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## PERSPECTIVE

### Consumers Hurt by Consumer Attorneys

By Robert F. Tyson Jr.

"Worry about yourself!" Something mothers have said to their children for many years is now something plaintiffs and their attorneys in personal injury lawsuits are going to have to acknowledge before the California Supreme Court. The collateral source rule has historically focused on the injured plaintiff and the medical insurance payments made on his or her behalf. In recent months, the collateral source rule has been stretched, strained, manipulated, and mangled in appellate court decisions to provide injured plaintiffs with a "super windfall." In *Yanez v. SOMA Environmental Engineering Inc.* 2010 DJDAR 9720 (June 24) and *Howell v. Hamilton Meats Inc.* 227 P.3d 342; 106 Cal.Rptr.3d 770, appellate courts held for the first time that plaintiffs may recover not only the medical expenses that were paid by their health insurers (i.e. a windfall), but also the much higher amounts that were billed by the health care providers, but never paid or owed (i.e. a super windfall).

Let there be no mistake about who the losers are in these appellate decisions. This is a tremendous loss for the California consumer. The financial impact of allowing plaintiffs for the first time to recover what health care providers bill patients, as opposed to what providers actually accept as payment, will be in the magnitude of billions of dollars. As plaintiffs' attorneys throughout the state prepare to line their pockets with this enormous windfall, under the guise of victims' rights, there is only going to be one person who ultimately pays for it all: the California consumer.

If corporate defendants and insurance companies are now forced to pay the full medical bills, which are often more than two or three times higher than anyone else pays, rest assured this new litigation cost will be passed onto consumers in the form of more expensive goods and services and insurance premiums. It is shameful that the cost of doing business in California will dramatically increase over something that is not even a cost! These are just medical bills that no one has paid and no one will ever pay, because the health care provider almost never seeks payment of the entire medical bill.

To reach these uncharted waters, the appellate courts have touched on everything but what the collateral source rule was intended to do for injured plaintiffs: Worry about yourself! Under the collateral source rule, "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 plaintiff would otherwise collect from the tortfeasor." *Helpend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal. 3d 1, 6. The focus of the collateral source rule is on the plaintiff and what the plaintiff receives from independent sources, such as health insurers. It is clear the collateral source

rule in California originates from the principle that amounts paid to a plaintiff from their own insurer, or some other source independent of the defendant, shall not be deducted from a plaintiff's recovery.

Back when you were growing up, worried about all the other kids staying out later or getting that cone you wanted from the ice cream truck, so are plaintiffs and their attorneys worrying about everyone else but themselves. The negotiations and benefits between the medical provider and the health care insurance carrier have nothing to do with the plaintiff or the collateral source rule. Whether a health care provider gets more patients because they accepted a lesser rate from a health insurer or one health insurer pays a provider less because of a better contract, does not make the difference between what was billed and what was paid a collateral source.

The difference between the gross medical bills and the amount voluntarily accepted by the medical provider as full payment from plaintiff's health care insurer - dubbed the "negotiated rate differential" in the *Howell* decision - is not a collateral source under the collateral source rule. This difference is a fiction. It is not a detriment to an injured party and is not recoverable. It is more accurately called a "nondetrimental variant." These are phantom damages that exist only in the fertile minds of those who stand to unjustly benefit most from asserting them: plaintiffs' lawyers.

It is also important to note, even without the existence of the collateral source rule, the difference between what is paid and what is billed is not damages in California. California Civil Code Section 3333 provides that the measure of damages in tort cases is "the amount which will compensate for all the detriment proximately caused thereby...." "Detriment" is defined in Civil Code Section 3282 as "a loss or harm suffered in person or property." Civil Code Section 3281 clarifies that one must actually "suffer detriment" before recovery can be obtained in the form of "money, which is called damages." Finally, Civil Code Section 1431.2(b)(1), which addresses several liability of tort defendants, defines "economic damages" as "objectively verifiable monetary [losses] including medical expenses," among other [verifiable losses] to the tort claimant.

The "nondetrimental variant" portion of medical bills plaintiffs seek to recover are simply not damages. Just because a hospital may bill \$100 for a single Tylenol tablet, does not mean it is recoverable damages. Just because something was "billed" does not mean plaintiff suffered a detriment in that exorbitant and unreasonable amount. There must have been some loss or harm to the plaintiff. A plaintiff with health care insurance has no loss or harm for medical bills, ever. This is because the voluntary agreements between medical providers and health insurers mandate the providers to accept certain sums in full satisfaction of whatever dollar figures the providers place on their bills. The amount of the medical bill does not matter to the plaintiff (she has insurance), to the medical provider (who has agreed to a certain sum in advance with the insurance carrier) or to the health insurance carrier (who has a contract for set amounts to be paid regardless of bill).

The excitement in the plaintiffs' bar at a possible unprecedented annihilation of the collateral source rule does not end with medical bills. It is their hope to ride this slippery slope to all facets of economic damages, increasing the cost of goods for all Californians. Plaintiffs will now seek the "rack rate" when recovering for hotel stays, because what is paid would no longer be a measure of damages. When plaintiffs seek recovery for a lost vehicle, the amount sought would be the MSRP, not what was paid. Plaintiffs seeking to recover attorney's fees would be able to recover their attorney's highest charged hourly rates, not what was actually paid to the attorney. The list of phantom damages is endless. Once a step is taken down the imaginary path of make believe damages, there is no end to plaintiffs' magical journey.

In *Yanez* and *Howell* the collateral source rule was applied by the trial courts and applied correctly. Post-trial hearings were held (*Hanif* hearings) to determine what was actually paid versus what was billed by medical providers. The injured plaintiffs were allowed to recover a windfall, as they put in their pockets the full amount of money that was paid on their behalf to the medical providers. Plaintiffs' attorneys now argue this windfall is not enough, they need a super windfall comprised of billions of dollars of phantom damages that will only come from one source: the California consumer.

In the coming months, the California Supreme Court will decide this issue in the *Howell* case. The Supreme Court will weigh the law with reality and hopefully tell plaintiffs' attorneys what the collateral source rule and mothers have been saying for years, "Worry about yourself!"

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