Neutralize the Collateral Source Rule

Reducing Your Client's Medical Expense Exposure

By John R. Crawford, Brent Tunis, and Beth Chapman

Keep reasonable medical expenses *reasonable* with these pointers, even in jurisdictions where the collateral source rule applies.

If a plaintiff can establish that a defendant negligently caused personal injuries, the plaintiff is allowed to recover reasonable medical expenses. But what are reasonable medical expenses? This article will explore that question and offer strategies on how to make sure that defendants only pay reasonable, and not artificially inflated, amounts.

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Plaintiff's Right to Award of Reasonable Medical Expenses

A plaintiff who is injured by the negligence of another "is entitled to recover damages for past or prospective… *reasonable medical* and other expenses" Restatement (Second) of Torts §924(c) (1979) (emphasis added). "This includes *reasonable expenses* for physicians, for nurses or hospitalization and for medical supplies." *Id.*, cmt. f (emphasis added). How courts have interpreted what constitutes the "reasonable expenses" related to medical care varies across jurisdictions. "States have generally adopted one of three basic approaches to how much of a medical expense can be introduced into evidence and how much can be recovered." Gary Wickert, *Medical Expenses, Insurance Write-offs, and the Collateral Source Rule*, Matthiesen, Wickert & Lehrer, S.C., 3 (2018), **https://www.mwl-law.com**. These three approaches are: (i) the actual amount paid; (ii) the amount billed; and (iii) the reasonable value. *Id.* Under the actual amount paid approach, a plaintiff's recovery is limited to the amount paid to a medical provider, by insurance or otherwise. *Id.* "Jurisdictions that limit recoverable damages to the actual amount paid generally have done so in accordance with statutory schemes designed to prevent double recovery." Ty A. Patton, *Common Sense and the Common Law, They're Not As Common As They Used to Be: A Critique of the Kansas Supreme Court's New Application of the Collateral Source Rule* [*Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205], 50 Washburn L.J. 537, 543 (2011).

Under the second approach, the amount-billed approach, recovery is allowed of the full, undiscounted medical bills, including write-off amounts, but only if the plaintiff

paid consideration for the insurance benefits. Wickert, *supra*, at 3. These "jurisdictions reason that the write-off itself is as much a benefit of an insurance agreement as a payment made by an insurance provider." Patton, *supra*, at 543.

Under the third approach, the reasonable-value approach, plaintiffs may recover the "reasonable value" of their medical expenses. These courts have predictably interpreted this phrase differently, with some jurisdictions limiting reasonable value to the amount actually paid, others permitting full recovery of billed charges, and other jurisdictions splitting the difference or allowing the jury to determine reasonable value after examining all relevant evidence. *Id.*

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For example, in Minnesota, a reasonable-value jurisdiction, the measure of damages for past medical expenses is simply "the reasonable value of medical services received." *Swanson v. Brewster*, 784 N.W.2d 264, 282–83 (Minn. 2010); *see also* Minnesota Jury Instruction 90.10 ("[t]he term 'damages' means a sum of money that will fairly and adequately compensate a person who has been (injured) (harmed)….").

In Wisconsin, the "proper measure of damages for medical treatment rendered in a personal injury action is the reasonable value of the medical treatment reasonably required by the injury." *Koffman v. Leichtfuss*, 630 N.W.2d 201, 201 (Wis. 2001). Wisconsin has also codified a rebuttable presumption that "[b]illing statements or invoices… are presumed to state the reasonable value of the health care services provided…." Wis. Stat. §908.03(6m)(bm). A litigant "attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources." *Id. See also* Wisconsin Jury Instruction 1756 ("You will insert as your answer to this [question] the sum of money you find has reasonably and necessarily been incurred… for the care of the injuries sustained by [plaintiff]."). Wisconsin Jury Instruction 1756 then uses a different, second paragraph, depending on whether any evidence was introduced disputing the value, reasonableness, or necessity of health care services. *Id.* Where such evidence is introduced, the instruction provides: "[t]he party challenging the [value of plaintiff's] past health care services has the burden to prove they were not [reasonable in amount]." *Id.*

A substantial number of courts in other jurisdictions have held "that the amount of the bill is not, of itself, proof of the reasonable value of the services, and that there must be other evidence showing reasonable value before the bills can be considered in assessing damages." 2 Stein on Personal Injury Damages Treatise §7:4 (3d ed.). "[O]ther courts hold that lay testimony in conjunction with medical testimony is sufficient evidence of the reasonableness of medical expenses." *Id.*

> [O]ther courts take the position that the amount of the bill, at least a bill that appears reasonable and furnishes no evidence of collusion or bad faith, constitutes a prima facie showing of the reasonableness of the amount, thereby placing the burden of showing the unreasonableness of the expense upon the defendant.

Id. A final group of courts appear to have assumed medical expenses were reasonable. *Id.*

Some states have enacted statutes providing that "proof that medical, hospital, or doctor bills were incurred because of an injury constitutes prima facie evidence that the bills were necessary and reasonable." *Id.* Finally, other states have enacted statutes providing that "medical bills are [either] presumptively reasonable or simply that such bills are admissible as evidence of the fair and reasonable charges for such services." *Id.*

Collateral Source Rule

Where a plaintiff receives compensation or has expenses paid by an individual or entity other than the tortfeasor, the plaintiff has received a "collateral source." At common law, "[p]ayments made or benefits conferred by other sources… do not have the effect of reducing the recovery against the defendant." Restatement (Second) of Torts §920, cmt. b (1979). The practical effect of the modern collateral source rule is that these collateral benefits are precluded from being placed into evidence or shown to the jury.

The application of the collateral source rule varies across jurisdictions and has been modified in many states by legislation. "The majority of the statutes prohibit recovery of damages that have been paid by a collateral source. However, these statutes generally exclude collateral payments for which there are subrogation rights, to ensure that a plaintiff is not undercompensated." Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 Def. Couns. J. 210 (2009).

For example, Minnesota applied the collateral source rule until 1986, when the Minnesota legislature passed the collateral source statute in order to prevent some double recoveries by plaintiffs. *Swanson v. Brewster*, 784 N.W.2d 264 (Minn. 2010). Minn. Stat. §548.251 altered the common law rule and provides that a plaintiff cannot recover damages from a defendant if the plaintiff has already received compensation from collateral sources. In practice, Minnesota's collateral source statute also functions as a rule of evidence, prohibiting litigants from informing the jury of the existence of collateral sources or any future benefits. Minn. Stat. §548.251, subd. 5.

Minnesota prevents double recovery through post-trial motion practice for a reduction of collateral source payments. Minn. Stat. §548.251, subds. 2, 3; *see also Swanson v. Brewster*, 784 N.W.2d at 269 ("Procedurally, the statute allows a party to file a motion requesting a determination of collateral sources after a jury returns a verdict awarding damages to a plaintiff… The collateral-source statute directs the court to reduce the award by the amounts determined to be collateral sources.") In *Swanson v. Brewster*, the Supreme Court of Min-

nesota determined, under the Minnesota collateral source statute, that "negotiated-discount amounts—amounts a plaintiff is billed by a medical provider but does not pay because the plaintiff's insurance provider negotiated a discount on the plaintiff's behalf—are 'collateral sources.'" *Id.* at 282.

In contrast, Wisconsin adheres to the common law collateral source rule. Wisconsin formally adopted the collateral source rule in 1921 in *Cunnien v. Superior Iron Works*, 184 N.W. 767 (1921). "Under the collateral source rule a plaintiff's recovery cannot be reduced by payments or benefits from other sources." *Koffman v. Leichtfuss*, 630 N.W.2d 201, 209 (Wis. 2001). Functionally, the Wisconsin collateral source rule prevents the jury from learning about collateral source payments, even when offered supposedly to assist the jury in determining the reasonable value of the medical treatment rendered, so that the existence of collateral source payments will not influence the jury. *Leitinger v. DBart, Inc.*, 736 N.W.2d 1 (Wis. 2007).

Prevailing Plaintiff Strategy

A given in personal injury litigation is that plaintiffs' lawyers will employ any and all tactics that will increase the potential verdict for their clients. It goes without saying that "[m]aximum recovery for the damages sustained by the plaintiff is the key in almost all personal injury litigation." 59 Am. Jur. Trials 395 (Oct. 2020 Update). In many jurisdictions, plaintiffs' attorneys only offer into evidence the amounts billed, not the amounts paid under a fee schedule, in an attempt to maximize a potential jury award and gain a windfall for their clients.

However, plaintiffs' introduction of the full billed amounts by medical providers is in stark contrast to the reality of today's medical care and billing system: "[t]he complexities of health care pricing structures make it difficult to determine whether the amount paid, the amount billed, or an amount in between represents the reasonable value of medical services." *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009). As is evident from the typical explanation of benefits form, or EOB, "providers generally do not receive anything close to the full billed amount for medical care provided." Amanda Heitz & Travis Wheeler, *A Change in Traditional Approach, Challenging Billed Medical Expenses*, 56 For The Defense (November 2014) at 84. "As more medical providers are paid under fixed payment arrangements… hospital charge structures have become less correlated to hospital operations and actual payments." The Lewin Group, *A Study of Hospital Charge Setting Practices*, at i (2005). Hospital executives reportedly admit that most charges have "no relation to anything, and certainly not to cost." Mark A. Hall & Carl E. Schneider, *Patients As Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L. Rev. 643, 665 (2008).

In fact, on average, hospitals end up receiving only approximately 35 to 40 percent of their billed charges. *Id.* (citing Steven Brill, *Special Report: Why Medical Bills Are Killing Us*, Time Magazine, Mar. 4, 2013, at 24 (reporting 35 percent)); *see also* Mark A. Hall & Carl E. Schneider, *Patients As Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L. Rev. 643, 663 (2008) (reporting that "insurers generally pay about 40 percent of billed charges and that hospitals accept such amounts in full satisfaction of the billed charges.") These averages are in line with a recent case that the authors of this article defended. In that case, Medicare only paid 38.03 percent of the face amount of the bills.

Accordingly, it follows that awarding a plaintiff the full amount of billed charges creates a significant windfall for plaintiffs. Despite this, "[i]n most jurisdictions, no rule or case law exists that will conclusively exclude the full billed amount," Heitz & Wheeler, *supra*.

Strategies for Defense Attorneys to Reduce Exposure for Medical Expenses

The ability to reduce a plaintiffs' claim for medical expenses is important for many reasons. In some cases, the medical expense claim can make up a majority of the defendant's exposure. In others, such a reduction is important because jury awards for noneconomic damages are often highly correlated to the award for economic damages. "While no single study has explored the correlation between pain-and-suffering damages and medical costs, several studies have shown positive correlation between pain-and-suffering damages and economic damages…." Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: a Critique of the Current Approaches and a Preliminary Proposal for Change*, Northwestern University Law Review 100, 112 (2006).

As set forth above, which strategies, arguments, and evidence that courts will allow are largely constrained by jurisdiction. In jurisdictions that have adopted the "amount paid" approach, defense attorneys are likely well-versed in introducing the amounts paid into evidence. The focus of this article is on jurisdictions that have either adopted the amount-billed approach or the reasonable-value approach, which has been interpreted to be synonymous with the face value of bills. Of these jurisdictions, the approach will vary somewhat, depending on the various evidentiary presumptions and statutes at play. The goal remains the same: persuade the jury that the medical providers who treated the plaintiff will accept much less than the face value of the bills in full satisfaction, and as a corollary, the plaintiff's true medical expenses are actually much less than will be suggested by the plaintiff. Employing the strategy recommended herein will

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likely have a secondary benefit in that "arguing [and introducing evidence and testimony regarding] reasonableness tends to reveal the weaknesses in the evidentiary reliability of the billed charges. Oftentimes, plaintiffs have no evidence to support their claims that the billed amount represents the reasonable expenses of care…." Heitz & Wheeler, *supra*, at 87.

The use of a trial deposition will also eliminate the possibility of an errant reference by the record custodian at trial that could open the door for a motion for mistrial.

Reducing a client's exposure to medical expenses essentially involves the following five-step process:

1) **Collection:** Collect the necessary information, the medical bills, and the amount accepted as payment in full.
2) **Organization:** Organize the data into a spreadsheet.
3) **Foundation:** Through an affidavit or deposition, establish the foundation for the admission of the data via testimony and the spreadsheet.
4) **Admission:** By stipulation, self-authentication (by statute or evidentiary rule), or trial testimony of the record custodian, offer the testimony and spreadsheet into evidence.
5) **Argument of Counsel:** Through effective argument of counsel, convince the jury that the reasonable value of the plaintiff's medical expenses is significantly lower than the face value of the charges.

Collection

Medical bills are of course routinely gathered or exchanged during the discovery phase. However, the defense must use a more thorough strategy to set up the argument at trial for a reduction. First, obtain by subpoena the amounts actually paid by the plaintiff's health insurer. Generally, the subpoena should be served on the record custodian or account representative of the institutions where the plaintiff was treated, requesting the records as to the actual amounts accepted as payment in full. The subpoena should request the following information regarding the plaintiff's treatment and the provider's fee schedules:

- The dates for each treatment or medication in a given date range;
- A description of each procedure or medication;
- The amount billed for each treatment or medication;
- The amount that was accepted in full satisfaction for a charge or series of charges; and
- Copies of fee schedules and other agreements between the provider and applicable insurer.

An excerpt from materials produced by the record custodian of one provider in response to a subpoena in a personal injury lawsuit in Wisconsin (Exhibit A-1 available **here**) contains all necessary data to prepare a trial exhibit. It includes dates of service, billing codes, charges, insurance adjustments, and insurance payments. For example, in the first series of entries, on January 3, 2017, the face value of plaintiff's charges totaled $5,750.00. After insurance adjustments, Medicare paid $905.46, or 15.75 percent of the face value. In the Wisconsin case, the plaintiff was charged a total of $116,864.04 over the course of his treatments at this provider. But Medicare only paid $44,446.40, or 38 percent in full satisfaction of the charges.

Organization

Once complete data similar to that found in Exhibit A-1 is received, that data must be organized and put into a format that is both (a) understandable to the jury and (b) admissible in the applicable jurisdiction. This process involves transposing the data into a spreadsheet prepared by defense counsel that provides the following information:

- The dates for each treatment or medication in a given date range;
- A description of each procedure or medication;
- The amount billed for each treatment or medication; and
- The amount that would be accepted as payment in full for each treatment or medication.

Exhibit A-2 (available **here**) contains a portion of the spreadsheet prepared using the data from Exhibit A-1.

The spreadsheet contains largely the same information as the medical bill provided in response to the subpoena. The notable difference is the last column of Exhibit A-2, wherein it is critical to designate the amounts that were accepted as payment in full as an "amount, which *would be* accepted as payment in full."

In order to transfer the desired information and data from the billing record (Exhibit A-1) to the spreadsheet (Exhibit A-2), the authors first obtained a searchable PDF of the billing record. Then, Adobe Acrobat DC was used to copy the data from the "AD Procedure Description" column for each admission date to a Word document. The data in the Word document was then pasted into an Excel spreadsheet. After the amounts in the column entitled "Charges" were entered, the actual payments made by Medicare and the State of Wisconsin were added up and entered into the final column identified as the amount that would be accepted as payment in full. Finally, the date column was completed by simply clicking in the lower right-hand corner of the Excel spreadsheet and dragging to copy the date into subsequent rows.

Laying Foundation

Once the spreadsheet is completed, defense counsel should establish the foundation for the amounts in the spreadsheet as well the foundation for the admission of the spreadsheet as an exhibit. This can be accomplished either by an affidavit or the deposition of the record custodian. If the record custodian is willing to sign an affidavit in lieu of a discovery deposition, the affidavit should include in part the affirmations found in the example available **here**.

It is important to be familiar with the collateral source rule in your particular jurisdiction in order to avoid possible exclusion on those grounds. To that end, as discussed above, any reference to actual payment of any bills must be avoided in the spreadsheet, the affidavit of the representative, and the testimony of the representative, if applicable.

Admission

The final step to getting the information in the spreadsheet and the spreadsheet itself into evidence at trial is either to obtain a stipulation from plaintiff's counsel that the spreadsheet may be admitted at trial or secure trial testimony of the record custodian with a subpoena. The record custodian's testimony can be either live or through a trial deposition. Since it is important in most jurisdictions that there be no mention of collateral sources or the actual payment of the bills, a trial deposition is probably the safer route. It will allow defense counsel to repeat questions as necessary to elicit an acknowledgment from the record custodian that the amounts shown in the spreadsheet represent the amount that the provider would accept as payment in full without mentioning that there was actual payment of those amounts. The use of a trial deposition will also eliminate the possibility of an errant reference by the record custodian at trial that could open the door for a motion for mistrial. *See, e.g.*, *Grogan v. Nizam*, 66 A.D.3d 734 (N.Y. App. Term 2d 2009) (upholding order for mistrial where the plaintiff's expert made one reference to insurance and the court gave curative instruction).

Serving a subpoena on a provider's record custodian works best when a plaintiff has received care from one provider or primarily from one provider. But in cases where a plaintiff has been treated at numerous providers and with numerous specialists, it will likely be more efficient to serve a subpoena on a record custodian with the plaintiff's health insurer.

While there may likely be pushback and objections from opposing counsel, the information in the spreadsheet should be admissible. *See, e.g.*, *Law v. Griffith*, 457 Mass. 349, 360, 930 N.E.2d 126, 135 (2010). The *Law* court stated:

> we conclude that a reasonable way to implement the second sentence of §79G is to permit the defendant to call a representative of the particular medical provider whose bill the defendant wishes to challenge, and to elicit evidence concerning the provider's stated charges and the range of payments that the provider accepts for the particular type or types of services the plaintiff received.

Id. "With its emphasis on range of payments, such evidence could assist the jury in identifying… what might be a fair and reasonable charge for the services at issue." *Id.* at 360–61.

Argument of Counsel at Trial

Once the spreadsheet and any testimony has been introduced into evidence, everything must be brought together with an effective closing argument. On the subject of damages, the argument should be made in some form that the jury should award the amounts as set forth in the spreadsheet rather than the face amount of the medical bills. Support for this argument can be made during argument by noting that the plaintiff is entitled only to the recovery of the reasonable value of medical services. *See* Heitz & Wheeler, *supra*, at 86. Emphasize that any damages award rendered "must be fair and reasonable to both the plaintiff *and* the defendant." *See* C. Barry Montgomery & Bradley C. Nahrstadt, *Crafting a Successful Closing Argument*, 51 For The Defense 9 (Sept. 2009). A good starting point is likely the applicable jury instruction on the issue of medical expenses. Emphasize to the jury that the law in your jurisdiction requires that the plaintiff be *compensated*, not rewarded, and that the standard is the reasonable value of the plaintiff's medical expenses. Point out that the defense has provided evidence that the entity to whom the bills are owed will accept significantly less for those charges and that the plaintiff has offered no evidence to the contrary.

> As a general proposition of damages law, a plaintiff must prove the reasonableness of claimed past medical expenses… Therefore, arguing reasonableness is consistent with existing burdens of proof and established law, even where there is otherwise unhelpful precedent on the billed versus paid issue.

Heitz & Wheeler, *supra*, at 86.

Finally, in addition to the above arguments, defense counsel should consider using an analogy to drive home the point that reasonable medical expenses should be the amount that the provider would accept as payment in full. The perfect analogy for this argument is the purchase of a car. Counsel can pose the following questions to the jury. How would one determine what the reasonable value is of a car on a dealer's lot? Would it be the amount shown on the car's sticker? Would it be the amount that the dealership agreed to accept as payment in full from the customer? In other words, would the reasonable value of the car be the sticker price that no one is willing to pay, or would it be the sale price that a buyer was willing to pay and the seller was willing to accept? The answer is obvious.

In order to reduce a defendant's exposure to medical expenses, defense counsel must collect and organize evidence that will convince a jury to award only those amounts a medical provider will accept as payment in full, not the artificially inflated amounts that appear on the medical bill before they are discounted under the appropriate fee schedule.

Conclusion

In order to reduce a defendant's exposure to medical expenses, defense counsel must collect and organize evidence that will convince a jury to award only those amounts a medical provider will accept as payment in full, not the artificially inflated amounts that appear on the medical bill before they are discounted under the appropriate fee schedule. To accomplish that objective, defense counsel need to obtain during discovery the actual amounts accepted as payment in full, organize that information in a trial exhibit, and take the necessary steps for the admission of that exhibit at trial.FD