



Arkansas Association of Defense Counsel

August 10th 2015

Just Another (Crack) In The Wall* - Medicare Not Subject To Collateral Source Rule?

In a decision of note to the defense community, the Delaware Supreme Court upheld a trial court's decision allowing the plaintiff to "blackboard" only those expenses actually paid by Medicare and refused to allow reference to those sums charged by the providers and written down by Medicare.

The Plaintiff sustained serious burns while a resident at a nursing home. The medical expenses reached \$3,683,797.00 though, Medicare paid only \$262,550.00 with balance written off by the providers, as required by Medicare.

The defense argued plaintiff's damages were limited to the amount actually paid by Medicare. Plaintiff argued she was entitled to the entire amount billed, including the written-off portions, because under the collateral source rule, an injured party is permitted to recover the full reasonable cost of medical services.

The court held the collateral source rule does not apply to amounts written off by Medicare utilizing the following analysis.

ISSUE I: States have taken three approaches in applying the collateral source rule to healthcare provider write-offs: (1) The rule is applied to write-offs in the same manner as third-party payments, such as those made by insurers; (2) The rule is applied to provider write-offs only if the injured party can be said to have bargained for the write-off; or (3) The rule is not applied to provider write-offs altogether.

States applying the first approach view provider write-offs as benefits conferred on plaintiffs by providers in the form of services gratuitously rendered at a price below standard rates. States choosing the second approach believe applying the rule to bargained-for write-offs honors the insurance arrangement for which the plaintiff paid, which in turn encourages the purchase of insurance. States that apply the third approach (the Delaware Court in this matter) reason that provider write-offs are not payments made to or benefits conferred on the injured party. The discounted portions of medical bills are paid by no

one. Though the healthcare provider confers a benefit on the injured party by writing off a portion of its bill in the event the injured party is the payer, if the payer is Medicare, Medicaid, or private insurance, the benefit accrues to the taxpayers or the private insurer.

The court reasoned the write-offs for Medicare patients are not payments made to or benefits conferred on the injured party. Any benefit that the plaintiff's healthcare providers conferred in writing off over 90% of the charges was conferred on federal taxpayers.

ISSUE II: The court noted that States not applying the collateral source rule to provider write-offs determine the reasonable value of medical services in one of two ways: (1) treat it as a jury question; or (2) treat the amount paid as dispositive of the reasonable value of the services as a matter of law.

The Delaware court adopted the second method because the collateral source rule is an exception to the general principles governing compensatory damages, and that exception, it was held, did not apply on these facts. Recovery is to be in accordance with ordinary damage principles. In Delaware, a plaintiff is entitled to compensation to make her whole, but no more. An award of the amount paid by Medicare would fully compensate the plaintiff for any economic loss. Because Stayton had not paid and will not be required to pay medical expenses above the amount paid by Medicare, her claim for the written-off portion of her medical bill seeks compensation for harm that will never occur.

Slayton v. Delaware Health Corp. No.601 (Del. 2014)

(* Our apologies to Pink Floyd)

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