

# WISCONSIN CIVIL TRIAL JOURNAL

SPRING 2012 • VOLUME 10 • NUMBER 1

## Defending Claims for Violations of Patient Privacy

*Gina Meierbachtol*

## IN THIS ISSUE

The Extinction of the Insurance Defense Lawyer?

*Michael W. Gill*

Eliminating Phantom Damages—It's Time to Amend Wisconsin's Collateral Source Rule

*Andrew Cook*

Confidentiality Agreements in the Settlement of a Lawyer's Professional Liability Claim—Why Do We Want Them, What Should We Ask For, and What Should We Expect to Receive?

*Russell M. Ware*

*Olson v. Farrar*: When Insurance Coverage Litigation Moves Beyond the Four-Corners Rule

*R. Michael Waterman*

*Brethorst v. Allstate*: A Turn in the Tide of Wisconsin Bad Faith Law?

*Jason P. Gehring & James M. Ryan*

*Schinner and Sustache*: When is Intentional Assault Accidental?

*Mark Malloy & Christina Katt*



**Wisconsin  
Defense Counsel**

Defending Individuals And Businesses In Civil Litigation



## Eliminating Phantom Damages—It’s Time to Amend Wisconsin’s Collateral Source Rule

by: Andrew Cook, The Hamilton Consulting Group, LLC

**D**uring the 2011-12 legislative session, a top legislative priority for the Wisconsin Defense Counsel was to rein in unfair and costly personal injury damages paid for medical expenses that were never actually incurred by the plaintiff. Specifically, the proposed legislative language was designed to address Supreme Court decisions holding that plaintiffs are entitled to be paid the full amount billed by the medical provider for past medical expenses, rather than the actual amount paid by medical assistance or the health insurer. Courts in other jurisdictions have referred to this overcompensation as “phantom damages.”

Led by its executive officers, WDC proposed legislative language that would correct this problem. Unfortunately, despite these efforts to reach a consensus, the language was opposed by the Wisconsin Hospital Association (WHA) and therefore the bill was derailed. However, despite this setback, WDC will continue to work on legislation to protect defendants from being forced to pay these phantom damages.

The first two parts of this article discuss the Wisconsin Supreme Court opinions addressing this issue, as well as various approaches by courts throughout the country in determining the reasonable value of medical expenses. Part III highlights how state legislatures are addressing the issue through legislation, and Part IV discusses WDC’s previous and future efforts to introduce and pass legislation to eliminate these costly and unjust damages.

### I. Wisconsin Supreme Court Decisions

The first of the cases allowing plaintiffs to recover the full amount of medical expenses billed, including amounts written off, i.e., “phantom damages,” is *Ellsworth v. Schelbrock*.<sup>1</sup> In *Ellsworth*, the plaintiff was injured in an automobile accident and was hospitalized for months. She sued the negligent driver and the driver’s insurer. Dunn County Department of Human Services intervened, asserting a claim of subrogation.

At the trial, the plaintiff introduced evidence of the amount billed by her medical providers, which totaled \$597,448.27. The defendant objected to the amount, arguing that only the amount actually paid (\$354,941) by Medical Assistance to the medical providers should have been introduced. The trial court ruled that the amount billed (\$597,448.27)—the sticker price—rather than the amount actually paid (\$354,941) was the proper measure of the amount of past medical expenses.

The case was appealed to the Wisconsin Supreme Court, which upheld the lower court. In reaching its decision, the court held that the collateral source rule applies to medical assistance benefits and, therefore, the defendant was not allowed to introduce evidence of the amount actually paid. Instead, the plaintiff was allowed to introduce the amount that was billed by the medical providers. In reaching its decision, the court ruled that Wisconsin’s tort law “applies the collateral source rule as part of a policy seeking to ‘deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor.’”<sup>2</sup>

Just a year later, the Wisconsin Supreme Court decided *Koffman v. Leichtfuss*,<sup>3</sup> in which the court held that the collateral source rule applies to cases involving payments made by health insurers. Similar to *Ellsworth*, the plaintiff in *Koffman* was injured in an automobile accident and required medical treatment. The total amount billed by the plaintiff's health insurer was \$187,931.78. However, due to contractual relationships with the plaintiff's health care providers, the insurance company received reduced rates and only paid \$62,324 of the amount billed. Another \$3,738.58 was paid by an insurance company and by the plaintiff personally, bringing the total amount of past medical expenses actually paid to \$66,062.58.

During the trial, the defendants moved to limit the evidence regarding medical expenses to the amounts actually paid (\$66,062.58), rather than the amounts billed (\$187,931.78). The trial court granted the defendant's motion and limited the evidence to the amount actually paid, and therefore ruled that the plaintiff was only entitled to the amount of medical expenses incurred (\$66,062.58) rather than the sticker price (\$187,931.78).

The case was appealed to the Wisconsin Supreme Court, which reversed the trial court. Once again, the court held that the collateral source rule applied, even to "payments that have been reduced by contractual arrangements between insurers and health care providers."<sup>4</sup> The court reasoned that this "assures that the liability of similarly situated defendants is not dependent on the relative fortuity of the manner in which each plaintiff's medical expenses are financed."<sup>5</sup>

The third case is *Leitinger v. DBart*.<sup>6</sup> In *Leitinger*, the plaintiff suffered injuries while working on a construction site. At trial, the parties argued over the reasonable value of the plaintiff's medical services. The trial court allowed both parties to proffer evidence of the amount billed by the medical provider (\$154,818.51) and the amount paid (\$111,394.73) by the plaintiff's health insurance company to prove the reasonable value of medical services. The trial court also allowed the parties to

present expert testimony about the reasonable value of medical services. The trial court awarded the plaintiff the amount his health insurance company actually paid for the medical treatment, not the sticker price.

The case was appealed to the Wisconsin Supreme Court, which phrased the issue as "whether, in light of the collateral source rule, evidence of the amount actually paid by a plaintiff's health insurance company for the plaintiff's medical treatment is admissible in a personal injury action for the purposes of establishing the reasonable value of the medical treatment rendered."<sup>7</sup> The court held that the "collateral source rule prohibits parties in a personal injury action from introducing evidence of the amount actually paid by the injured person's health insurance company, a collateral source, for medical treatment rendered to prove the reasonable value of the medical treatment."<sup>8</sup> According to the court:

Simply put, the collateral source rule states that benefits an injured person receives from sources that have nothing to do with the tortfeasor may not be used to reduce the tortfeasor's liability to the injured person. In other words, the tortfeasor is not given credit for payments or benefits conferred upon the injured person by any person other than the tortfeasor or someone identified with the tortfeasor (such as the tortfeasor's insurance company).<sup>9</sup>

Finally, and most recently, in *Orlowski v. State Farm Mut. Auto. Ins. Co.*, a decision issued March 7, 2012, just as this article was going to print, the Wisconsin Supreme Court unanimously ruled that the collateral source rule also allows for the recovery of phantom damages in cases involving first-party underinsured motorist claims.<sup>10</sup> The specific issue before the court in *Orlowski* goes beyond the scope of this article, but the reader should be aware that the decision does re-affirm the essential holdings of *Ellsworth*, *Koffman*, and *Leitinger*.



As a result of these decisions, plaintiffs in Wisconsin are being overcompensated for their medical bills in personal injury cases. This should be a concern to all Wisconsin citizens, who will end up paying for the price of the plaintiffs' overcompensation through higher insurance and medical costs.

## II. A Review of Decisions in Other Jurisdictions

Cases involving phantom damages generally fall within two types: 1) Those involving write-offs due to negotiated rates between health care providers and health insurers; and 2) Medicaid write-offs.

Within both types, courts generally take three approaches: 1) Award the plaintiff the full amount of medical expenses billed by the provider; 2) Award only the amount actually paid to the medical provider; or 3) Allow both parties to admit evidence of the amount billed and the amount paid and allow the jury to decide the reasonable value of medical services.

Below is a discussion of the three approaches taken by the courts when deciding whether to award a plaintiff medical expenses.

### A. Reasonable Value of Medical Expenses—Plaintiff Gets the Full Sticker Price

The Wisconsin Supreme Court has joined at least ten other jurisdictions in awarding plaintiffs the full sticker price, or phantom damages.<sup>11</sup> These courts take the view that if any windfall should ensue, the plaintiff, not the tortfeasor, should reap the benefit. Similar to the Wisconsin Supreme Court in *Ellsworth*, these courts claim that the collateral source rule deters negligent conduct by placing the full cost of the award on the tortfeasor.

### B. Actual Amounts Paid—Eliminating Phantom Damages

A number of jurisdictions have rejected the approach taken by the Wisconsin Supreme Court and instead have ruled against phantom damages. Most notable is a recent California Supreme Court decision.

**California:** In *Howell v. Hamilton Meats and Provisions, Inc.*,<sup>12</sup> the California Supreme Court held that the plaintiff was not entitled to the full sticker price. According to the court, “an 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.”<sup>13</sup>

In reaching its decision, the court noted that in no way did it “abrogate or modify the collateral source rule as it has been recognized in California.”<sup>14</sup> The court concluded that “the negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule.”<sup>15</sup>

In *Howell*, the court cited a lower court decision, *Hanif v. Authority of Yolo County*,<sup>16</sup> where a plaintiff's medical bills were paid for by Medicaid (called Medical in California). In *Hanif*, the appellate court ruled that an injured plaintiff may not recover from the tortfeasor more than the actual amount paid or incurred for past medical care and services. The court explained its reasoning:

In tort actions damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring him as nearly as possible to his former position, or giving him some pecuniary equivalent.... The primary object of an award of damages in a civil action, and the fundamental principle on which it is based, are just compensation or indemnity for the loss or injury sustained by the complainant, and no more....

... Applying the above principles, it follows that an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation.

... Thus, when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate.<sup>17</sup>

**Pennsylvania:** In *Moorhead v. Crozer Chester Med. Ctr.*,<sup>18</sup> the Pennsylvania Supreme Court held that the plaintiff was only entitled to the amount actually paid. The court explained that awarding the plaintiff the full sticker price “would violate fundamental tenets of just compensation.”<sup>19</sup> According to the court, “it is a basic principle of tort law that ‘damages are to be compensatory to the full extent of the injury sustained, but the award should be limited to compensation and compensation alone.’”<sup>20</sup> The court further explained that the plaintiff did not pay the full sticker price, nor did Medicare, which was the collateral source, and held that “the collateral source rule does not apply to the illusory ‘charge’ of \$96,500.91 since that amount was not paid by any collateral source.”<sup>21</sup>

**Texas:** In *Haygood v. Escabedo*,<sup>22</sup> the plaintiff argued that the collateral source rule should have applied and thus excluded evidence of the amount actually paid. The court rejected this argument and held that “only evidence of recoverable medical expenses is admissible at trial.”<sup>23</sup>

The court cited a Texas statute that went into effect in 2003, precluding evidence or recovery of expenses for which “neither the claimant nor anyone acting on his behalf will ultimately be liable.”<sup>24</sup> The law also provided that “recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.”<sup>25</sup>

Explaining that a defendant “is not liable to a health care provider or its patients for medical expenses the patients were not required to pay the provider,”<sup>26</sup> the court stated that “[f]or patients to recover such expenses from the [defendant] ‘would

be a windfall.’”<sup>27</sup> Further, the court noted that “health care providers set charges they maintain are reasonable while agreeing to reimbursement at much lower rates determined by insurers to be reasonable, resulting in great disparities between amounts billed and payments accepted.”<sup>28</sup>

Similar to the California Supreme Court (see above), the Texas Supreme Court rebutted the argument that its decision resulted in a windfall to the defendant. Instead, the court noted that “to impose liability for medical expenses that a health care provider is not entitled to charge does not prevent a windfall to a tortfeasor; it creates one for a claimant...”<sup>29</sup>

### C. Letting the Jury Decide

The third approach, used by a few jurisdictions, is to simply allow the plaintiff to introduce the amount billed and the defendant to produce evidence of the amount paid, and to allow the jury to decide the reasonable value of medical expenses. Below is a summary of the cases that have adopted this approach:

**Indiana:** *Stanley v. Walker*<sup>30</sup> involved an automobile accident between the plaintiff and defendant. The amount of medical bills actually paid by the plaintiff was discounted from the amount originally billed because of an arrangement between the plaintiff’s health insurer and medical providers.

The defendant moved at trial to introduce evidence of the amount actually paid. The plaintiff objected, citing the collateral source rule. The Indiana Supreme Court held that the collateral source rule did not bar evidence of the discounted amounts in order to determine the reasonable value of medical services. The court explained that “to the extent the adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed.”<sup>31</sup>

The court explained its holding:

The reasonable value of medical service is the measure used to determine damages to an injured party in a personal injury matter. This value is not exclusively based on the actual amount paid or the amount originally billed, though these figures certainly may constitute evidence as to the reasonable value of medical services. A defendant is liable for the reasonable value of the services. We find this to be the fairest approach; to do otherwise would create separate categories of plaintiffs based on the method used to finance medical expenses.<sup>32</sup>

**Ohio:** In *Robinson v. Bates*,<sup>33</sup> the plaintiff sued the owner of the residence from whom she rented after breaking a bone in her foot when she slipped and fell on the driveway. During the trial, the plaintiff proffered her medical bills of \$1,919. Her insurance company had negotiated the amount of \$1,350.43 as payment in full.

The court ruled that the collateral source rule did not apply. Therefore, both the amount originally billed by the provider and the amount paid by the insurer were admissible to prove the reasonable value of the medical treatment.

In discussing the collateral source rule, the court explained that the purpose of the rule is to exclude evidence of benefits paid by a collateral source. However, because no one pays the write-off (the difference between the sticker price and the lower amount actually accepted by the medical provider), the court noted that “it cannot possibly constitute payment of any benefit from a collateral source.”<sup>34</sup> The court further explained that “[t]he jury may decide that the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment, or some amount in between.”<sup>35</sup> According to the court, “[a]ny difference between the original amount of a

medical bill and the amount accepted as the bill’s full payment is not a ‘benefit’ under the collateral source rule because it is not a payment....”<sup>36</sup>

### III. Nationwide Movement by State Legislatures to Eliminate Phantom Damages

State legislatures are addressing the issue of phantom damages by introducing legislation. Several states have successfully introduced and passed legislation protecting defendants—and ultimately consumers—from awarding unjust windfalls to plaintiffs.

**North Carolina:** In 2011, the North Carolina Legislature enacted substantive legislation<sup>37</sup> which included language addressing phantom damages. Specifically, the new law changed the state’s evidence rules by including the following language:

Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

**Oklahoma:** Similarly, the Oklahoma Legislature passed legislation<sup>38</sup> eliminating phantom damages:

Upon the trial of any civil case involving personal injury, the actual amounts paid for any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party shall be the amounts admissible at trial, not the amounts billed for expenses incurred in the treatment of the party. If, in addition

to evidence of payment, a signed statement acknowledged by the medical provider or an authorized representative that the provider in consideration of the patient's efforts to collect the funds to pay the provider, will accept the amount paid as full payment of the obligations is also admitted. The statement shall be part of the record as an exhibit but need not be shown to the jury. Provided, if a medical provider has filed a lien in the case for an amount in excess of the amount paid, then bills in excess of the amount paid but not more than the amount of the lien shall be admissible. If no payment has been made, the Medicare reimbursement rates in effect when the personal injury occurred shall be admissible if, in addition to evidence of nonpayment, a signed statement acknowledged by the medical provider or an authorized representative that the provider, in consideration of the patient's efforts to collect the funds to pay the provider, will accept payment at the Medicare reimbursement rate less cost of recovery as provided in Medicare regulations as full payment of the obligation is also admitted. The statement shall be part of the record as an exhibit but need not be shown to the jury. Provided, if a medical provider has filed a lien in the case for an amount in excess of the Medicare rate, then bills in excess of the amount of the Medicare rate but not more than the amount of the lien shall be admissible.

#### **IV. Time to Eliminate Phantom Damages in Wisconsin**

It's time for Wisconsin to overturn these Wisconsin Supreme Court cases by passing legislation that would prohibit plaintiffs from obtaining phantom damages. As previously noted, WDC attempted to introduce and pass such legislation during the 2011-12 legislative session. WDC officers met numerous times with WHA officials to negotiate language that would address the concerns of WHA. However, no consensus was reached and, as a result of WHA's opposition, no legislation was ever introduced.

The legislation WDC drafted sought to allow the jury to see all the evidence and determine the reasonable value of medical services. The language did not incorporate the much stricter stance adopted by the California Supreme Court, which limited the damages to the amount actually paid.

WDC's language was an attempt to afford all defendants the same protections WHA currently receives involving medical malpractice claims. Under current law, medical providers are allowed to introduce evidence of payments made by collateral sources in order to determine the reasonable value of medical expenses. For example, Wis. Stat. § 893.55(7) expressly states that "[e]vidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury is admissible in an action to recover damages for medical malpractice." The law was enacted in 1995 as part of Act 10 (After going into effect, however, this law was weakened considerably by the Wisconsin Supreme Court in *Lagerstrom v. Myrtle Werth Hospital*<sup>39</sup>).

We are hopeful that the Legislature introduces and passes this legislation next session. This is an issue which is vitally important not only for WDC attorneys representing their clients, but for all consumers. By overcompensating plaintiffs for medical bills that were never paid, those costs invariably are passed on to all consumers in the price of goods and services, including health care. WDC will continue to make this issue a top priority until meaningful legislation is introduced and passed into law.

*Andrew Cook is a lobbyist with the Hamilton Consulting Group, LLC, and represents the Wisconsin Defense Counsel before the Legislature. Prior to joining Hamilton Consulting, Mr. Cook practiced law in Washington state as an in-house legal counsel with the Building Industry Association of Washington. Mr. Cook also litigated land use and environmental law cases with the Pacific Legal Foundation.*

## References

- 1 2000 WI 63, 235 Wis. 2d 678, 611 N.W.2d 764.
- 2 *Id.*, ¶ 7 (citing *American Standard Ins. Co. Cleveland*, 124 Wis. 2d 258, 264, 369 N.W.2d 168 (Ct. App. 1985)).
- 3 2001 WI 111, 246 Wis. 2d 31, 630 N.W.2d 201.
- 4 *Id.*, ¶ 31
- 5 *Id.*
- 6 2007 WI 84, 302 Wis. 2d 110, 736 N.W.2d 1.
- 7 *Id.*, ¶ 4.
- 8 *Id.*, ¶ 7.
- 9 *Id.*, ¶ 26.
- 10 *Orlowski v. State Farm Mut. Auto. Ins. Co.*, 2012 WI 21, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_ (decided March 7, 2012).
- 11 *Lindholm v. Hassan*, 369 F. Supp. 2d 1104, 1110 (D.S.D. 2005); *Mitchell v. Haldar*, 883 A.2d 32, 40 (Del. 2005); *Hardi v. Mezzanotte*, 818 A.2d 974, 985 (D.C. App. 2003); *Olariu v. Marrero*, 549 S.E.2d 121, 122-23 (Ga. App. 2001); *Bynum v. Magno*, 101 P.3d 1149, 1160 (Haw. 2004); *Wal-Mart Stores, Inc. v. Frierson*, 818 So.2d 1135, 1139-40 (Miss. 2002); *Brown v. Van Noy*, 879 S.W.2d 667, 676 (Mo. App. 1994); *Haselden v. Davis*, 579 S.E.2d 293, 294 (S.C. 2003); *Acuar v. Letourneau*, 531 S.E.2d 316, 322-23 (Va. 2000); *Bozeman v. Louisiana*, 879 So. 2d 692, 706 (La. 2004).
- 12 52 Cal. App. 4th 541, 257 P.3d 1130, 120 Cal. Rptr. 3d 325 (Cal. 2011).
- 13 *Id.* at 566.
- 14 *Id.*
- 15 *Id.*
- 16 200 Cal. App. 3d 635, 246 Cal. Rptr. 192 (1988).
- 17 *Id.* at 640-41.
- 18 765 A.2d 786, 791 (Pa. 2001).
- 19 *Id.* at 790.
- 20 *Id.*
- 21 *Id.*
- 22 356 S.W.3d 390 (Tex. 2011).
- 23 *Id.* at 399.
- 24 Tex. Civ. Prac. & Rem. Code § 41.0105.
- 25 *Id.*
- 26 356 S.W.3d at 397.
- 27 *Id.* at 396.
- 28 *Id.* at 390.
- 29 *Id.* at 395.
- 30 906 N.E.2d 852 (Ind. 2009).
- 31 *Id.* at 858.
- 32 *Id.* at 856.
- 33 857 N.E.2d 1195 (Ohio 2006).
- 34 *Id.* at 1200.
- 35 *Id.*
- 36 *Id.*
- 37 <http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H542v7.pdf>
- 38 <http://e-lobbyist.com/gaits/OK/HB2023>
- 39 2005 WI 124, 285 Wis. 2d 1, 700 N.W.2d 201 (2005).