FLORIDA Justice Reform INSTITUTE

Truth In Damages: Personal Injury Awards Should Not Be Based On Inflated Medical Bills

THE ISSUE

The goal of tort law is to make an individual whole by compensating the individual for the injury he or she has suffered. It is thus necessary and appropriate to require the defendant to reimburse the plaintiff for medical expenses incurred as a result of the defendant's negligence. However, in Florida defendants often are required to pay two, three, even four times the amount that the plaintiff – or the plaintiff's insurer – actually paid or will pay for medical care. These additional amounts are known as "phantom damages."

Phantom damages arise because the amount billed by the health care provider is generally less that the amount actually paid by the plaintiff or the plaintiff's insurer for the medical treatment. In other words, the amount billed by the provider is akin to the "sticker price" of a new car: much like a car buyer seldom pays the full sticker price for the car, a plaintiff seldom pays the full bull for the medical treatment. The reason is that, for many years, healthcare providers have not received payment based on their list prices; instead, providers are paid based on either payment schedules set by Medicare rules or negotiated rates with managed care plans. Even uninsured patients seldom pay list prices, as healthcare providers have established indigent care programs that provide subsidies or discounts to low-income patients and write off an increasing amount of bills. Unfortunately, under current Florida law defendants often must pay the full "sticker price" of plaintiffs' medical bills even though the plaintiff has not been – and never will be – required to pay this inflated amount.

FLORIDA LAW

Florida's collateral source law currently prohibits introduction at trial of the amount actually paid by the plaintiff or the plaintiff's private insurer for medical treatment; instead, only the gross amount of the medical bills may be introduced.[1] However, the collateral source law also makes the plaintiff's award subject to a post-verdict reduction by the amount discounted or written off the health care provider.[2] For example, if the plaintiff was billed $10,000 for medical treatment but only paid $6,000 in full satisfaction of the bill, the court is required to reduce the award by $4,000.

There are several problems with the current collateral source law. First, if a plaintiff is awarded compensation for future medical expenses, the amount of that compensation is calculated based on the "sticker price" of the future treatment and not on the price that the plaintiff would actually have to pay. And – because the plaintiff has not received any discount or third-party payment for such future treatment – there is nothing against which to reduce an award of future expenses. Thus, if the sticker price of the plaintiff's future medical treatment is $10,000, the plaintiff will be awarded the entire $10,000 even though the actual price of such treatment would be far less.

The second problem is the use of "letters of protection" ("LOPs") to defer payment of medical bills until the conclusion of litigation. An LOP is an agreement through which a health care provider agrees to suspend efforts to collect medical bills from a plaintiff during the pendency of the plaintiff's lawsuit. In exchange, the healthcare provider receives a right to payment of its bills from any amount awarded to the plaintiff as a result of the suit. Traditionally, LOPs provided a means for those who are uninsured or without financial resources to promptly receive medical care while litigation was pending. In Florida, however, LOPs are now being used to circumvent the restrictions on phantom damages. Since LOPs

[1] Fla. Stat. § 768.76 *See Nationwide v. Harrell*, 53 So. 3d 1084 (Fla. 1st DCA 2010). However, if the plaintiff's bills were paid by Medicare or Medicaid, only the amount actually paid can be introduced. *See, e.g., Cooperative Leasing, Inc. v. Johnson*, 872 So. 2d 956 (Fla. 2d DCA 2004)

[2] *Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005).

only defer payment of medical bills, the plaintiff technically has not benefited from any discount or third-party payment at the time judgment is entered. Thus – as with future medical expenses – there is nothing against which to reduce an award and the defendant must pay the entire "sticker price" of plaintiff's medical bills.

The third problem is that prohibiting introduction of the actual amount of medical expenses incurred by the plaintiff often leads to juries awarding inflated damages for noneconomic injuries that are more subjective and difficult to estimate, e.g., pain and suffering. For example, some jurors base the amount of damages for pain and suffering on the amount of medical expenses incurred by the plaintiff.[3] Consequently, introduction of the amount actually billed instead of the amount actually paid will still result in phantom damages despite the existence of a post-trial setoff.

The fourth problem is that, even if the amount actually billed and/or paid for the plaintiff's medical treatment is reasonable, the treatment was unnecessary and provided merely to "run up the bill." For example, in one recent case the appellate court concluded that the defendant remains responsible for the full amount of the medical costs *even if aspects of treatment were unnecessary* because it was foreseeable that, after an accident, some doctors might recommend that patients undertake treatment that is not needed or subpar.[4]

SOLUTION

To help eliminate phantom damages, Fla. Stat. § 768.76 should be amended as follows:

(1) Actual amounts paid for medical expenses are admissible at trial;
(2) Amounts billed for medical expenses that do not reflect amounts accepted in full satisfaction of the account are inadmissible at trial;
(3) When a health care provider defers payment of medical bills through a letter of protection or other means, the provider may only recover the usual and customary amount accepted as payment for the services provided; and
(4) Evidence regarding the necessity of medical treatment is admissible at trial, and expenses for unnecessary medical treatment is not recoverable.

[3] *See* Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 253-54 (1993).
[4] *See Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010).