THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL QUARTERLY

Civil Practice and Procedure

Donald Patrick Eckler and Matthew A. Reddy
Pretzel & Stouffer, Chartered, Chicago

Best Laid Plans: The Continuing Uncertainty in Admissibility of Medical Bills

More than six years after answering a number of outstanding questions on the operation of the collateral source rule in cases in which the plaintiff's medical bills were settled for less than the billed amount, many practitioners continue to have misunderstandings of the Illinois Supreme Court's ruling in *Wills v. Foster*, 229 Ill. 2d 393 (2008). Practitioners may take solace in the fact that at times the judiciary has also misapplied the law surrounding this complex topic. "The Third District oversimplified [the] court's holding in *Arthur* as 'simply give the jury the initial bill and move on with the evidence.'" *Wills*, 229 Ill. 2d at 400. As will be detailed in this article, the practice of submitting the entire billed amount to the jury, based only on the foundation of partial payment, is a misapplication of the law. The defendant may choose to stipulate to the value of the medical bills or require that the plaintiff prove the reasonable value of the medical services rendered. Valid strategic reasons may exist for either choice. This article is intended to illuminate both options in a practical manner.

Arthur v. Catour: Collateral Source and Reasonable Value

Presented with the question of whether the plaintiff may present the amount of medical bills as medical expenses in a case, or whether the plaintiff shall be limited to presenting only the amount paid, the Illinois Supreme Court held that the plaintiff may present to the jury the amount that the plaintiff's health-care providers initially billed for services rendered if a sufficient foundation is laid with regard to the reasonable value of the medical services provided. *Arthur v. Catour*, 216 Ill. 2d 72, 74 (2005). In analyzing the certified question, the court noted that the dual nature of the collateral source rule is evident:

> The traditional approach is to treat [the collateral source rule] as having substantive *and* evidentiary components. The substantive component is a rule of damages. This component bars a defendant from reducing the plaintiff's compensatory award by the amount the plaintiff received from a collateral source. The evidentiary component bars admission of evidence of the existence of the collateral source or the receipt of evidence.

Arthur, 216 Ill. 2d at 79–80 (emphasis added) (quoting J. Fischer, Understanding Remedies § 12(a), at 77 (1999)).

"The collateral source rule protects collateral payments made to or benefits conferred on the plaintiff by denying the defendant any corresponding offset or credit. Such collateral benefits do not reduce the defendant's tort liability, even though they reduce the plaintiff's loss." *Id.* at 78. Having ruled that the plaintiff is entitled to present the entire billed amount to the jury, the court addressed the certified question. The question presented was one of proof rather than entitlement, *i.e.*, a question involving the evidentiary component of the collateral source rule and not a substantive rule

of damages. *Id.* at 81. "Plaintiff of course, is *entitled* to recover as compensatory damages the reasonable expense of necessary medical care resulting from defendants' negligence, *if proved*." *Id.* (emphasis added).

The question of proof concerns the rules regarding the admissibility of evidence of medical expenses. The long-standing rule is that to recover for medical expenses, the plaintiff must prove that he or she has become liable to pay a medical bill, that he or she necessarily incurred the medical expenses because of injuries resulting from the defendant's negligence, and that the charges were reasonable for services of that nature. *Id.* (citing *N. Chi. St. Ry. Co. v. Cotton*, 140 Ill. 486, 498 (1892) and *Wicks v. Cuneo-Henneberry Co.*, 319 Ill. 344, 349 (1925)).

The question addressed by the court in *Arthur* concerned not only whether the plaintiff was entitled to recover the total billed amount, but importantly what foundational evidence was necessary to submit the total billed amount to the jury. The majority states, "[t]he only relevant question in the litigation between plaintiff and defendants is the reasonable value of the services rendered. The certified question merely asks whether certain evidence is admissible in such cases." *Id.* at 81. The court reiterated the rule that the plaintiff must prove that the charges for services were reasonable.

Evidence of the amount charged alone does not indicate reasonableness. *Victory Mem'l Hosp. v. Rice*, 143 Ill. App. 3d 621, 624 (2d Dist. 1986). When evidence is admitted, through testimony or otherwise, that a medical bill was for treatment rendered and that the bill has been paid, the bill is *prima facie* reasonable. *Flynn v. Cusentino*, 59 Ill. App. 3d 262, 266 (3d Dist. 1978). The *prima facie* reasonableness of a paid bill can be traced to the enduring principle that the free and voluntary payment of a charge for a service by a consumer is presumptive evidence of the reasonable or fair market value of that service. *Wicks*, 319 Ill. at 349. The premise is that a consumer will not willingly pay an unreasonable or unusual charge for a service. *Id.*

Wicks, decided in 1925, involved a three dollar payment to a medical provider for services rendered. The Illinois Supreme Court restated the established principle that payment of a physician's bill is *prima facie* evidence of its reasonableness. *Id.* at 349. In *Wicks*, the physician charged three dollars and was paid the three dollars. Rarely today will a practitioner encounter such facts. Our country continues to move in a direction where insurance, private or government-run, is ubiquitous. Due to the clout of such programs, and the resulting contractual agreements they have with medical providers, bills are typically satisfied at a deeply discounted rate. "[T]he medical marketplace has drastically changed. For example, today, the discounting of medical bills is a common practice in the health-care field." *Arthur*, 216 Ill. 2d at 99 (citing *Mitchell v. Hayes*, 72 F. Supp. 2d 635, 637 (W.D. Va 1999)). It is within this framework that the defense attorney must familiarize himself or herself with the foundational requirements for the introduction of potentially exorbitant medical bills.

In addressing the question of proof, the court in *Arthur* determined whether certain evidence is admissible when determining the reasonable value of services rendered. Unlike in *Wicks*, many of the charges for the healthcare services rendered to Joyce Arthur were discounted due to contractual agreements Blue Cross had with the plaintiff's health-care providers. Applying the principles outlined earlier in this article, the court held:

> [P]laintiff cannot make a *prima facie* case of reasonableness based on the bill alone, because she cannot truthfully testify that the *total billed amount has been paid*. Instead, she must establish the reasonable cost by other means—just as she would have to do if the services had not yet been rendered, *e.g.*, in the case of required future surgery, or if the bill remains unpaid.

Arthur, 216 Ill. 2d at 83 (emphasis added).

Given the presence of significant discounts and write-offs, the court in *Arthur* necessarily distinguished between the amount paid and the fact that a bill had been paid or satisfied. The above-stated premise that a consumer will not willingly pay an unreasonable or unusual charge for a service cannot sensibly be applied to suggest that a payment of a fraction of a charged amount renders the charged amount reasonable. In the common scenario where the bill is satisfied for considerably less than the total billed amount, logic would dictate that only the amount paid in satisfaction of the bill is the fair-market value of the service. To assume otherwise ignores the premise of the rule, as well as the changing structure of medical billing in the presence of insurance, both public and private.

Dissent of Chief Justice McMorrow in *Arthur v. Catour*

Chief Justice McMorrow criticized the majority's analysis as being unworkable. *Id.* at 97. In her dissent, she cites many of the same cases as the majority for the proposition that a paid bill constitutes *prima facie* evidence that a bill is reasonable. *Id.* at 88–89. But, she cites these cases for the contrary proposition that evidence of a paid bill, whether paid in whole or in part, is sufficient foundation for the admission of the charged amount.

Further, she opines that the rule that a paid bill constitutes *prima facie* evidence that a bill is reasonable is premised upon efficient judicial administration. *Id.* at 89. She suggests that "'[t]o require otherwise would unnecessarily inconvenience both the parties, the court, and the public, by requiring doctors and other medical or hospital personnel to leave their normal duties to testify to a matter which should otherwise go undisputed.'" *Id.* at 90. (quoting *Flynn*, 59 Ill. App. 3d at 266). Chief Justice McMorrow opines that the majority opinion's unworkable analytical framework compromises the traditional protections afforded by the collateral source rule and might necessitate a trial within a trial on the question of the reasonableness of the plaintiff's medical expenses. *Id.* at 87.

Chief Justice McMorrow also points out questions left unanswered by the majority opinion. For instance, the majority held that the plaintiff must establish the reasonable cost of her medical expenses by other means, but those other means were left unspecified. *Id.* at 95-96. "Furthermore, the majority would allow defendants to 'challenge plaintiff's proof on cross-examination and to offer their own evidence pertaining to the reasonableness of the charges,' but provides no insight as to what this evidence might be." *Id.* at 96. In her dissent, the Chief Justice envisioned a line of questioning where the defendant would attempt to proffer evidence that the bill had been satisfied for less than the billed amount, potentially alerting the jury to the presence of insurance. *Id.* at 98. "Allowing evidence of both the billed and discounted amounts compromises the collateral source rule, confuses the jury, and potentially prejudices both parties in a case." *Id.*

Wills v. Foster

As predicted, following the decision in *Arthur*, "disagreement exist[ed] in the courts over whether the defense may introduce evidence of the paid amount to assist the jury in determining reasonable value." *Wills*, 229 Ill. 2d at 415. The confusion had stemmed from the court's holding in *Arthur* that the defendants were "free to challenge a plaintiff's proof of reasonableness on cross-examination and to introduce their own evidence of reasonableness." *Id*. at 416. The court in *Wills* addressed Chief Justice McMorrow's criticism by holding that the defendants may not introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the collateral source rule. *Id*. at 418. The court reiterated, however, that the defendants are free to cross-examine any witnesses that the plaintiff might call to establish reasonableness, and the defense is also free to call its own witnesses to testify that the billed amounts do not

reflect the reasonable value of the services rendered. *Id.* Having addressed the question of what the defendant may do to dispute the reasonableness of a medical bill, the court focused its attention on what foundation the plaintiff must lay for the introduction of medical bills into evidence.

As outlined previously, the substantive rule of damages component of the collateral source rule "bars a defendant from reducing the plaintiff's compensatory award by the amount the plaintiff received from the collateral source." *Arthur*, 216 Ill. 2d at 80. In the *Wills* case, the plaintiff's medical bills arising out of the accident totaled $80,163.47. *Wills*, 229 Ill. 2d at 395. However, the amount actually paid by Medicaid and Medicare, in full settlement of the bills, was $19,005.50. *Id*. at 395–96. The defense argued that the collateral source rule did not apply to payments made by Medicaid and Medicare given the language in *Arthur* and the holding of *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353 (1979). The defense contended that the rationale of the collateral source rule would not apply to the plaintiff who was not required to bargain for her benefits, but received them free of charge because of her status. *Wills*, 229 Ill. 2d at 397. Therefore, the defense moved *in limine* to limit the evidence to only the amount of the bills that had been paid.

"The position defendant took in this case was not that the amounts billed were not reasonable, but that the written-off amount was not recoverable as damages as a matter of law." *Id*. at 419. The court in *Wills* considered three approaches courts had taken in determining whether, pursuant to the collateral source rule, the plaintiff was entitled to recover for his or her full billed medical expenses when the bill was later settled by a third party for a lesser amount. Rather than place limits on the operation of the collateral source rule, as had been done in *Peterson*, the Illinois Supreme Court made clear that Illinois follows the "reasonable value approach." *Id*. at 412–13. The court's ruling eliminated the creation of classes of plaintiffs, and ensured that the liability of similarly situated defendants "is not dependent on the relative fortuity of the manner in which each plaintiff's medical expenses are financed." *Id.* at 414. In so deciding, the court expressly overruled *Peterson* and ruled contrary to the defendant's position in *Wills*.

The defendant in *Wills* had stipulated to the admission of the billed amounts and did not object to their reasonableness. *Id*. at 396, 419. Therefore, even though the plaintiff did not produce a witness to testify that the entire billed amount was reasonable, the entire amount was submitted to the jury. "By stipulating to the admission of the billed amounts into evidence and failing to offer any objection, defendant relieved plaintiff of the burden of establishing reasonableness [of the billed amount]." *Id.* Worthy strategic considerations may exist for this practice, but a practitioner should be aware of the option not to stipulate to the billed amounts.

How May a Defense Practitioner Dispute the Reasonableness of the Plaintiff's Medical Bills?

As outlined above, the defense is "free to challenge a plaintiff's proof of reasonableness on cross-examination and to introduce their own evidence of reasonableness." *Id.* at 415. The defense may not introduce evidence that the bills were satisfied for an amount less than the billed amount.

Taking advantage of the *Arthur* and *Wills* decisions, the plaintiffs' counsel have often undertaken to issue requests to admit to the defendants regarding the reasonableness of the medical bills claimed. The necessity and reasonableness of the medical services the plaintiff received to treat his or her injuries and the reasonable cost of those medical services are proper subjects for a Rule 216 request to admit. *Szczeblewski v. Gossett*, 342 Ill. App. 3d 344, 348 (5th Dist. 2003). Supreme Court Rule 216 provides that "a party has a good-faith obligation to make a reasonable effort to secure answers to requests to admit from persons or documents within the responding party's reasonable control," including from the party's attorney and insurance company investigators or representatives. *Szczeblewski*, 342 Ill. App. 3d at 349.

Following *Szczeblewski*, the Illinois Appellate Court First District weighed in on this issue in *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110. (1st Dist. 2010). In that case, the defense responded to the plaintiff's itemized requests by stating that, having made reasonable inquiry and the information known or readily available within the defendant's control, and not being a physician or a nurse, having no training in medical billing and practice rates or treatments described, the defendant's knowledge was insufficient to admit or to deny. *Oelze*, 401 Ill. App. 3d at 124.

The appellate court criticized the defense for making a formulaic assertion of the language found in *Szczeblewski*, and held that the responding party must explain why its resources are lacking to such an extent that it cannot answer the requests. *Id.* at 126. Given its access to an insurance company and the insurer's databases of claims and necessary treatments and expenses, the defendant could have made a "pretty good guess" at the reasonableness of the expenses and treatments. *Id.* The court held that the defendant's failure to answer in detail results in an admission of the requested facts. *Id.*

The holdings in *Szczeblewski* and *Oelze* make it difficult to respond to requests to admit directed at the foundational requirements for the admission of the plaintiff's medical bills. The holdings, however, do not foreclose the defendant from responding that the party cannot truthfully admit or deny the reasonable value of the medical bills, provided that response is not merely "formulaic." Supreme Court Rule 216(c) allows for such a response, but the court's holding in *Oelze* requires that the defendant demonstrate an effort to determine whether either the defendant or insurance company is truthfully able to make determinations as to the reasonable value of medical bills. Some insurance companies may keep a database where such information might be found, others may not. Defense counsel would be wise to submit the bills tendered by the plaintiff to the insurance company for investigation.

Alternatively, defense counsel may endeavor to retain an expert in medical billing to determine the reasonableness of the bills claimed by the plaintiff. Based on the opinion of this expert, the defense can truthfully deny the reasonableness of the medical bills, and have a good-faith basis to do so.

Conclusion

In a case in which the plaintiff seeks to admit a bill that has not been paid *in whole or in part*, he or she must establish reasonableness by other means, such as by introducing the testimony of someone having knowledge of the services rendered and the reasonable and customary charge for such services. *Wills*, 229 Ill. 2d at 403. Thus, the Illinois Supreme Court concluded that while the plaintiff in *Arthur* was entitled to submit the amounts initially billed, she could not establish a *prima facie* case of reasonableness of the amounts initially billed based on the bills alone because the entire billed amount had not been paid. *Arthur*, 216 Ill. 2d at 81–83. As was covered in this article, whatever amount for which the plaintiff lays the proper foundation may be challenged by a billing expert, utilized to provide support for a denial of any request to admit, or called as a witness at trial on the issue of reasonableness. No matter the specific posture of the plaintiff's medical bill evidence, it is important for defense practitioners to distinguish between the plaintiff's entitlement to introduce the full amount billed and the foundational requirements to appropriately do so.

About the Authors

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered.* He practices in both Illinois and Indiana in the areas of commercial litigation, professional malpractice defense, tort defense, and insurance coverage. Mr. Eckler

earned his undergraduate degree from the University of Chicago and his law degree from the University of Florida. He is a member of the Illinois Association of Defense Trial Counsel, the Risk Management Association, and the Chicago Bar Association. He is the co-chair of the CBA YLS Tort Litigation Committee. The views expressed in his article are his, and do not reflect those of his firm or its clients.

Matthew A. Reddy is a trial attorney with *Pretzel & Stouffer, Chartered*. He joined the firm in August 2014. Prior to joining the firm, Mr. Reddy worked at the City of Chicago's Department of Law, where he tried numerous Cook County Law Division jury trials, including cases involving claims of malicious prosecution, battery, and false imprisonment against Chicago Police Department officers. He also tried numerous cases involving premises liability and motor vehicle collisions. While at the City, Mr. Reddy additionally handled a substantial caseload of worker's compensation and administrative review files.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.