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Preventing defendant from muddying the waters at trial

Using Howell *to the plaintiff's benefit at trial*

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Trials can be complicated and lengthy for a jury faced with a parade of facts, arguments, witnesses, and legal jargon. As plaintiffs' attorneys, it is essential that we focus the jury on the material issues so the jury is not lost in the obstacles erected by defense counsel. One way to do this is to remove unnecessary battles from the courtroom.

Although *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551, and subsequent cases have caused alarm among the plaintiffs' bar, a plaintiff can use those cases to his or her advantage by establishing plaintiff's paid medical bills are reasonable before trial. Assuming defendant's disclosed experts have not opined on the matter, a plaintiff can file a motion in limine to preclude the defendant from introducing any opinion, evidence, or argument to dispute the reasonableness of plaintiff's paid medical bills. The motion is based on the presumption that paid bills are reasonable and, without expert opinion to the contrary, defendant cannot rebut that presumption. By removing this skirmish, plaintiffs avoid confusing the issues and wasting undue time and can focus the jury on the important battles.

Reasonable value

The established premise is that plaintiff can recover the "amount which will compensate for all the detriment proximately caused" by defendant's tort. (See Civ. Code, §§ 3281, 3333.) Recovery for medical expenses has been capped to the lesser of (1) the amount paid or incurred for past medical expenses and (2) the reasonable value of the services. (*Howell*, *supra*, 52 Cal.4th 541, 555; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1325-1326.)

Under long established California law, the reasonable value of a good or service is often determined by the actual payments tendered and accepted. As such, evidence of payment of medical bills has been deemed sufficient to establish a presumption as to the reasonableness. (See *Howell*, *supra*, 52 Cal.4th at p. 555; *Pacific Gas & E Co. v. G. W. Thomas Drayage* (1967) 69 Cal.2d 33, 42-43.) The court in *Malinson v. Black* (1948) 83 Cal.App.2d 375, 379, stated, "It is well settled that the amount paid is some evidence of reasonable value and in the absence of any showing to the contrary such evidence has been held to be sufficient. Likewise, it would seem that evidence of the expense incurred would be some evidence of reasonable value." In *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 626, the court held that the plaintiffs' testimony identifying the medical bills relating to treatment and indicating that the bills were paid, coupled with the admission of the bills themselves, showed that the charges were reasonable. The court in *McAllister v. George* (1977) 73 Cal.App.3d 258, 263 found that the plaintiff's testimony that the bills for his dental treatment were paid, and the admission of the bills themselves, established a presumption that the charges were reasonable.

Courts have based this reasoning on the "recognition that a person who receives a bill has 'every interest to dispute its accuracy or reasonableness if there is reason to do so. Thus, if a bill or invoice is paid, the court is assured of the accuracy and reasonableness of the charges.'" (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1268 (quoting *Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 272).) Medical insurers especially pay medical treatment bills after analysis and arms-length negotiations between the providers and insurers, thus providing an accurate picture of the "reasonable value" of the services. (See *Townsend v. Keith* (1917) 34 Cal.App. 564, 565.)

Presumption of reasonableness in light of multiple markets

The *Howell* decision built on this historic presumption of reasonableness and emphasized that the negotiated rate may be the best indication of the reasonable value of the services provided and that it is unclear how any other "market value" could be determined. As *Howell* explained:

> Pricing of medical services is highly complex and depends, to a significant extent, on the identity of the payer. In effect, there appears to be not one market for medical services but several, with the price of services depending on the category of payer and sometimes on the particular government or business entity paying for the services. Given this state of medical economics, how a market value other than that produced by negotiation between the insurer and the provider could be identified is unclear.

(*Howell*, *supra*, 52 Cal.4th at p. 562.)

Following the *Howell* decision came *Corenbaum*. Although the *Corenbaum* opinion further chipped away at the use of the full amount billed by determining that evidence of the full amount billed is not relevant to prove past medical expenses, future medical expenses, and/or noneconomic damages, it did reiterate

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and strengthen the presumption of reasonableness: "Thus, where a medical provider has agreed, before treating a plaintiff, to accept a certain amount for its services, that constitutes the provider's price and there is no need to determine a reasonable value for those services." (*Corenbaum*, *supra*, 215 Cal.App.4th 1308, 1326.)

In the most recent addition, the Fourth Appellate District analyzed *Howell* and *Corenbaum* and the reasonableness of medical expenses of an uninsured plaintiff. (*Bermudez v. Ciolek* (June 22, 2015, G049510) __ Cal.4th __ [DJDAR 7065].) The uninsured plaintiff testified during trial that he had not paid any of his medical bills, believed that his medical providers would be paid out of any recovery he received, and he would be responsible for the bills no matter what happens in the litigation. The plaintiff introduced the unpaid bills as well as expert testimony of two witnesses regarding the reasonableness of the charges he incurred for his medical care. The court found that the full billed amount is admissible to demonstrate the "full range of fees" when determining the reasonable value of services in the health-care marketplace and that plaintiff introduced sufficient evidence to support an award of damages for past medical care up to the amount cited by the experts.

In the process of discussing the reasonableness of plaintiff's unpaid bills, the *Bermudez* court upheld the *Howell* opinion's reliance on the paid amount due to the complex market for medical services. It declared that, in practical terms, the measure of damages of an insured plaintiff will likely be the amount paid to settle the claim in full. The court continued that, although it is theoretically possible to prove the reasonable value of services is lower than the negotiated rate, "nothing in the available case law suggests this will be a particularly fruitful avenue for tort defendants." (*Bermudez*, *supra*, __ Cal.4th __ [DJDAR. 7065, 7072].)

Between Civil Code section 3333 and these cases, a plaintiff should be allowed to present to the jury the paid cost as reasonable compensation for the detriment caused by defendant without defendant presenting evidence to the contrary.

Defendant's failure to dispute presumption of reasonableness

Armed with the presumption that paid medical bills are reasonable, a plaintiff can argue that the burden shifts to defendant to dispute that presumption. If defendant has not disclosed any expert to dispute this presumption, then plaintiff can preclude defendant from muddying the waters with this argument during trial.

There are potentially two steps to demonstrate that a defendant has failed to dispute the presumption of reasonableness. First, if defendant has failed to disclose an expert to provide an opinion on the reasonableness, plaintiff can argue in a motion in limine that defendant has failed to present any expert testimony to refute the presumption. Second, if defendant has disclosed an expert to discuss the medical bills, it is important to question defendant's expert during deposition to establish: (1) that the expert is not opining on or disputing the reasonableness of the medical bills; and (2) that the expert has stated all of the opinions that he or she intends to present at trial. (See *Jones v. Moore* (2000) 80 Cal.App.4th 557, 561-562, 565 (affirming exclusion of expert testimony going beyond the opinions expressed during expert deposition).) With this foundation, a plaintiff can preclude defendant from mentioning, opining, or arguing that plaintiff's medical bills were not reasonable.

The *Howell* lineage has frustrated many, if not all, on the plaintiffs' side; however, it is time to spin these cases to benefit our clients. Employing and expanding on this presumption of reasonableness saves money, time, and resources as well as prevents defendants from complicating trial.


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