Determining Reasonable Value for Medical Services

Collateral Source Decisions Result in More Settlements and Fewer Motions

by Kyle Bachus

Following recent decisions of the Colorado Supreme Court,[1] the law regarding the collateral source rule is now crystal clear. This increased clarity has led to fewer motions and more settlements, which benefits all parties.

The law is now settled that any evidence of benefits or gifts received by a plaintiff from someone other than the defendant is inadmissible at trial for any purpose. Evidence may still be presented as to the reasonable value of services, but evidence of the actual amounts paid or even written off as a result of a collateral source arrangement of any kind may not be presented. This evidentiary question is a different question than whether there are circumstances where a judgment can be reduced or "set off" by a judge post-trial by the amount of collateral source benefits received by a plaintiff. Understanding the clarity of the law requires the inquiries of pre-judgment admissibility to be considered separately from post-judgment set-off.

Pre-Judgment Admissibility

In Colorado, the common law collateral source rule precludes the admission of any evidence at trial regarding benefits or gifts a plaintiff receives from sources collateral to the tortfeasor. The exclusion of collateral source evidence ensures that juries are not misled or confused by such evidence.[2] As the Colorado Supreme Court re-affirmed in *Wal-Mart v. Crossgrove*, "trial courts must exclude evidence of amounts paid by a collateral source even to

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Kyle Bachus is a founding partner of Bachus & Schanker, LLC, where he litigates cases involving catastrophic injuries, serious personal and financial damage, wrongful death, and insurance bad faith. His practice is limited to the representation of injury victims and their families—(303) 893-9800, kbachus@coloradolaw.net.

Billed Versus Paid—An Unresolved Evidentiary Question

by Heather A. Salg

A couple of years ago, I attended a continuing legal education program led by Kyle Bachus. Kyle's presentation was on the topic of the Made Whole Statute, CRS § 10-1-135, and included a slide that declared "The War is Over." Kyle was implying that the passage of the statute meant there no longer would be any dispute about the reasonable value of medical services—that amounts billed for such services would be the *per se*, exclusive, and automatically admissible evidence of reasonable value. I thought then, Kyle, that you spoke too soon.

In your article, you say that the law regarding the collateral source rule is "crystal clear." Although we agree that in Colorado, evidence of amounts accepted by physicians in full satisfaction of their bills is inadmissible, I think the evidentiary implications are anything but clear. In fact, the passage of the Made Whole Statute and the Colorado Supreme Court's recent decisions in *Volunteers of America Colorado Branch v. Gardenswartz*,[1] *Sunahara v. State Farm Mutual Automobile Insurance Co.*,[2] *Wal-Mart v. Crossgrove*,[3] and *Smith v. Jeppsen*[4] have served only to increase the litigation costs and uncertainty of determining value for both plaintiffs and defendants.

Amounts Billed Versus Amounts Paid

Anyone who has ever received an "Explanation of Benefits" letter in the mail from an insurance company—one of those letters that says "This is not a bill"—knows there is a significant differ-

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Heather A. Salg is a Shareholder at Harris, Karstaedt, Jamison, and Powers, P.C. She is a civil defense attorney with substantial trial and arbitration experience defending a variety of cases involving personal injury claims. She also briefs and argues cases in front of the Colorado Court of Appeals and Colorado Supreme Court—(720) 875-9140, hsalg@hkjp.com.

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show the reasonable value of services rendered."[3] This common law rule was codified by the Colorado Legislature in 2010 through CRS § 10-1-135(10)(a):

> The fact or amount of any collateral source payment or benefits *shall not* be admitted as evidence in any action against an alleged third-party tortfeasor. (Emphasis added.)

The legislature broadly defined "benefits" in the same statute under CRS § 10-1-135(2)(a):

> "Benefits" means payment or reimbursement of health care expenses, health care services, disability payments, lost wage payments, or any other benefits of any kind, including discounts and write-offs, provided to or on behalf of an injured party under a policy of insurance, contract, or benefit plan with an individual or group, whether or not provided through an employer.

To be clear, the collateral source exclusion does not mean that all evidence of amounts paid is inadmissible. It means only that evidence of amounts paid by sources collateral to the tortfeasor as a gift, payment, or "benefit" to the plaintiff is inadmissible.

Let me illustrate by way of example:

1. If a plaintiff goes to the doctor, receives a bill, and personally pays the bill, it is likely that the amount paid by the plaintiff will not be excluded at trial by the rule, because the benefit was not from a collateral source.

However:

2. If a plaintiff goes to the doctor, the doctor bills the plaintiff's health insurance, and the health insurance brokers a deal with the doctor over the payment, the amount paid and the amount written off by agreement are "benefits" from a collateral source. Therefore, the amounts are inadmissible at trial.

The rationale behind this rule is simple. As thoroughly described in *Crossgrove*, the jury is almost certain to be misled by evidence of amounts paid by a collateral source.[4] This is because in negotiations between healthcare providers and insurance companies, the providers receive benefits from the insurance company in exchange for lower rates, including assurances of prompt payment, increased administrative efficiency, and access to a larger patient pool. Additionally, the jury is likely to reduce a judgment if jurors know or believe that medical bills have been paid by the insurer, despite the fact that the plaintiff typically must pay back or subrogate those amounts.

The exclusion of amounts paid by a collateral source does not preclude the defendant from presenting other evidence of reasonable value. It would, however, exclude a defendant from simply offering evidence or opinions based on what other providers accept from insurance companies for such services, because, as the court explained in *Crossgrove*, those amounts are based on negotiations and are greatly reduced by factors that have little or nothing to do with the services provided.

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ence between what healthcare providers bill and what they actually accept in full satisfaction of their bill. There is no single, clear-cut reason for this. Hospital executives have stated that charges (billed amounts) bear "no relation to anything," certainly not to the cost of medical services, and that there is no longer any method to the medical pricing "madness."[5] In short, providers routinely bill more than they expect to get paid—and this applies to every single entity that pays medical expenses, from the uninsured to the most deluxe health insurer.

This practice exists in part because it enables providers to "write off" the difference between what is billed and what is paid as "charitable," and write-offs have favorable tax consequences for providers.[6] Medical providers also engage in "cost-shifting," meaning that costs not paid by the uninsured, Medicare, or Medicaid are shifted to private health insurers.[7] Ultimately, to make sure that providers are able to collect the maximum amount for their services, bills are sent out for much higher amounts than the provider actually expects to recover from anyone.

As a result, medical bills bear little or no relationship to the reasonable value for medical services. However, in personal injury cases, plaintiffs routinely seek to present evidence of the billed amounts to the jury as proof of the reasonable value of medical services. Not surprisingly, defendants objected and sought to present evidence of the amounts that actually were accepted by medical providers as payment for medical services. The Colorado Legislature and Supreme Court in the last couple of years have precluded defendants from presenting such evidence.

The Question of Reasonableness

Many plaintiffs' attorneys in Colorado seem to read recent case law and CRS § 10-1-135(10)(a) as indicating that billed amounts are now the exclusive evidence of reasonable value, and that medical bills are automatically admissible. However, nowhere in *Gardenswartz, Sunahara, Crossgrove*, or *Jeppsen* does the Colorado Supreme Court state that the jury is permitted to consider *only* evidence of billed amounts. The Court simply held that amounts actually paid were inadmissible. Similarly, CRS § 10-1-135(10)(a) provides that

> [t]he fact or amount of any collateral source payment or benefits shall not be admitted as evidence in any action against an alleged third-party tortfeasor or in an action to recover benefits under [the uninsured motorist coverage statute].

It is still the law in Colorado that "the correct measure of damages for medical expenses is the necessary and reasonable value of services rendered."[8] It appears, Kyle, that we are in agreement that defendants can offer evidence of reasonable value. You suggest, though, that defendants may not introduce any evidence whatsoever about amounts providers are paid by insurance companies. Here, we disagree. Although the cases preclude defendants from introducing amounts paid in a particular case, they do not go so far as to preclude any consideration of amounts generally paid to providers by a number of sources, including insurance companies.

The question of reasonableness can and should be resolved with reference to amounts that are usually and customarily accepted in payment for property, goods, or services.[9] There is nothing that prohibits both sides to a personal injury case from presenting evidence relevant to the determination of reasonable value, other than the amounts paid in the particular case before the court.[10] Such evidence may consist of billed amounts, and also may include the amount usually and customarily accepted in payment for a particular good or service.[11]

Burdens Are Placed on Both Parties

The unfortunate consequence of the rulings by the Colorado Legislature and Supreme Court is that now both parties have one more issue on which they must retain expert witnesses. The defense can and should retain an expert to review the medical bills and compare the amounts billed to usual and customary amounts that other medical providers in a similar geographic area would accept in payment for their services. As long as the defense does not attempt to introduce evidence of the amounts actually paid in the specific case before the court, current Colorado law does not preclude the introduction of usual and customary amounts as evidence of reasonable value.

Plaintiffs too must retain experts to opine on the issue of reasonable value. Since the trilogy of cases of *Sunahara, Crossgrove*, and *Jeppsen* were handed down in April 2012, plaintiffs have taken to providing with their Rule 26(a)(2) disclosures a generic endorsement of treating providers who purportedly will opine that the amounts they billed were "reasonable." Other, more cautious counsel may even designate a "records custodian" to lay the foundation for the admissibility of medical bills. It appears that these attorneys are interpreting the trilogy of cases and the statute to indicate that billed amounts are automatically admissible and *per se* evidence of reasonable value. I am glad to see, Kyle, that you are not among these attorneys. Neither the Colorado Supreme Court nor the Colorado Legislature has done away with the requirements that an appropriate foundation be laid by a qualified witness before the introduction of evidence, and neither has precluded the introduction of other evidence of reasonable value.

In many cases, treating providers do not even know what they charge. Records custodians may know what the charges were, but it is unlikely that they know whether the specific charges are consistent with usual and customary charges in their geographic areas. If plaintiffs believe that the medical provider has the appropriate foundation to testify about reasonable value, then a description of the provider's qualifications should be provided with the Rule 26(a)(2) disclosure. Such a description would have to set forth how the treating providers would be qualified by experience, training, and/or specialized knowledge with respect to determining the reasonable value of their own medical charges.

Additionally, to comply with the rule, it would be insufficient to set forth merely the conclusory statement that the medical providers' bill is reasonable. Pursuant to the rule, the expert endorsement has to provide the basis for the expert's opinions. What data was considered by the expert to determine the reasonableness of charges? What were the sources of such data? Why was that data considered and is that the data generally relied on by experts in the industry? What was the relationship of the cost of particular services to the charges? What, in the expert's opinion,

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In her Counterpoint article, Heather Salg contends that an expert should be allowed to testify about what other providers accept as payment from an insurance company; however, her argument would fly in the face of the reasoning behind *Crossgrove*. Heather also argues that the evidentiary exclusion will drive up the cost of personal injury litigation by requiring both sides to endorse additional experts to opine on the issue of reasonable value. To date, we have not seen this happen. Many Rule 35 experts can be endorsed to testify about the reasonable value of medical services. Likewise, the plaintiff's treating doctors, who already will be called to testify, can opine on reasonable value. The plaintiff can also testify about the amounts billed. The only limitation on both parties is that neither the plaintiff nor the defendant will be able to offer "reasonable value" opinions based on amounts paid or write-offs gained through collateral source arrangements.

So, where do we stand? The law is clear that evidence of gifts, payments, or benefits from collateral sources is inadmissible. CRS § 10-1-135 codified the common law rule. CRS § 13-21-111.6 does not change the rule, because it only applies to whether a judge engages in a post-judgment reduction of amounts paid or written off by collateral sources. Why is this rule good for both sides? Because now it is settled that the only admissible evidence is that which truly reflects the value of the services and the value cannot be diluted by offering evidence that a provider will accept less from an insurance carrier in exchange for a large client base and assurances of prompt payment. The result is that, in most cases, the value will be the amount billed, which means the parties can easily determine the medical portion of economic damages. This clarity already has resulted in more settlements.

Post-Judgment Reduction in the Verdict

CRS § 13-21-111.6, Colorado's collateral source statute, at first requires a court to reduce the amount of a verdict, post-trial, by the amount the plaintiff is indemnified or compensated for the loss. However, the statute includes an exception that is so broad that it nearly swallows the rule. The exception states that any amount received as part of a contract entered into and paid for by the plaintiff or on the plaintiff's behalf is excluded from the rule and cannot be set off by the judge after trial.

Thus, in application, the rule actually prohibits a court from reducing a judgment by the amount the plaintiff is indemnified or compensated for the loss from health insurance, Medicare, workers' compensation, disability insurance, or any other benefit conferred through a contract involving payment by the plaintiff or on the plaintiff's behalf. However, a judge will likely reduce a judgment by way of a post-trial set-off by the amount the plaintiff is indemnified or compensated for the loss by truly charitable contributions and government benefits such as gifts and Medicaid.

The rule is needed because the plaintiff, not the defendant, should benefit from the plaintiff's foresight to invest in insurance, particularly because the plaintiff has been paying for these benefits in premiums for years. If the rule were otherwise, the plaintiff would have paid for the benefits for years only to find that when they are actually needed, the benefits would be taken away by a post-trial set-off, and the plaintiff's foresight to purchase insurance would benefit the defendant only in the form of reduced liability.

Because this rule is typically easy to interpret, all parties know before a trial which benefits likely will be reduced by a judge post-trial. As a result, all sides can better predict the outcome, making settlements more commonplace.

Conclusion

When the question of pre-trial admissibility and the question of post-trial set-offs are analyzed separately, the law of each is crystal clear. This clarity is truly a benefit to both sides of every case that involves payments or benefits from a collateral source. Already, we are seeing fewer motions on collateral source and increased settlements, and we expect that to continue to improve.

Notes

1. *Volunteers of America Colorado Branch v. Gardenswartz*, 242 P.3d 1080, 1083-84 (Colo. 2010); *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 280 P.3d 649 (Colo. 2012); *Wal-Mart v. Crossgrove*, 276 P.3d 562 (Colo. 2012); *Smith v. Jeppsen*, 277 P.3d 224 (Colo. 2012).
2. *Gardenswartz, supra* note 1 at 1083.
3. *Crossgrove, supra* note 1 at 568.
4. *Id.* at 566-67. ■

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are usual and customary charges in the geographic area where the treatment was received? How were those values set? What alternative values might be relevant? This is the type of information that would need to be included for an expert's testimony to be admissible under the reliability prong of *People v. Shreck*.[12] Additionally, the expert's methodology should be provided, including whether any studies have been done by the treating providers or others, whether they are peer reviewed, whether the methodology used by the expert is generally accepted by other experts in the area, and how the methodology is used in the non-judicial setting.

It is not always clear whether any investigation is done to determine whether endorsed treating providers and/or records custodians are qualified to lay the foundation for the admissibility of medical bills. Defendants should request confirmation from plaintiffs to determine whether the experts do in fact have the appropriate qualifications and possess the opinions they were endorsed to give. If depositions are taken and they reveal that the experts did not actually have the qualifications or opinions they were endorsed to give, defendants can consider seeking fees and costs associated with taking the expert's deposition.[13]

In Search of a Workable Solution

The situation created by the decisions of the Colorado Supreme Court and Legislature create a situation that is unfavorable to both sides of the civil bar. Now, each side must retain and prepare an entirely new category of experts for the presentation of relevant evidence at trial. This increases the time we have to spend preparing our cases and the amount of money our clients have to spend on experts.

There are some signs that relief may be in sight. The Colorado Legislature in 2012 capped the amounts hospitals can charge to the medically uninsured and required hospitals to post discount policies.[14] There will now be "bottom line" numbers publicly available to help assess reasonable value. Additionally, Colorado created a new website, the Colorado All Payer Claims Database,[15] where information is being compiled and reported about medical expenses by zip code. This may help both sides more easily determine reasonable value for medical services.

Notes

1. *Volunteers of America Colorado Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010).

2. *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 280 P.3d 649 (Colo. 2012).

3. *Wal-Mart v. Crossgrove*, 276 P.3d 562 (Colo. 2012).

4. *Smith v. Jeppsen*, 277 P.3d 224 (Colo. 2012).

5. Hall and Schneider, "Patients as Consumers: Courts, Contracts, and the New Medical Marketplace," 106 *Michigan L.Rev.* 643, 665 (Feb. 2008), available at www.michiganlawreview.org/assets/pdfs/106/4/hallschneider.pdf.

6. *See, e.g.*, Schorn, "FAQs on Hospital Bills" (Feb. 11, 2009), available at www.cbsnews.com/8301-18560_162-1369185.html ("Hospitals get certain accounting and public-relations benefits even when they don't collect from the uninsured. For-profit hospitals get a tax write-off on uncollected debts. Non-profit hospitals (85 percent of U.S. hospitals are non-profit) cite their uncollected debts in fund-raising efforts and to the government in arguing for higher Medicare and Medicaid reimbursement payments."). *See also* Brill, "Bitter Pill: How Outrageous Pricing and Egregious Profits Are Destroying Our Health Care," *Time* 16, 26 (March 4, 2013) ("thousands of nonprofit institutions have morphed into high-profit high-profile businesses . . . nonprofit hospitals across the country, which are exempt from income taxes, actually end up averaging higher operating profit margins than . . . for profit hospitals after the for-profits' income-tax obligations are deducted. In health care, being nonprofit produces more profit.").

7. Department of Regulatory Agencies, "Annual Report of the Commissioner of Insurance to The Colorado General Assembly on 2011 Health Insurance Costs" 26 (Feb. 16, 2012), available at www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Health+Insurance+Cost+Report+2011.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251814997724&ssbinary=true.

8. *Lawson v. Safeway, Inc.*, 878 P.2d 127, 131 (Colo.App. 1994).

9. *City of Thornton v. Pub. Utils. Comm'n*, 402 P.2d 194, 198 (Colo. 1965) ("Fair market value has many times been described as the price a buyer is willing to pay and [a] seller is willing to accept under circumstances that do not amount to coercion.").

10. The collateral source rule only precludes defendants from introducing evidence that some or all of plaintiff's claimed economic damages that were paid by an entity other than defendant, if plaintiff contracted for those benefits prior to a particular injury causing event. The rule does not preclude defendant from seeking to admit evidence that plaintiff received benefits from a gratuitous source such as Medicaid. *See Gomez v. Black*, 511 P.2d 531, 533 (Colo.App. 1973).

11. *Id.*

12. *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

13. *See Brown v. Silvern*, 141 P.3d 871, 875 (Colo.App. 2005) ("a party may request sanctions based on the opposing party's providing, without substantial justification, misleading disclosures, or its failure, without substantial justification, seasonably to correct misleading disclosures.").

14. CRS § 25-3-112.

15. *See* www.cohealthdata.org. ■