Recovery for Medical Expenses When a Plaintiff with Medical Insurance Opts to Treat on a Lien Basis

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Recovery for Medical Expenses When a Plaintiff with Medical Insurance Opts to Treat on a Lien Basis

Written by George A. Pisano – 7/5/18

One of the items an insurance adjuster will look at when valuing a product liability claim is to see how much the plaintiff incurred in medical expenses and medical bills after the accident. Naturally, if the injuries sustained by the plaintiff are truly "serious," it is reasonable to expect that there will be a sizeable claim for reimbursement for the plaintiff's medical expenses. Plaintiffs' attorneys are aware of this and as a result will typically try to inflate the figure that represents the plaintiff's past medical expenses. An experienced plaintiffs' attorney recognizes that the defendant's insurance carrier may value their client's claim based in part on the amount of the plaintiff's incurred medical expenses, and, as such, they want to make that figure as large as possible to maximize their client's potential settlement or recovery at trial.

The *Howell* decision (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541) and its progeny of cases in California hold that a plaintiff is not entitled to recover for medical expenses in the inflated amount that was billed but only

in the amount that the plaintiff's medical insurance provider actually paid and was accepted by the provider as payment in full. The difference in the amount that was billed from what was actually paid can be substantial since the medical insurance providers typically pay only a fraction of the amount billed. In order to circumvent this limitation on medical expenses, savvy plaintiffs' counsel will often refer clients who have medical insurance to outside doctors for treatment to be paid on a lien basis. An unresolved question is the amount of recoverable medical expenses that may be submitted to the jury when a plaintiff with medical insurance opts to treat on a lien basis, rather than submitting the bills to its medical insurance provider.

Division Six of the Second Appellate District of the California Court of Appeal recently issued an opinion that deals with a *Howell* lien issue in *Pebley v. Santa Clara Organics, LLC.* In *Pebley*, the court held that a plaintiff with medical insurance who nonetheless opts to treat on a lien basis should be deemed an uninsured plaintiff who can introduce the full amounts "billed" under the lien as evidence of medical damages. The court declined to follow another Court of Appeal decision, which came to the opposite conclusion finding that plaintiffs who treat on a lien basis should not be entitled to recover the full amount billed on a lien basis but only the reasonable market value of the services.

Because there is now a split in authority in California, the trial judges faced with this issue must pick which precedent to follow. Until the split in authority is resolved, defense counsel should

argue that bills for medical services on a lien basis are inadmissible as reflecting only the billed cost of services as opposed to the reasonable market value of services. Defense counsel also should seek to admit evidence of what the true market rate of the medical services is as opposed to the billed amount. Finally, defense counsel should not agree to the court-approved jury instruction (CACI jury instruction 3903A) that talks about medical economic damages in terms of reasonable "cost of services." Defense counsel should instead argue that the "reasonable cost" reference in the jury instruction should be replaced with "reasonable market value." If the court overrules the objection, at least the issue is preserved for appeal.