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An Uncomfortable Truth: Attacking Inflated Medical Specials

The topic of a plaintiff recovering damages for the cost of medical services rendered has been subject to several decisions clarifying a murky area of Illinois law. Defense attorneys are keenly aware, as is anyone who has reviewed an explanation of benefits statement, that the amounts billed by medical providers for services are sometimes arbitrary and in no way reflective of the amount eventually paid in full satisfaction of the bill. Armed with this truth, the defense may attempt to reduce special damages that will be blackboarded in front of a jury in closing arguments. Unfortunately, without clear boundaries, defense attorneys were reticent to offer affirmative evidence or cross-examine plaintiff's foundation witnesses for fear that they would cross the line and violate the collateral source rule. A recent Illinois Appellate Court Third District decision provides meaningful guidance on both issues. *Verci v. High*, 2019 IL App (3d) 190106-B.

The Evolution of the Introduction of Medical Bills at Trial

The seminal cases on the substantive and evidentiary rules surrounding the introduction of medical bills as damages are two Illinois Supreme Court cases: *Arthur v. Catour*, 216 Ill. 2d 72 (2005), and *Wills v. Foster*, 229 Ill. 2d 393 (2008). Before *Arthur*, an open question remained as to whether a plaintiff was limited to presenting only the amounts paid in satisfaction for a medical bill. The Illinois Supreme Court held in *Arthur* that a plaintiff is entitled to present the entire billed amount to the jury, but only if a proper foundation is laid as to the reasonable value of the medical services rendered. *Arthur*, 216 Ill. 2d at 74.

The court indicated that the collateral source rule has both a substantive and evidentiary component. *Id.* at 79-80. The substantive component is a rule of damages and bars a defendant from reducing the jury's award by the amount that the plaintiff recovered from a collateral source. *Id.* The evidentiary component bars a defendant from offering evidence of the existence of the collateral source. *Id.*

Having determined that a plaintiff is entitled to recover the full billed amount, the court turned its attention to what foundational evidence was required for a plaintiff to submit the full billed amount to a jury. Evidence of the amount charged alone does not indicate reasonableness. *Victory Mem. 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). However, given ubiquitous discounts, write-offs, and discounts on modern medical bills, the court in *Arthur* distinguished between the paid portion of a bill and the portion that remained unpaid though the bill was fully satisfied.

> [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).

Rebuttal and Cross Examination by the Defense Following a Proper Foundation

Following the *Arthur* decision, confusion remained, particularly over "whether the defense may introduce evidence of the paid amount to assist the jury in determining the reasonable value." *Wills v. Foster*, 229 Ill. 2d 393, 415 (2008). The *Arthur* court held that defendants were "free to challenge a plaintiff's proof of reasonableness on cross-examination and to introduce their own evidence of reasonableness." *Wills*, 229 Ill. 2d at 416. However, in her dissent in *Arthur*, Chief Justice McMorrow noted that "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." *Arthur*, 216 Ill. 2d at 96. The Chief Justice envisioned a line of questioning wherein 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.*

The court in *Wills* addressed Chief Justice McMorrow's criticism by holding that 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. *Wills*, 229 Ill. 2d at 418. The court reiterated, however, that defendants are free to cross-examine any witnesses that a 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.*

Unfortunately, the holding in the *Wills* case did little to address Chief Justice McMorrow's legitimate concerns. Judges and defense attorneys alike remain skittish at the prospect of cross-examining a plaintiff's foundational witnesses on the reasonableness of the proffered bills, lest they intrude on the collateral source rule. Likewise, the introduction of affirmative evidence calling into question the reasonable value of the plaintiff's medical bills would seem to require mention of insurance payments.

Verci v. High

The *Verci* court was faced with addressing both of these methods of challenging the reasonableness of a plaintiff's medical bills. *Verci*, 2019 IL App (3d) 190106-B, ¶ 13.

The plaintiff claimed that as a result of the defendants' negligence, she was injured and required medical treatment costing in excess of $1 million. *Id.* ¶ 1. A majority of the plaintiff's medical charges were from one provider: Dr. Kube of the Prairie Spine and Pain Institute. *Id.* The defense strongly disputed the reasonable value of the services rendered by Dr. Kube. *Id.* The defendants engaged in a two-pronged attack on the reasonableness of the plaintiff's medical bills. The defendants disclosed an expert, Rebecca Reier, to present her conclusion that rather than the $810,937.04 billed by Dr. Kube, the reasonable value of the services he provided was $148,118. *Id.* ¶ 5. The defendants also deposed Dr. Kube, who testified that he had a cash price for certain procedures, and who agreed that the cash price of a procedure "represents

or illustrates what I think would be a fair reimbursement for my services under that [cash] model and everything that it entails." *Id.* ¶ 12.

As noted above, the defendants also retained a billing expert, Ms. Reier, to present contradicting testimony regarding the reasonable value of the plaintiff's medical services. Ms. Reier relied upon various databases including: Fair Health Data Systems, Optum National Feel Analyzer, and the American Hospital Directory. *Id.* ¶ 6. These databases incorporate data consisting of charges from providers obtained from insurance companies and allow for analysis by geographic area. *Id.* ¶¶ 7-8.

After the plaintiff objected to both Ms. Reier's testimony and the cross-examination of Dr. Kube, the trial court entered an order (1) prohibiting defendants from cross-examining Dr. Kube regarding his cash advertised pricing at trial and (2) allowing defendants' billing expert to testify at trial regarding her opinions on the reasonable value of Dr. Kube's medical services. *Id.* ¶ 2.

On appeal, the *Verci* court noted that when a bill has not been paid, the plaintiff "can establish reasonableness by introducing the testimony of a person having knowledge of the services rendered and the usual and customary charges for such services." *Id.* ¶ 20 (quoting *Arthur*, 216 Ill. 2d at 82). The *Verci* court further noted that "[d]efendants are free to cross-examine any witness that a 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." *Id.* ¶ 21 (quoting *Wills*, 229 Ill. 2d at 418).

Cross Examination

The appellate court found that the trial court's refusal to allow defendants to cross examine Dr. Kube about the cash prices that he advertised was error. *Verci*, 2019 IL App (3d) 190106-B, ¶ 25. The court reviewed the holdings on this issue from other jurisdictions and concluded that evidence as to what the provider usually charges, the stated charges, and the range of charges, is relevant to the determination of the reasonable value of the medical services. *Id.* ¶ 24 (citing *Weston v. AKHappytime, LLC*, 445 P.3d 1015, 1028 (Alaska 2019); *Law v. Griffith*, 930 N.E.2d 126, 135 (Mass. 2010); and *Melo v. Allstate Ins. Co.*, 800 F. Supp. 2d 596, 602 (D. Vt. 2011)). Furthermore, the court noted that such evidence does not undermine the collateral source rule because it does "not touch in any manner on whether, or in what amount, collateral third parties . . . had paid for the medical treatment the plaintiff received." *Verci*, 2019 IL App (3d) 190106-B, ¶ 24 (quoting *Law*, 930 N.E. 2d at 135-36).

Testimony of Defense Expert

The *Verci* court noted that the Illinois Supreme Court held that defendants "are free to 'offer their own evidence pertaining to the reasonableness of charges.'" *Id.* ¶ 27 (quoting *Arthur*, 216 Ill. 2d at 83). Defendants can also present testimony about what other providers in the area charge for the same services. *Id.* (citing *Weston*, 445 P. 3d at 1028; *Melo*, 800 F. Supp 2d at 602). Ms. Reier's report and deposition testimony were based largely on the databases she reviewed, particularly the FAIR Health database. *Id.* ¶ 28.

The court noted, however, that the information contained in the FAIR Health database is not evidence of what other area providers charge for the services, "because (1) the data comes from an unknown number of insurance companies, not health care providers, (2) the database is used to determine reimbursement rates, not the reasonableness of provider

charges, and (3) the data contained in the database is incomplete." *Id.* ¶ 29. As the data is obtained from insurance companies and not medical providers, charges submitted to uninsured patients are not included. The court noted that the data would be skewed given the fact that uninsured patients are often billed higher amounts than insured patients. *Id.* ¶ 30. The court also pointed out that not all insurance companies provide information to the database referenced, and therefore the FAIR Health data cannot be counted on to constitute proof of the fair and reasonable charges for the services that the plaintiff received. *Id.* ¶ 31. Finally, the referenced databases are typically used to calculate the usual and customary fee for reimbursement rates. The court, relying on opinions from different jurisdictions, found that reimbursement rates are not relevant to show whether a medical charge is reasonable. *Id.* ¶¶ 32, 34 (citing *Gerlach v. Cove Apartments, LLC*, 446 P. 3d 624, 633 (Wash. Ct. App. 2019)). Importantly, testimony about reimbursement rates is not only irrelevant but also violates the collateral source rule. *See State v. Campbell*, 438 P.3d 448, 457 n.14 (Or. Ct. App. 2019).

Conclusion and Practice Tip

In many cases, plaintiff's attorneys will disclose treating medical professionals to lay the required foundation for introducing the full billed amount of a medical service where the bill is either unpaid, or not paid in full. The decision in *Verci* provides defense counsel with solid ground upon which to dispute plaintiff's medical specials. Crucially, this decision provides a road map for cross examining a medical provider with their "cash rates" along with their willingness to accept an amount less than the billed amount in full satisfaction of their bill. Nevertheless, a defense attorney must remain careful not to reference the fact that insurance or another collateral source may have satisfied the bills on behalf of plaintiff.

In other cases, plaintiff's attorneys will retain a billing expert to satisfy the foundation required to introduce the full billed amount to the jury. Although the *Verci* court disapproved of the use of certain databases in the context of a rebuttal witness for the defense, the logic applies equally when used by a plaintiff. Defense attorneys should move to bar plaintiff's experts that purport to lay the foundation as to the reasonableness of medical bills using these disfavored databases.

Finally, although a defense attorney may offer evidence as to the reasonableness of medical bills, reliance on databases, particularly those with data that appears incomplete or limited to data obtained form insurance companies only, may be deemed inadmissible. Rather, a billing expert should obtain data regarding the rates charged by providers in the geographic area for comparison.

About the Authors

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