



Indiana's Collateral Source Statute as a Rule of Evidence and Damages in a Medical Insurance Benefits Context

The common law collateral source rule (“collateral source rule”) is both a rule of evidence and damages used to preclude the introduction into evidence of payments made to a plaintiff in a lawsuit to cover the costs of all or a portion of the plaintiff’s sustained injuries.

For example, a plaintiff was bitten by a dog and sued the dog’s owner for the medical care required to treat the dog bite. The hospital charged the plaintiff \$10,000 in medical treatment, but the plaintiff’s health insurer negotiated its own rates for medical service which only equaled \$6,000. In accordance with the negotiated rates, the hospital accepted \$6,000 as full payment for medical treatment given to the plaintiff. At trial, the plaintiff may introduce the hospital bill for \$10,000 which may be considered prima facie evidence for the “reasonableness” of the cost of medical care. However, generally, the dog owner cannot introduce the \$6,000 accepted payment due to the collateral source rule. The defendant may be held liable for the real pecuniary loss of the plaintiff of \$6,000 *and* the \$4,000 which was billed but never paid. This results in a windfall to the plaintiff, and these additional amounts are referred to as “phantom damages.”

Currently, many states have revised the collateral source rule through statute; however, issues still remain unresolved in their application. These include the statutes’ applicability to negotiated settlements and government-sponsored insurance programs.

Common Law Collateral Source Rule in Practice

The collateral source rule and some courts’ interpretations of collateral source statutes create an evidentiary process that results in misleading the jury about the scope of the plaintiff’s actual loss.

By introducing the original inflated billed amount but not the lower actually-paid amount, the jury is not given an opportunity to consider the scope of costs involved to determine the

reasonable value of the services provided. This effectively limits the jury's ability to perform its primary purpose - to act as fact-finder.

Defendants may work around this problem by introducing other outside evidence of the reasonable value of services rendered. However, these options tend to dramatically complicate the trial process. This is particularly true when it involves complex medical service pricing.

Settlement negotiations are also heavily affected by the collateral source rule. If the original inflated amount billed to an injured party may be introduced as evidence but the lower actually-paid amount is precluded from introduction, negotiations will necessarily tend to the higher amount. While defendants may try to lessen that amount by introducing outside evidence and expert testimony to the jury, it requires significant resources to collect that evidence and pay for expert witnesses. This added step also increases the amount of money paid towards defense counsel. These additional costs increase the likelihood that a defendant will pay an inflated settlement amount simply because the time, money, and risk necessary to rebut the original inflated amount billed outweigh the potential savings that might result.

Current Changes to the Collateral Source Rule through Legislative Action

Common law states have generally operated under the collateral source rule, but many states have modified the rule by statute. For example, Indiana operated under the collateral source rule until the Indiana legislature abrogated the collateral source rule with the collateral source statute.¹

The statute's purpose is to reduce the likelihood that a plaintiff will recover damages that exceed

¹ *Shirley v. Russell*, 663 N.E.2d 532, 534 (Ind. 1996) (“But our legislature abrogated the common law collateral source rule when, in 1986, it enacted the statute implicated by this case.”); *Travelers Indem. Co. of Am. v. Jarrells*, 927 N.E.2d 9374 (Ind. 2010) at 377 (Boehm, J., finding the collateral source rule to be partially abrogated, stating, “The statute allows proof of payments from some collateral sources...and also directs the trier of fact to ‘consider’ the payments allowed to be admitted into evidence. [citation omitted.] In these respects the statute departs from its treatment of other collateral source...”).

their pecuniary loss.² Several other states including Florida,³ Missouri,⁴ West Virginia,⁵ and Wisconsin⁶ have legislation addressing phantom damages. Last year, Oklahoma passed S.B. 789 which addressed medical payments under the collateral source rule.

Recent Attempts to Minimize Collateral Source Statutes

Some courts have attempted to carve out exceptions to collateral source statutes for government-sponsored insurance programs. For example, an Indiana appellate court recently affirmed a trial court's exclusion of payments made by government-sponsored health insurance. The trial court determined that the payments were excluded under the collateral source statute and disallowed as an exception under the Indiana Supreme Court's *Stanley v. Walker* ruling as useful to the jury to determine "reasonable value."

In affirming the trial court, the appellate court found that the statute applied but distinguished *Stanley*'s "reasonable value" exception by finding that *Stanley* requires an arms-length transaction and a buyer-seller negotiation. The appellate court limited *Stanley* "only to lower paid amounts when those amounts are the result of negotiated discounts and therefore are probative of a medical service's reasonable value."⁷

² Burns Ind. Code Ann. § 34-44-1-1 ("The purpose of this chapter is: (1) to enable the trier of fact in a personal injury or wrongful death action to determine the actual amount of the prevailing party's pecuniary loss; and (2) to provide that a prevailing party not recover more than once from all applicable sources for each item of loss sustained.").

³ H.B. 1271 (Fla. 2016).

⁴ S.B. 847 (Mo. 2016).

⁵ S.B. 296. (W.Va. 2016).

⁶ A.B. 539/S.B. 405 (Wis. 2016).

⁷ *Patchett v. Lee*, 2015 Ind. App. LEXIS 718 *26 .

Finding Government-Sponsored Insurance Programs as Indicative of “Reasonable Value”

The Indiana case indicates two primary issues that other state courts may need address in the future: 1) whether a bilateral negotiation is required, and 2) whether a government program is non-negotiated.⁸

The Indiana Supreme Court in *Stanley* recognized that payment rates between providers and insurers are “generally” contracted, but does not require a bilateral or arms-length negotiation.⁹ In fact, the terms “bilateral” and “arms-length” never appear in the *Stanley* opinion.¹⁰ The term “negotiate” or a derivative of the term only appears four times - none of which appear in the holding of the case.¹¹ This is in keeping with the collateral source statute’s purpose.

The appellate court also distinguished private insurers from government-sponsored insurance programs by identifying budget and political considerations as the primary concerns instead of the reasonable value of medical services.¹² However, those budget and political considerations have different implications in the light of a medical service provider’s ability to decline participation in government-sponsored insurance programs. Even in private insurance negotiations, factors such as a provider’s office budget and an insurer’s willingness and ability to pay are factors in setting a reimbursement rate.

Legislatures consider the likelihood that providers will join or drop the insurance program and set reimbursement rates based, in part, on a provider’s willingness to accept the reimbursement

⁸ ATRA has filed an amicus brief which addresses these issues and another policy concern of creating two classes of plaintiffs - a private insurance class ineligible for “phantom damages” and a government-sponsored insurance class eligible for “phantom damages.” The brief can be accessed here:

http://atra.org/sites/default/files/documents/Patchett_Lee%20-%20Brief%20of%20Amicus%20Curiae-c.pdf.

⁹ See generally, *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Patchett v. Lee*, 2015 Ind. App. LEXIS 718 *26 and 27.

rate for services provided as a contract.¹³ Presumably, if the reimbursement rate is unreasonable, providers will not join the insurance program. Consequently, legislatures' carefully-considered reimbursement rate is still probative of the reasonable cost of medical services.¹⁴

Conclusion

State legislatures continue to revise and modernize the collateral source rule, and state courts are required to continue to provide guidance for a balanced approach that put the determination of “reasonable value” properly in the hands of the fact-finder.

¹³ 405 IAC 10-9-4(a)(2).

¹⁴ See MEDICARE PHYSICIAN PAYMENT RATES: Better Data and Greater Transparency Could Improve Accuracy, GAO-15-434: Published: May 21, 2015. Publicly Released: May 21, 2015 (finding that the American Medical Association and other medical provider groups were heavily consulted in setting Medicare rates).