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

An Outside Bet: Reduction in the Amount of Recovery in Medical Malpractice Cases

Defense practitioners pride themselves on the ability to challenge the plaintiff's claims. Whether on account of strategy or hubris, defense counsel often focus their energy on contesting wrongdoing and sometimes ignore damages. In a prior article, Donald Patrick Eckler & Matthew A. Reddy, *Best Laid Plans: The Continued Uncertainty in the Admissibility of Medical Bills*, IDC QUARTERLY, Vol. 25, No. 2, at 57-61 (2015), we discussed the mechanisms that defense attorneys can use to limit admissible damages from an evidentiary basis at trial.

There is, however, a mechanism by which a defense attorney in a medical malpractice suit may demand a reduction in the amount of recovery following a trial. A statutory exception to the collateral source rule exists in the Illinois Code of Civil Procedure at 735 ILCS 5/2-1205. This section allows a medical malpractice judgment to be reduced by the medical charges associated with a claim. 735 ILCS 5/2-1205; *Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C.*, 279 Ill. App. 3d 469, 481 (5th Dist. 1996). Section 2-1205 was enacted to reduce the costs of malpractice actions by eliminating duplicative recoveries. *DeCastris v. Gutta*, 237 Ill. App. 3d 168, 175 (2d Dist. 1992). The savvy defense attorney should be aware of the potential benefits and limitations of this statutory mechanism.

At issue is the interpretation of section 2-1205 of the Code, which states:

> An amount equal to the sum of (i) 50% of the benefits provided for lost wages or private or governmental disability income programs, which have been paid, or which have become payable to the injured person by any other person, corporation, insurance company or fund in relation to a particular injury, and (ii) 100% of the benefits provided for medical charges, hospital charges, or nursing or caretaking charges, which have been paid, or which have become payable to the injured person by any other person, corporation, insurance company or fund in relation to a particular injury, shall be deducted from any judgment in an action to recover for that injury based on an allegation of negligence or other wrongful act, not including intentional torts, on the part of a licensed hospital or physician provided however that:
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> Application is made within 30 days to reduce the judgment;
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> Such reduction shall not apply to the extent that there is a right of recoupment through subrogation, trust agreement, lien, or otherwise;
>
> The reduction shall not reduce the judgment by more than 50% of the total amount of the judgment entered on the verdict;

> The damages awarded shall be increased by the amount of any insurance premiums or the direct costs paid by the plaintiff for such benefits in the 2 years prior to plaintiff's injury or death or to be paid by the plaintiff in the future for such benefits; and
>
> There shall be no reduction for charges paid for medical expenses which were directly attributable to the adjudged negligent acts or omissions of the defendants found liable.

735 ILCS 5/2-1205.

While at first glance, the language of this statue seems clear, interpretations of it have been anything but. As discussed below, different Illinois appellate districts have reached starkly disparate decisions regarding its application. Moreover, the Illinois Supreme Court has not yet provided definitive guidance. Practitioners are thus left with an unreliable tool to reduce a plaintiff's overreaching damages claim. However, with appropriate and timely discovery, judgment reduction may be achievable.

Perkey v. Portes-Jarol

In *Perkey v. Portes-Jarol*, following a verdict of $600,000 in the plaintiff's favor, with $310,000 of that amount for medical expenses, the defendant claimed that under section 2-1205 it was entitled to a reduction of the judgment. *Perkey v. Portes-Jarol*, 2013 IL App (2d) 120470, ¶ 76. The defendants sought a reduction in an amount equal to 100% of the medical benefits "which have been paid, or which have become payable to the injured party by any insurance company or fund in relation to a particular injury," subject to the limitation that the reduction was limited to 50% of the gross judgment. 735 ILCS 5/2-1205.

The plaintiff argued in response that there was a right of recoupment by Blue Cross Blue Shield and therefore, under the statute, a reduction would not apply. *Perkey*, 2013 IL App (2d) 120470, ¶ 81. Notably, it is the right of recoupment rather than the perfection of that right that bars a setoff. *York v. El-Ganzouri*, 353 Ill. App. 3d 1, 22 (1st Dist. 2004). However, the defendants countered that unlike the defendant in *York*, they were able to show the amount of the medical expenses paid and the amount of the lien. *Perkey*, 2013 IL App (2d) 120470, ¶ 84.

In response to the defendants' motion, plaintiff also included an affidavit attaching a "reimbursement provision" which was part of his health insurance policy. *Id.* ¶ 80. The plaintiff also included a letter from his insurer stating that his health plan had a "reimbursement and/or subrogation provision" and that the total amount of benefits provided was $134,933.85. *Id.* ¶ 81. In their reply, and based on the plaintiff's admission that the lien/benefits paid were limited to $134,933.85, the defendants amended their request and asked the court to reduce the judgment by $174,066.15, the difference between the $310,000 awarded by the jury as medical expenses and the amount of the lien. *Id.* ¶ 82.

The plaintiff argued that the statute barred a reduction of the judgment because there was a right to reimbursement. *Perkey*, 2013 IL App (2d) 120470, ¶ 110. That argument ignores the plain language of the statute, which states: "[s]uch reduction shall not apply *to the extent that* there is a right of recoupment through subrogation, trust agreement, lien, or otherwise." 735 ILCS 5/2-1205(2) (emphasis added). The plaintiff's argument would be correct if the statute stated "*if* there is a right of recoupment," instead of: "'*to the extent that'* there is a right of recoupment." *Perkey*, 2013 IL App (2d)

120470, ¶ 112 (emphasis added in-part, and in original in-part) (quoting *Prazen v. Shoup*, 2012 IL App (4th) 120048, ¶ 35.

Therefore, the appellate court found that the language limits the reduction only to the extent of, or amount of, the right of recoupment. *Id*. The court noted that the plaintiff's interpretation "would disallow any reduction even if the insurer had a right to recoup one cent, [which] runs counter to section 2-1205's purpose of reducing the costs of medical malpractice actions by eliminating duplicative recoveries." *Id*.

Miller v. Sarah Bush Lincoln Health Center

In contrast with the Illinois Appellate Court Second District's ruling in *Perkey v. Portes-Jarol*, the court in *Miller v. Sarah Bush Lincoln Health Center* reversed the trial court's order reducing the verdict and directed the trial court to reinstate the jury's verdict without any reduction. *Miller v. Sarah Bush Lincoln Health Ctr.*, 2016 IL App (4th) 150728, ¶ 1. Following verdict, the defendants filed a motion to reduce the verdict by the medical expenses pursuant to 735 ILCS 5/2-1205. *Miller*, 2016 IL App (4th) 150728, ¶ 4. However, a significant portion of the medical bill damages awarded by the jury were for portions of medical bills which had been "written off" by the providers. *Id.* ¶ 9. The plaintiff therefore argued that this "written off" amount was not paid by anyone. *Id*. As such, the appellate court had to determine whether the legislature intended section 2-1205 to allow verdicts to be reduced by the amount of medical bills written off by health care providers. *Id*. The Illinois Appellate Court Fourth District held that it did not. *Id.*

Under section 2-1205(2), a judgment cannot be reduced by an amount subject to recoupment. *Id*. ¶ 14. The trial court had to determine what the "benefit" was referenced in the statute. *Id*. ¶ 15. The plaintiff argued that the trial court was incorrect when it found that the benefit provided to the plaintiff was the total award for medical treatment. *Id*. The plaintiff further argued that the benefit is what the collateral source actually pays on behalf of the injured person, and not what the jury awards. *Id*.

The appellate court agreed and held that "[t]he statute does not allow a verdict to be reduced by the amount of the bills which have been satisfied or the value of the benefit to the plaintiff." *Id*. ¶ 16. "Instead, it only allows a verdict to be reduced by the amount paid to the medical providers or payable to the plaintiff." *Id*. An examination of the plain language of the statute led the appellate court to the conclusion that "it was only intended to apply if the benefits were paid to the medical providers or had become payable to the plaintiff—and then only if other limitations do not apply." *Id*. ¶ 17. The court indicated that any other interpretation would ignore the restrictive language" ,which have been paid, or which have been payable to the injured person ".*Id*. The court agreed with the statement made in the amicus brief filed by the Illinois Trial Lawyers Association that "[a] write-off by the medical provider entitled to payment is the antithesis of a payment by definition." *Miller*, 2016 IL App (4th) 150728, ¶ 16.

Contrasting the *Perkey* and *Miller* Decisions

There is a conflict between the *Perkey* and *Miller* decisions. As noted in the *Milller* decision, the *Perkey* court did not analyze whether bills written off by medical providers qualify as benefits paid to medical providers or payable to the plaintiff. *Miller*, 2016 IL App (4th) 150728, ¶ 20. The total amount awarded by the jury for the reasonable costs of the plaintiff's medical care and services far exceeded the amount paid by Blue Cross Blue Shield. *Perkey*, 2013 IL App (2d)

120470, ¶¶ 79, 81. While not explicitly stated, it seems logical that the *Perkey* opinion allowed a reduction for the "written off" or "adjusted" amount of the plaintiff's bills, whereas the *Miller* opinion did not. We can assume this because in the *Perkey* case, the insurer indicated the total amount of benefits provided, which was less than the amount that was presented to the jury as evidence. *Id*. ¶ 81 The Fourth District chose not to follow the Second District's opinion because the arguments made in that case were different than the arguments raised in their appeal. *Miller*, 2016 IL App (4th) 150728, ¶ 21. The Second District dealt only with whether the right to recoupment, in-part, prevented a reduction in the judgment. *Id*.

Conclusion

While there is a lack of clarity as to whether a judgment may be reduced by the written-off amounts, defense counsel should be prepared to indicate to the court whether there is a third party that retains a right of recoupment, and to what extent. Crucially, the benefits paid by the insurers in both *Perkey* and *Miller* matched the lien. However, agreements by insurance companies with Plaintiffs to accept less than the full amount of their lien in satisfaction of that lien are common.

Therefore, even under the more restrictive reasoning of the Miller opinion, the defense would be entitled to a reduction of the award to the extent that an insurance company made payments which exceed the amount retained under a lien. Effective use of this technique necessitates discovery on that issue and an insistence that such information and material be turned over by the plaintiff. Importantly, the defendant has the burden of demonstrating that the collateral source payments were not subject to a right of recoupment, in which case reduction would not be warranted to whatever extent the recoupment applied. *See DeCastris*, 237 Ill. App. 3d at 175. Additionally, the defendant would likely have been entitled to an additional reduction in the amount of recovery, had it provided admissible evidence of the reduction of the lien. *Perkey*, 2013 IL App (2d) 120470, ¶ 120.

About the Authors

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

Matthew A. Reddy is a trial attorney with *Pretzel & Stouffer, Chartered*. 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.

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