COLLATERAL SOURCE: CONSTANT CONFUSION

Katherine L. Vojas and **Jeffrey E. Atkinson** Lashly & Baer, P.C.

The Collateral Source Rule is a factor in one of the first questions all defendants and their insurers ask when a claim is received or a lawsuit is filed: "How much will this cost?" Application of the Collateral Source Rule can make an enormous impact on bottom-line dollars and cents, which in turn can mean the difference between settling or going to trial. Pleading, proving and recovering medical expenses are inextricably tethered to the Rule.[1]

Some variation of the Rule exists in every state and jurisdiction. Initially the creation of the courts, the Rule, in fact, is an exception to the general principle that damages in tort actions should be compensatory only. The theory of the Rule is a simple one: wrongdoers should not benefit from a reduction of damages due to payments made wholly independent of the wrongdoer. In practice, the Rule prohibits the reduction of a plaintiff's economic damages against a defendant because a "collateral source" paid those expenses on the plaintiff's behalf. Consequently, the Rule prevents defendants from introducing evidence at trial that the plaintiff's damages were covered in whole or in part by another.

In practice, the Rule often results in a windfall for a plaintiff, albeit one typically created by actions society encourages — the plaintiff's maintaining of insurance or employment. Nevertheless, defense attorneys frequently argue that their clients should not have to pay for compensatory damages never actually incurred by the plaintiff. In some cases, this windfall can be in the hundreds of thousands of dollars.

UNCERTAINTY IS THE ONLY CERTAINTY

An evolving issue in this realm is whether the Rule applies to government payments, specifically, Medicare and Medicaid. While the programs are funded in part through payroll taxes, as Medicare and Medicaid are heavily subsidized by state and federal governments and are essentially available to everyone under the programs' broad mandates (the elderly or poor), does the theory behind the Rule survive? Should defendants be on the hook for medical bills they are ultimately helping pay with their own tax dollars? Or should all the cards be on the table for the jury to decide how to assess damages?

Unfortunately, there is little case law exploring the intersection between the

Rule and Medicare/Medicaid. Adding to the confusion, state statutes and court decisions vary by jurisdiction. To date, states have applied a spectrum of approaches – each with varying degrees of liability for defendants.

Most states hold the Rule applies to Medicaid and Medicare, treating those payments the same as private insurance payments. In these states, evidence that Medicaid or Medicare paid for the relevant medical bills cannot be introduced, and the award cannot be reduced due to such payment. Further, in these states, juries only see the total billed amount for medical expenses, not the discounted amount after contractual write-offs.[2] While the approach favors the underlying theory of the Rule, the heavy discounts typically applied by Medicare/Medicaid give plaintiffs the largest potential windfall in their claims against defendants.

On the opposite end of the spectrum, some states, including Delaware, New Jersey and Michigan, do not extend the Rule to Medicare and Medicaid. In these jurisdictions, while continuing to recognize the underlying principle of the Rule that a defendant should not benefit from a plaintiff's collateral sources, courts are unwilling to apply the Rule to these government programs. The admission of medical bills is modified, with their admission limited to the amount paid by Medicare or Medicaid. This modified Rule minimizes the windfall to plaintiffs by prohibiting plaintiffs from recovering the total amount billed, an amount never actually incurred by the plaintiff, while recognizing the government's claims for reimbursement.[3] This modified Rule is also philosophically consistent with Medicare's set-aside policy requiring certain defendants to earmark money for future medical care rather than Medicare bearing the future burden. This modified rule, limiting plaintiffs' medical expense damages to discounted insurance amounts is a growing trend, even outside the context of Medicare and Medicaid.

MEDICARE VS. MEDICAID: DISTINCTIONS OCCUR

Further complicating the distinction, a number of states apply the Rule to Medicaid, but not Medicare. For example, Colorado statutes allow the reduction of a verdict by a collateral source amount. "Gratuitous" medical care, like Medicaid, is covered by statute and set off from an award. However, Medicare is treated differently from Medicaid, barring a set off for any collateral benefits arising out of a contract paid by the plaintiff that contains an expectation of receiving a future benefit. This "expectation of receiving a future benefit" includes Medicare and private insurance.

Similarly, in Louisiana, the Rule is not applicable when a plaintiff has paid no consideration for his benefits. Because Medicaid is free for its recipients, plaintiffs cannot recover any amounts for medical care paid for by Medicaid, billed or paid. However, Medicare recipients can recover the write-off since they paid consideration for it.[4] Louisiana courts have held, "where plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source benefit he receives, we hold that the plaintiff is unable to recover the 'write-off' amount."

Allowing a reduction of an award where the medical care was gratuitous preserves the Rule's theory that the defendant should not benefit from a plaintiff's foresight and expenditures incurred through insurance premiums. States like Louisiana and Colorado emphasize the value of the plaintiff paying consideration for the benefit by differentiating the two government services, even if such payment is only through involuntary taxes paid throughout a plaintiff's working years. As a result, a defendant may be responsible for significantly different verdict amounts depending on whether the plaintiff is enrolled in Medicaid versus Medicare.

APPLYING THE INCONSISTENCY

The imbalance between states that apply the Rule to Medicare and Medicaid and states that do not becomes clear when considering medical liens. Although Medicaid and Medicare possess what is known as a "super lien" on awards related to medical payments, the lien is often only for a percentage of the gross medical charges. Typically, the medical write-off will not be recoverable. As a result, a hospital may accept $5,000 as a "payment in full" for a plaintiff's $50,000 medical bill and write off the $45,000 difference. In this scenario, Medicaid has a $5,000 lien, even if the plaintiff recovers millions. Moreover, if a plaintiff does not obtain an award, the plaintiff is not required to make any payment to the hospital. Some states combat this inequality by allowing the defendant to introduce the "actual cost" of medical care.

Additionally, some states have capped lien recovery via statute. For example, in Illinois, the total recovery for medical lienholders is capped at 40% of the amount awarded if there are multiple lienholders and at one-third if there is only one such lienholder.[5] Thus, even where a lien exists, a plaintiff likely will never be responsible for the full amount of their medical care. However, defendants in a state that considers such liens as collateral sources without actual or reasonable cost limitations will be on the hook for the entire amount of medical care billed.

CONCLUSION

The Collateral Source Rule is a complex area of the law that varies greatly by jurisdiction. The Rule becomes even more complex as courts and legislatures analyze how the rule intersects with other areas of the law. States use a spectrum of approaches to decide whether Medicaid and Medicare are collateral sources. Some states even distinguish between the two programs. As a result, a defendant in one state may be found liable for the full amount of gross medical charges that a plaintiff would never be responsible for, while the same defendant would not be responsible for any of the same charges in another.

Katherine L. Vojas focuses her practice on business litigation and the defense of health care providers against claims of medical malpractice. She earned her J.D. from Saint Louis University School of Law and received her bachelor's degree, cum laude, from Saint Louis University, with a sociology major and a philosophy minor.

Jeffrey Atkinson is an experienced trial attorney who concentrates his practice in civil litigation, medical malpractice defense and workers' compensation matters. He earned his J.D. from Washington University School of Law and graduated with a bachelor's degree, cum laude, in mathematics from Albion College, Albion, Michigan.

1 Matthiesen, Wickert & Lehrer, S.C., *Medical Expenses, Insurance Write-Offs, And The Collateral Source Rule*, (September 2, 2021), https://www.mwl-law.com/wp-content/uploads/2018/02/MEDICAL-EXPENSES-INSURANCE-WRITE-OFFS-COLLATERAL-SOURCE-RULE.pdf
2 See e.g. *Dyet v. McKinley*, 81 P.2d 1236 (Idaho 2003).
3 See, e.g., *Mann v. Varney Construction*, 23 S.W. 3d 231 (Mo. App. 2000).
4 *Bazeman v. State*, 879 So.2d 692 (La. 2004).
5 770 ILCS 23/10