and resolved in a particular jurisdiction, counsel should be prepared to present expert testimony regarding how health care services are typically paid, and what amounts — or range of amounts — are accepted by the health care providers as payment in full for the types of services the plaintiff received. In addition, counsel may need to present testimony by an economist regarding how this evidence of medical discounts affects the value of future medical expenses the plaintiff is likely to incur. In addition, counsel may consider preserving the issue for appellate review by filing a motion *in limine* regarding what evidence the jury can consider when determining the reasonable value of medical services.

Because the dollar amounts are often so large and the law is so fractured, the "reasonable value" of medical services issue should keep litigators busy for years to come.

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