



Accuracy in Damages

We support HB 379 by Rep. Hood and SB 1128 by Sen. Richter that ensures the evidence the jury sees reflects the amount the health care provider was actually paid for his or her treatment of the claimant. We also support reform that allows a defendant to provide a jury with evidence of unnecessary medical treatments.

Issue/Background

The greatest element of economic damages in a personal injury lawsuit is often the cost of medical treatment. In Florida, generally only the *billed* amount of medical treatment is admissible as evidence in trials. This is due to Section 768.76, Florida Statutes, which prohibits the introduction of evidence regarding payments for medical treatment made by collateral sources such as private health insurers.

The Problems

In Florida, there are three main problems that prevent accuracy in damages.

Billed Charges versus Paid Charges

Anyone who's gone to the doctor wouldn't be surprised to hear that the amount a medical provider bills for services is usually more – sometimes much more – than the amount the provider is actually willing to accept in payment.

But in Florida, generally the jury only sees the amount billed when determining damages. While judges can reduce or set-off the award based on amounts paid by other sources like health insurance, problems still exist.

First, using billed charges hides from the jury exactly how much the claimant has actually been damaged. Unfortunately, the inflated amount creates a false impression that misleads juries as they determine total damages. Second, because the jury awards damages for future medical care after seeing those inflated past costs, the future care award is oftentimes inflated as well. Here, though, the judge is not allowed to reduce the award for bills not yet paid.

Letters of Protection

A Letter of Protection is an agreement between the claimant's lawyer and the medical provider, where the provider agrees not to collect until the lawsuit is over, so the "paid" amount the provider would have accepted is not available to the judge for consideration.

Since judges are not allowed to reduce an award for medical bills not yet paid, a Letter of Protection hides these bills from the judge's reach, inflating the total damages.

Medically Unnecessary Treatment

Under Florida law, if a defendant is liable for causing the claimant's injuries, that defendant is also liable for a treating provider's alleged medical malpractice that aggravated the claimant's injuries. This principle entitles the claimant to a so-called "Stuart instruction" that directs the jury to award additional damages resulting from

negligent, unskillful, or unsuccessful medical care.

So the defendant is unfairly faced with a no-win situation. If the defendant doesn't challenge a medically unnecessary treatment, they pay for it. If the defendant does challenge it, the court considers the defendant to be suggesting an act of medical malpractice. The judge then issues a "Stuart instruction" to the jury that they include those medically unnecessary treatment costs as damages, and the defendant still pays for it.

The Solution

Since the claimant owes a treating medical provider only what was actually paid, the claimant's compensation for those damages should be the same, rather than amounts that no one paid or ever will pay.

To achieve that result, the legislation directs that:

- Juries see the amounts medical care providers actually accepted to provide care, whether from the claimant, private health insurance, or a government program like Medicare and Medicaid. Other than any outstanding copays or deductibles, any difference between the billed and paid amounts is not admissible or recoverable. In the case of a lien or claim of subrogation, the amount of the lien or subrogation claim plus the copay or deductible is the maximum amount recoverable and admissible.
- When there is a medical bill not yet paid, including as a result of a Letter of Protection, either party may present to the jury evidence of:
 - the amount billed by the provider;
 - the usual and customary charge accepted by area providers; and
 - the amount the provider sold the Letter for to a financing company.
- If the defendant proves by a preponderance of the evidence that treatment rendered was not medically necessary, the defendant is not liable for those damages resulting from the medically unnecessary treatment.

Safeguards

To protect the rights of medical providers, the legislation also:

- Prohibits the discovery and admissibility of individual reimbursement contracts between providers and insurers other than those applicable to the claimant, and specifically states that the legislation has no other effect regarding compensation paid to providers.
- Specifically states that any determination of medical necessity may not be used to recover payments already made to the provider, or in any malpractice, disciplinary or regulatory action against the provider.
- Applies the force of the bill only to actions arising on or after the effective date.