The Various Approaches to Recovery

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Brief Survey of Plaintiff's Recoverable Past Medical Expenses in Multiple Jurisdictions

Across the nation, states continue to have different approaches when it comes to the admissibility and effect of billed versus paid medical expenses. California and Texas are among the few jurisdictions where the billed or unpaid medical expenses, without expert testimony, are generally not admissible for any purpose. Yet Florida, Illinois, New York, and New Jersey, along with many other states, follow a hybrid approach where the billed or unpaid amount is admissible, but the court is required to make a post-verdict reduction to the paid amounts of past medical treatment. Nevada follows the common law collateral source rule approach and allows evidence of the amount billed for purposes of establishing damages and does not allow any evidence of write-offs or reductions to reduce the awarded medical damages.

California

The billed amounts for medical expenses are not admissible for any purpose in California.

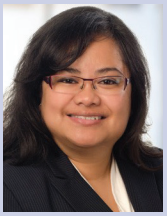
First, a plaintiff cannot recover the billed amount because he or she was never expected to repay the written-off or discounted amount obtained as a result of insurance. This proposition was set forth by the California Supreme Court in *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal.4th 541 (2011). In *Howell*, the California Supreme Court held that an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his insurer for the medical services received or still owing at the time of trial. *Id.* at 566–67. The court rejected the plaintiff's argument that defendants are liable for the full billed amount, regardless of any discount the insurer may negotiate. *Id.* at 563–64. The *Howell* decision prevents plaintiffs from recovering in damages more than the actual harm incurred, simply because the injured plaintiff did not suffer any economic loss in that amount. *Id.*

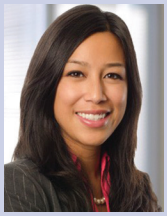
In *Howell*, Ms. Howell was injured in an auto accident. Her providers billed approximately $174,000, but accepted as payment in full from her insurers about $41,000. The California Supreme Court reversed the court of appeals' decision, reversing the trial court's reduction of the medical damages award, holding that the trial court properly granted the defendant's motion reducing the past medical damages award to reflect the amount the medical providers' accepted as payment in full. *Id.* at 566–67. The court further held that evidence of the higher billed amount was irrelevant on the issue of past medical expenses. *Id.* at 567.

Therefore, under *Howell*, to be recoverable as a medical expense, the medical expense must be both incurred and reasonable. The *Howell* court noted that "the general rule under the Restatement, as well as California law, is that a personal injury plaintiff may recover *the lesser* of (a) the amount paid or incurred for medical services, and (b) the reasonable value of the services." *Id.* at 556 (emphasis in original).

The "reasonable value" of services was first tackled in *Hanif v. Housing Authority of Yolo County*, 200 Cal. App. 3d 635 (1988), the appellate court examined "whether the 'reasonable value' of recovery means that an injured plaintiff may recover from the tortfeasor more than the actual amount he paid or for which he incurred liability for past medical care and services." *Id.* at 640. The appellate court in *Hanif* found that an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation and that "a plaintiff is entitled to recover up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable." *Id.* at 643.

Building on this principle, the court in *Howell* held that the full amount billed by medical providers *is not an accurate measure of the value of the services provided*. *Howell*, 52 Cal.4th at 560–63. An injured plaintiff whose medical expenses are paid through private insurance may only recover as economic damages the amounts paid by the plaintiff or his or her insurer for the past medical services received or still owing at the time of trial. *Id. Howell* expressly rec-





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ognized the confusing reality of medical billing—that that there can be significant disparities between the amounts billed by different medical providers and "a medical care provider's billed price for particular services is not necessarily representative of *either* the cost of providing those services or their market value." *Id.* at 564.

Moreover, courts have concluded that evidence of *unpaid* medical bills is inadmissible because of the widely varied costs of services between providers who may accept lesser amounts as payment. *Corenbaum v. Lampkin*, 215 Cal. App. 4th 1308, 1328–31 (2013). Since the unpaid bills are inadmissible for the reasonable value of services, the unpaid bills are also inadmissible for purposes of establishing future medical expenses and inadmissible for proving noneconomic damages.

In *Ochoa v. Dorado*, 228 Cal. App. 4th 120, 136–37 (2014), the court of appeal extended the reasoning in *Corenbaum* and held that unpaid medical bills are not evidence of reasonable value because of the varied costs of services as discussed in *Howell* and *Corenbaum*. Consequently, the unreliability of unpaid medical bills makes them inadmissible for purposes of establishing reasonable value.

At the time of finalizing this article, the Fourth Appellate District of California issued a decision further discussing the import of expert testimony on the reasonable cost of medical expenses. In *Omar Bermudez v. Faith Ciolek, et al.* (G049510, June 22, 2015), the uninsured plaintiff suffered serious injuries in an auto accident that required extensive medical treatment, including multiple back surgeries. Prior to trial, the parties stipulated to the admissibility, but not the reasonableness, of a summary of past medical bills that totaled $445,430.64. Plaintiff retained orthopedic surgeon, Dr. William Van Der Reis, to testify about the reasonableness of the cost of the past medical care. Plaintiff's expert testified that most costs were fair and reasonable, but discounted a few of the charges. Dr. Van Der Reis also testified about costs of future care. Plaintiff's own neurosurgeon, Dr. Fardad Mobin, also testified about the reasonableness of the cost for the services he provided to the plaintiff. Dr. Mobin also discounted some costs and testified about the cost of the plaintiff's anticipated future medical care.

Defendants in *Bermudez* presented testimony from a defense-retained orthopedic surgeon expert, Dr. Michael Weinstein, to testify about the reasonableness of the past medical costs. Dr. Weinstein testified that many of the costs incurred should be discounted to a lower value that would be consistent with the market rate for that treatment. Ultimately, the jury awarded past and future medical expenses consistent with the plaintiff's evidence. Defendants appealed the damages award and claimed that the plaintiff failed to meet his burden of proving the reasonable cost of treatment.

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The court of appeals reviewed *Howell* and its progeny in depth with some attention to the recent holding in *Ochoa*. The court concluded that the plaintiff met his burden with the expert testimony offered and the jury was entitled to consider it in reaching its verdict. The court also noted that the defendants had failed to file any motion *in limine* or object to the foundation of any expert on the reasonableness of costs. This prevented the court of appeal from reviewing the trial court's admission of such expert testimony.

Based on the cases discussed above, we offer the following practice tips for practitioners in California and in those states that limit the presentation of unpaid medical expenses:

1. Conduct discovery (most likely via deposition) of medical treatment providers and/or their office staff on the procedures and practices related to billing and payment from insured and uninsured patients;
2. Retain your own expert to evaluate the reasonable cost of any medical care (past and future) to establish your own evidence on damages;
3. Make sure to file a motion *in limine* related to any testimony about the reasonable cost of care and request an evidentiary hearing to test opposing counsel's expert on his or her calculations;
4. Preserve your rights on appeal by asserting evidentiary objections to improper or questionable testimony offered during trial regarding the reasonable cost of past and future medical care.

Texas

Texas legislature has codified its approach to the recovery of a plaintiff's medical expenses in Civil Practice and Remedies Code section 41.0105. This section provides that "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." The Texas Supreme Court has defined "actually paid and incurred" as "expenses that have been or will be paid, and excludes the difference between such amount and charges the service provider bills but has no right to be paid." *Haygood v. De Escabedo*, 356 S.W.3d 390 at 396–97 (Tex. 2011).

The Texas Supreme Court reasoned in *Haygood v. De Escabedo* that any adjustment in the amount of the charges is a benefit to the insurer that the insurer obtains from the provider, not a benefit for the insured. *Haygood*, 356 S.W.3d at 395. The court concluded that the collateral source rule does not allow recovery of medical expenses a health care provider is not entitled to charge because to allow such recovery would constitute a windfall for the plaintiff. *Id.* at 396.

In addition, the court reasoned that "[s]ince a claimant is not entitled to recover medical charges that a provider is not entitled to be paid, evidence of such charges is irrelevant to the issue of damages" and must be excluded at trial. *Id.* at 398. Rather, "only evidence of recoverable medical

expenses is admissible at trial." *Id.* at 399. Therefore, a plaintiff cannot introduce evidence of medical bills that a provider will not accept as payment for treatment, such as adjustments, write-offs, credits, or discounts. Any amount that will not be paid to the provider cannot be included in the plaintiff's award past medical expenses.

From an evidentiary perspective, the *Haygood* decision means that a plaintiff may only offer evidence of recoverable medical expenses. This has been adopted into the Texas Rules of Evidence. *See* Tex. R. Evid. 902(10)(c)(medical expenses affidavit). However, "the collateral source rule continues to apply to recoverable medical expenses, and the jury should not be told that they will be covered in whole or in part by insurance, nor should the jury be told that a health care provider adjusted its charges because of insurance." *Id.* at 400.

The Texas rule does not allow the tortfeasor to avoid liability for medical expenses borne by a charity that was designed to benefit the patient. The expenses borne by the charity on behalf of a patient are actually incurred and are recoverable by the injured plaintiff at trial. *Big Bird Tree Serv. V. Gallegos,* 365 S.W.3d 173 (Tex.App.Dallas 2012, n.p.h.).

Illinois

Illinois generally follows the collateral source rule, as stated in the Restatement (Second) of Torts §920(A)(2) (which precludes a tortfeasor from presenting evidence of, or obtaining an offset for, funds received by the plaintiff from a collateral source).

The Illinois Supreme Court further clarified application of Illinois' collateral source rule in the 2008 decision, *Wills v. Foster*, 229 Ill.2d 393, 892 N.E.2d 1018 (Ill.2008). The court explained that, from an evidentiary standpoint, the rule prevents defendants from introducing any evidence to the jury that a plaintiff's losses were covered, in total or in part, by a source independent of and collateral to the defendant. *Wills,* 229 Ill.2d at 399. The rule prevents the jury from learning anything about collateral income. *Wills* 323 Ill.2d. at 400, citing *Arthur v. Catour,* 216 Ill.2d 72 at 79 (Ill.2005). For instance, the rule prevents defendants from introducing any evidence that all or part of a plaintiff's losses have been covered by insurance. A defendant may cross-examine any witness regarding the reasonableness of plaintiff's medical bill amounts.

A defendant is also prevented from arguing that the plaintiff's medical bills were unreasonable by pointing to evidence that the bills were settled for a lesser amount than what was originally billed. Instead, a defendant must prove unreasonableness of the bills through cross-examination and other witness testimony. A defendant may also call his on her own witness to testify that the billed amounts do not reflect the reasonable value of the services that the plaintiff received. *Wills,* 229 Ill.2d at 418.

> The court concluded that the collateral source rule does not allow recovery of medical expenses a health care provider is not entitled to charge because to allow such recovery would constitute a windfall for the plaintiff.

As a substantive rule of damages, the rule "bars a defendant from reducing the plaintiff's compensatory award by the amount the plaintiff received from the collateral source." *Wills*, 323 Ill.2d. at 400, quoting J. Fischer, Understanding Remedies §12(a), at 77 (1999).Comment *d* to section 920A of the Restatement notes that the rule is of common law origin and may be altered by statute. Restatement (Second) of Torts §920A, Comment *d*, at 515 (1979). Thus, benefits received by the plaintiff do not diminish the potential damages otherwise recoverable from the defendant. *Id.* at 400.

Under the Illinois collateral source rule, write-offs and discounts of medical bills are irrelevant because plaintiffs are entitled to recover the total medical expenses they incur. There is no distinction among sources from which the plaintiff received medical treatment, whether it be through private insurance or government programs like Medicare or Medicaid. *Wills*, 323 Ill.2d. at 418–419. The Illinois Supreme Court explained that a plaintiff is "entitled to recover as compensatory damages the reasonable expense of necessary medical care" and the collateral source rule protects any collateral payments to plaintiff "by denying the defendant any corresponding offset or credit." *Wills*, 323 Ill.2d. at 419. A plaintiff is entitled to the full value of his medical expenses, as evidenced by the bills submitted by medical providers.

The Illinois legislature has modified the collateral source rule in sections 2-1205 and 2-1205.1 of the Code of Civil Procedure in the context of medical malpractice. (735 ILCS 5/2-1205, 2-1205.1) Under these statutes, a judgment will be reduced by "50 [percent] of the benefits provided for lost wages or private or governmental disability income programs, which have been paid" and by "100 [percent] of the benefits provided for medical charges, hospital charges, or nursing or caretaking charges, which have been paid." 735 Ill. Comp. Stat. 5/2-1205(ii)(2009).

Florida

While evidence of the amounts billed is allowed, the court is required to reduce the amount of past medical expenses by the reduced amount actually accepted by the providers. Florida's approach to the collateral source rule was codified in section 768.76, Florida Statutes. Section 786.76 requires a damage award be reduced by the amount of collateral sources for which no subrogation rights exists (Fla. Stat. 768.76(1)). Under this statute,

> …the court shall reduce the amount of such award 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; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of the claimant's immediate family

to secure her or his right to any collateral source benefit which the claimant is receiving as a result of her or his injury. After the jury determines the total amount of damages, the court will determine the amount of collateral source benefits and deduct that amount from the jury's verdict. Florida's Jury Instruction (Civ.) 6.13(a) instructs the jury that this will be done.

For past medical expenses, a plaintiff can only be compensated for actual economic loss; therefore, those expenses that are written down or written off cannot be recovered. In the case of Medicare and Medicaid, a plaintiff will be limited to the amount the provider accepted from Medicare. The original billed amount is considered irrelevant since it is not a loss and evidence of the billed amount is not admissible. *Cooperative Leasing v. Johnson* 872 So. 2d 956 (Fla. 2d DCA 2004).

When a plaintiff's care is covered by private insurance, the recoverable damages will be limited to those actually paid by the insurer and thus prevent a plaintiff from obtaining double recovery. *Budget Rent-A-Car Sys., Inc. v. Castellano*, 764 So 2d 889, 891 (Fla 4th DCA 2000); *Thyssenkrupp v. Lasky* 868 So. 2d 547 (Fla 4th DCA 2003); *Goble v. Frohman* 901 So. 2d 830 (Fla. 2005).

New York and New Jersey

Like Florida, both New York and New Jersey allow evidence of the billed amount to be presented at trial, but require the past medical expenses be reduced by the court post-trial. Specifically, New Jersey allows the plaintiff's damages to be reduced by the amount of collateral source payments made (other than workers' compensation and life insurance) less the premiums paid. See *Perreira v. Rediger*, 778 A. 2d 429 (NJ 2001) and *Cockerlin v. Menendez*, 411 N.J. Super. 596, 988 A.2d 575 (App DIV. 2010).

New York also allows the plaintiff to present the billed amount as evidence of damages and then reduce the award based on the amount paid. New York statute sets specific amounts depending upon the action as follows: After a plaintiff has proven entitlement to compensation for past medical expenses, the court is required to reduce the amount of the damages award by any amount plaintiff is entitled to receive from collateral sources. N.Y. C.P.L.R. 4545, *et seq.* These sources have generally included insurance policies (except for life insurance policies), most social security benefits, workers' compensation awards, and employee benefit programs. New York's collateral source rule, however, only applies to verdicts; it does not apply to settlements. *Fasso v. Doerr,* 903 N.E.2d 1167, 1173 (N.Y. 2009). The defendant bears the burden of proving entitlement to collateral source set-offs. *Firmes v. Chase Manhattan Auto. Fin. Corp.,* 852 N.Y.S.2d 148, 160 (N.Y. App. Div. 2008). The defendant must prove entitlement to a collateral source set-off with "reasonable certainty," which is "more than a preponderance of the evidence but less than proof beyond a reasonable doubt," which is defined as "clear and convincing evidence that the result is 'highly probable.'" *Id.*

When a plaintiff's care is covered by private insurance, the recoverable damages will be limited to those actually paid by the insurer and thus prevent a plaintiff from obtaining double recovery.

When a plaintiff has private insurance, recovery for medical expenses in a personal injury action can be limited when part or all of those expenses were paid through private insurance. *Meegan v. Progressive Ins. Co.,* 838 N.Y.S.2d 748, 751 (N.Y. App. Div. 2007) ("[P]laintiff's recovery of past and future medical expenses… may be limited by exclusions, conditions, limits, or other provisions of the [private insurance] policy."). Notably, however, nothing in N.Y. C.P.L.R. 4545 alters the equitable subrogation rights of insurers against the alleged tortfeasor to recover costs paid on behalf of the insured. *Fasso,* 903 N.E.2d at 1173.

New York's collateral source rule operates differently, however, when the issue is one of *public* insurance. N.Y. C.P.L.R. 4545(a) includes notable exceptions to the types of collateral sources that can be indemnified; among those exceptions are "life insurance and those payments as to which there is a statutory right of reimbursement." Both Medicaid and Medicare are sources entitled by statutory law to reimbursement, specifically liens against a plaintiff's recovery. N.Y. Soc. Serv. Law §104-b(1) (2009) ("If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of such assistance and care furnished by such public welfare official on and after the date when such injuries were incurred.").

Accordingly under N.Y. C.P.L.R. 4545, a damages award in favor of a plaintiff will not be reduced to account for payments made on behalf of the plaintiff for medical services by Medicare and Medicaid. *Singh ex rel. Singh. v. Long Island Jewish Med. Ctr.,* 2006 WL 431635, at *2 (N.Y. Sup. Ct. Queens County Feb. 17, 2006). Rather, recovery for medical expenses by plaintiff would be subject to liens by the applicable public welfare official. *See Id.* ("If this case were to go to trial CPLR 4545(a) would bar the plaintiffs from recovering from the defendant the cost of any medical care that was or in the future would be replaced from any collateral source such as insurance except such collateral sources (such as [M]edicaid or [M]edicare) entitled by law to liens against any recovery of the plaintiff.").

In addition to collateral sources, any medical expense write-offs on behalf of plaintiffs are taken into account when determining past medical expenses. For example, in 2002, a New York court ruled that a defendant could not be held liable for medical expenses that were ultimately written off by the plaintiff's treating hospital. *Kastick v. U-Haul Co. of W. Michigan,* 740 N.Y.S.2d 167, 169 (N.Y. App. Div. 2002). The court reasoned that "[a]lthough the write off technically is not a payment from a collateral source within the meaning of

CPLR 4545, it is not an item of damages for which plaintiff may recover because plaintiff has incurred no liability therefor." *Id.*

Nevada

Nevada follows the common law collateral source rule. Nevada case law requires sufficient and competent evidence to support all medical expenses. *K-Mart Corp. v. Washington*, 866 P.2d 274, 285 (Nev. 1993) overruled on other grounds by *Pope v. Motel 6,* 114 P.3d 277 (Nev. 2005). Courts look to the medical providers' testimony as competent evidence supporting medical expenses. *Hall v. SSF, Inc.,* 112 Nev. 1384, 1390 (Nev. 1996). The collateral source rule precludes evidence of payments that were made to or on behalf of a plaintiff from third-party sources including, most notably, discounts and write-downs from medical providers negotiated with health insurance companies and Medicare.

Excluding evidence of write-downs can significantly affect potential damages in a personal injury action. Specifically, the jury is presented only with evidence of the total medical bills charged and would not know that a third party paid the bills at a substantially discounted rate. The practical result is a potential windfall to a plaintiff who is only required to reimburse the third party for the amount they actually paid.

In *Tri-County Equipment and Leasing, LLC v. Klinke*, 128 Nev. Adv. Op. 33 286 P.3d 593 (2012), the Nevada Supreme Court stated that it would be willing to consider the admissibility of medical provider write-downs in the appropriate case. The court noted that several courts have addressed the applicability of the collateral source rule to medical provider discounts.

In Nevada, a bill that modifies the collateral source rule, Senate Bill 291, is currently before the legislature as part of a proposed tort reform package. As of the time of writing this article, the bill passed the senate, but the assembly tabled its vote on the bill. Until the legislature passes the bill, Nevada will continue to follow the collateral source rule and prohibit evidence of collateral sources at trial.

Conclusion

Given the varied approaches to the recovery of past medical expenses—either paid or unpaid—counsel and claims handlers would do well to obtain complete billing records from each provider and consider taking the deposition of a person most knowledgeable on medical billing. This can be particularly useful in those jurisdictions where the write-downs and discounts vary widely.