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PPAC and Its Possible Effects on Medical Expense Tort Damages

Part Two of a Two-Part Article

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In last month's issue, we began a discussion of how the mandatory health insurance requirement of the Patient Protection and Affordable Care Act of 2010 (PPAC) could work to reduce the amount of tort damages recoverable for medical expenses. We continue herein.

'Billed' Rate an Avoidable Consequence with 'Negotiated' Rates Now Available to All

PPAC dramatically increases the availability of medical insurance. Beginning in 2014, PPAC sections 1501 and 1502 will require all individuals to obtain and maintain health insurance, and PPAC section 1201 will prohibit health insurers from discriminating against individuals or participants on the basis of health status, including pre-existing conditions. Thus, health insurance policies must be offered on a guaranteed issue and guaranteed renewal basis.

The universal availability of medical insurance should greatly reduce the amount of medical expense damages recoverable by tort plaintiffs. This follows from the dramatic difference between a health care provider's schedule of listed rates (sometimes dubbed the "usual and customary" rates) and the negotiated rates they typically accept as payment in full for their services under health insurance service agreements. *See* William R. Jones, Jr., Managed Care and the Tort System: Are We Paying Unnecessary Billions?, 63 *Def. Couns. J.* 74, 75 (1996) ("The difference between the managed care fixed rate and the provider's billed charges is often as much as 600 to 800 percent."). For example, in *Nishihama v. City and County of San Francisco*, 93 Cal. App. 4th 298, 306-07, 309 (2001), the court reduced a $17,168 damages award based on the hospital's full "billed" rate to $3,600, the amount the hospital had accepted as payment in full for its services pursuant to its agreement with the plaintiff's health insurer — reflecting an 80% reduction in damages. Similarly, in *People v. Millard*, 175 Cal. App. 4th 7, 27 (2009), the listed rate for health care services was three times the negotiated amount actually accepted as payment in full for those services. The huge difference between the "list" and "negotiated" prices of health care services exists because "a hospital's price list doesn't reflect what hospitals expect to recoup for a given service. Instead, the prices are the hospital's *initial bargaining position* from which insurers negotiate down." Joseph Goldstein, Exerting Their Patients: Spate of Lawsuits Forces Change in Not-For-Profit Hospital Billing, 95-May *A.B.A.J.* 19, 19 (2009) (emphasis added).

In *Howell v. Hamilton Meats & Provisions Inc.*, 2011 WL 3611940, at *15 (Aug. 18 2011), the California Supreme Court recently confirmed that "[w]here the [health services] provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." Although the *Howell* court declined to address whether evidence of the "billed" amount was relevant to other issues, such as noneconomic damages or future medical expenses, defense counsel should argue that such fictitious bills that no one will ever pay are irrelevant to any damages issue.

Any medical expense damages a plaintiff is projected to incur after Jan. 1, 2014, should be based on the lower negotiated rates for health care services (not the higher "list" or so-called "usual and customary" rates), since health insurance to cover those services is reasonably available (indeed, required) by federal law. Under the doctrine of avoidable consequences (discussed in Part One of this article), this lower negotiated rate should be the most that plaintiffs may recover because they should be taking advantage of the lower negotiated rates and avoiding the "usual and customary" rates for health care services through compliance with the mandatory health insurance requirement of federal law. For this reason, defense counsel and their experts must be prepared to present evidence and argument regarding a plaintiff's future medical expense damages based on anticipated "negotiated" rates for such services.

Moreover, because the PPAC now requires everyone to purchase health insurance as a matter of federal law, there is an open question whether future medical expenses covered by the PPAC are recoverable by a tort plaintiff at all. As explained below, courts have traditionally allowed tort plaintiffs to recover their medical expenses twice — once from their health insurer and a second time from the tortfeasor causing the injury. Courts have justified such double recovery under the collateral source rule as being an appropriate incentive to purchase insurance and to reward persons who have the foresight and providence to carry health insurance. The PPAC undermines this traditional justification for applying the collateral source rule to medical expense damages.

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PPAC and the Collateral Source Rule

Because tort "damages are normally awarded for the purpose of compensating the plaintiff for injury suffered," recovery of such damages is limited to "*just compensation … and no more*," and a plaintiff, "in being awarded damages, [must not] be placed in a better position than he would have been had the wrong not been done." *Hanif v. Hous. Auth. of Yolo Cnty.*, 200 Cal. App. 3d 635, 640-41 (1988) (emphasis in original); *see* Cal. Civ. Code § 3333 (West 2011) (tort measure of damages is "the amount which will compensate for all the detriment proximately caused" by the tort); 6 Witkin, *supra*, § 1548, at 1022 ("In tort actions, damages are normally awarded for the purpose of compensating the plaintiff for injury suffered … . On the other hand, the plaintiff is not entitled to be placed in a better position than he or she would have been in had the wrong not been done.").

Under the collateral source rule, however, "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." *Helfend v. S. Cal. Rapid Transit Dist.*, 2 Cal. 3d 1, 6 (1970). Thus, the collateral source rule has often allowed tort plaintiffs to recover medical expense damages paid by their health insurers, even if that recovery placed them in a better position than they would have been had the wrong not occurred. *See Haygood v. De Escabedo*, __ S.W.3d __, No. 09-0377, 2011 WL 2601363, at *3 & n.40 (Tex. July 1, 2011) (documenting the split of authority on this issue in jurisdictions across the country); *see also Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 222-26 (Kan. 2010); Restatement (Second) of Torts § 920A (1979).

In *Howell*, the California Supreme Court held that the collateral source rule "has no bearing on amounts that were included in a provider's bill but for which the plaintiff never incurred liability because the provider, by prior agreement, accepted a lesser amount as full payment." 2011 WL 3611940, at *1. Accordingly, "a personal injury plaintiff may recover *the lesser* of (a) the amount paid or incurred for medical services, and (b) the reasonable value of the services." *Id.* At *6, emphasis in original; *see Id.* At *14 ("[A]n injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial."). However, the Supreme Court also explained that its decision in *Howell* did not alter the collateral source rule as articulated in *Helfend* and the Restatement. *Id.* ("[W]e in no way abrogate of modify the collateral source rule as it has been recognized in California.").

In *Helfend*, the California Supreme Court acknowledged that "the collateral source rule provides plaintiff with a 'double recovery,' rewards him for the injury, and defeats the principle that damages should compensate the victim but not punish the tortfeasor." 2 Cal. 3d at 10. The *Helfend* court explained that "[c]ourts consider insurance a form of investment" and that the rule "expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance." *Id.* However, the court also expressly acknowledged that the "legitimate objectives" of the collateral source rule "may or may not survive the spread of a philosophy of social insurance." *Id.* at 8, n.8.

The PPAC is arguably a form of "social insurance" that undermines the "legitimate objectives" for applying the collateral source rule to a tort plaintiff's medical expenses. For example, *Helfend* applied the collateral source rule to medical expense damages because it viewed health insurance as something optional or voluntary for both insureds and health insurers — *i.e.*, something individuals could choose to have and something insurance companies could refuse to give. 2 Cal. 3d at 9-10 ("The collateral source rule as applied here embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim's providence. The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities.") (footnote omitted). The *Helfend* court reasoned that, under these circumstances, a "[d]efendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance." *Id.* at 10. Thus, the *Helfend* court viewed the collateral source rule as creating an incentive for individuals to obtain insurance. After 2014, that rationale will no longer apply to most medical expenses.

The PPAC's enactment vitiates the cornerstone justifications for applying the collateral source rule in the medical insurance context because, as explained above, medical insurance is no longer optional — for insureds or for health insurers. Regardless of anyone's personal preferences, medical insurance is now required by federal law. Accordingly, there is far less justification for applying the collateral source rule to medical expenses that are projected to be incurred after the PPAC becomes completely operational in January 2014. Cf. *Pac. Gas & Electric Co. v. Super. Ct.*, 28 Cal. App. 4th 174, 182 (1994) (observing that the collateral source rule may not apply to benefits available under insurance that is made mandatory by statute, such as uninsured motorist benefits); *Waite v. Godfrey*, 104 Cal. App. 3d 760, 770-73 (1980) (a plaintiff's "receipt of uninsured motorists proceeds more accurately results from the enlightenment of state policy than from the consequence of the insured's own thrift or providence.").

Conclusion

It follows that such future medical expenses arguably should not be recoverable as tort damages at all, but instead should be set off against any damages awarded for medical expenses. In other words, tort plaintiffs no longer need to recover medical expense damages to be "made whole" to the extent such damages are covered by health care insurance mandated by the PPAC. At the very least, defendants should be permitted to introduce evidence and argument that plaintiffs' future medical expenses will be covered by the health insurance that they will be required to purchase under federal law.