

The legal boundaries of third-party carriers' medical-bill negotiations

A defense move to lower the value of pain-and-suffering damages as a multiple of medical bills

By Albert Abkarian & Nicholas Abkarian

Recently, an unprecedented situation has arisen in California personal-injury cases where third-party carriers have begun using unaffiliated organizations to negotiate lower medical bills directly with the plaintiff's healthcare providers and pay the negotiated bills, without notifying the plaintiff's attorney or the patient. In most cases, the providers are not aware that they are discussing the patients' case with third-party carriers because the unaffiliated organization will omit its real identity and representation from the providers. These direct negotiations are an attempt to artificially lower the value of pain-and-suffering damages recoverable by plaintiffs, because the third-party carriers intend to introduce the reduced medical bills as evidence of the full and final amounts charged by their medical providers.

This article will set forth four key concepts. First, it will explain why healthcare providers communicating about a patient's medical records and negotiating with third-party carriers regarding a patient's medical bills is likely in violation of HIPAA and California law. Second, it will demonstrate how insurance companies who use outside organizations to negotiate bills with healthcare providers on their behalf are probably in violation of the California Insurance Code. Third, it will show that recent cases, like *Howell* and *Pebley*, likely do not support third-party carriers presenting their negotiated lower bills as final billing totals at trial. Lastly, it will outline the ethical and public policy concerns against third-party carriers directly negotiating with medical care providers.

Relevant statutes

HIPAA Privacy Rule

Understanding this issue requires a review of the HIPAA "Privacy Rule." The HIPAA Privacy Rule "protects all '*individually identifiable health information*' held or transmitted by a covered entity or its business associate, in any form or media, whether *electronic, paper, or oral*." (https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html.) The Privacy Rule calls this information "*protected health information* (PHI)." (*Ibid.*) According to the Privacy Rule, *"[e]very*

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health care provider, regardless of size, who electronically (fax, email or telephone) transmits health information in connection with certain transactions, is a 'covered entity' that must follow the Privacy Rule. This sort of 'individually identifying health information' includes information relating to "the past, present, or future payment for the provision of health care to the individual." (*Ibid.*)

HIPAA's privacy rule establishes the basic idea that individually identifiable health information, including a patient's medical bills, should not be discussed with parties who do not have privity of contract with a patient or are not directly authorized by a patient as their first-party insurance carrier. As such, a healthcare provider who communicates via fax or telephone with a third-party insurance company about their patient's medical bills without authorization from their patient or their legal representative will likely be in violation of the HIPAA privacy rule.

California Civil Code § 56.10

Civil Code section 56.10 also supports the contention that healthcare providers should not communicate and negotiate their patient's medical bills directly with third-party carriers. Section 56.10, subdivision (a) addresses this specific issue, as it states that "[a] provider of health care, health care service plan, or contractor shall not disclose medical information regarding a patient of the provider of health care …. without first obtaining an authorization." This statute indicates that communications regarding a patient's medical bills with third-party carriers is improper, and healthcare providers who negotiate with third-party carriers regarding their patient's medical bills will probably be in violation of section 56.10.

Furthermore, the exception in subsection (c)(2), allowing medical information to be disclosed to insurers or entities "responsible for paying for healthcare services" to determine responsibility for and to make payment, applies only to first-party carriers who are directly responsible for a patient's medical-bill payments and have direct relationship with the patient. This exception does not apply to third-party carriers, who have no contractual privity with the patient, have no authorization to discuss the patient's medical bills, and have no actual responsibility to pay for the patient's bills, regardless of whether they decide to directly make payments to the healthcare providers. Furthermore, third-party carriers have a motivation that is contrary to patients' interests when they attempt to artificially reduce pain and suffering recovery after negotiating for reductions in medical bills. Thus, healthcare providers who negotiate with third-party carriers who have interests adverse to their patients are potentially in violation of the Civil Code.

Cal. Code Regs. Tit. 10 Section 2689.11(a) & California Insurance Code § 791.13

In the cases where third-party carriers have negotiated bills directly with healthcare providers, the carriers have almost always used outside organizations to negotiate the bills on their behalf. California Code of Regulations Title 10, section 2689.11 addresses this issue in stating that "[a] licensee shall not disclose nonpublic personal medical record information about a consumer to affiliated or nonaffiliated third parties without the consumer's prior written authorization." Third-party insurers likely violate this code by disclosing nonpublic medical information to organizations they hire to negotiate medical bills, whether these organizations are affiliated or not.

These actions also violate Insurance Code section 791.13, which states that "[a]n insurance institution, agent, or insurance-support organization shall not disclose any personal or privileged information about an individual collected or received in connection with an insurance transaction," subject to exceptions that do not apply in these situations. Therefore, third-party carriers who disclose a patient's medical-billing information to outside organizations that negotiate on their behalf will likely also violate the California Insurance Code.

Relevant cases

***Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541**

In *Howell*, the California Supreme court held that the collateral source rule does not permit fully billed medical amounts to be introduced as evidence when a plaintiff's healthcare providers accepted, as full payment, a discounted amount negotiated in a preexisting contract with plaintiff's private insurance. In cases where a preexisting agreement between plaintiff's private first-party carrier and the healthcare providers exists, the plaintiff "cannot meaningfully be said ever to have incurred the full charges." (*Id.* at p. 557.) As a result, the Court found that "[t]he [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." (*Id.* at p. 549.)

Furthermore, *Howell*'s ruling only applies to an "injured plaintiff whose medical expenses are "paid through private insurance" with a direct relationship to the patient, and not in situations where plaintiffs choose to treat on a lien basis or outside their available first-party insurance plan. (*Id.*, 52 Cal.4th at p. 566.) The Court further clarified that "[i]n so holding, we in no way abrogate or modify the collateral source rule as it has been recognized in California" (*Id.* at p. 566.) *Howell* therefore does not modify the traditional collateral source rule where 1) plaintiff's first-party carrier does not have a preexisting negotiated agreement with plaintiff's healthcare providers or 2) plaintiff decides to treat on a lien basis or outside their available first-party insurance plan.

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Since this case only addresses the collateral source rule's inapplicability to medical expenses negotiated and paid by first-party insurance carriers *per a preexisting contractual agreement*, applying its ruling to cases involving third-party carriers directly negotiating with and paying healthcare providers contradicts the intent of *Howell*. When there are no preexisting agreements and third-party carriers negotiate medical bills directly with a patient's providers, the *patient has still incurred the bill* before the third-party carrier's negotiations. Since medical bills later negotiated by third-party carriers are bills that are actually incurred by plaintiffs, the collateral-source rule should allow Plaintiffs to introduce the fully billed medical amounts as evidence in trial. Therefore, allowing third-party carriers to directly negotiate medical bills with healthcare providers and present the negotiated bills as full and final billed amounts contradicts the spirit and purpose of the court's ruling in *Howell* and the long-standing precedent of California's collateral source rule.

***Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266**

In *Pebley*, the court held that plaintiffs who decide to treat on a lien basis with medical providers, rather than through their available insurance plan, could introduce fully billed medical bills as evidence into trial. The court reasoned that plaintiffs who choose to treat outside of their first-party available insurance plan, such as on a lien basis, should be treated as "uninsured plaintiffs" because they take on the responsibility for the bills themselves. (*Id.*, 22 Cal.App.5th at pp. 1277-78.) As a result, the court found that "the full lien amounts that were billed were admissible" as evidence in trial, although the reasonableness of the medical bills could still be challenged. (*Id.* at p. 1278.)

Thus, under *Pebley*, even if a third-party carrier were to directly negotiate with a healthcare provider to lower the bills and pays those bills, a plaintiff should still be able to introduce the fully billed medicals as evidence in trial since the Plaintiff actually incurred and took on the responsibility for the fully billed amount and there was no pre-existing contractual agreement to reduce healthcare bills.

***Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1291**

Katiuzhinsky also provides further support for the contention that third-party carriers should not be allowed to directly negotiate a patient's medical bills with the patient's healthcare providers and introduce the lowered bills as evidence at trial of the fully billed amounts. In that case, the Court ruled that "[t]he intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment." (*Id.*, 152 Cal.App.4th at p. 1291.) The Court's logic here further provides support for the contention that if a plaintiff has taken on responsibility for the amounts billed by their healthcare providers, the plaintiff can introduce those fully billed amounts at trial, regardless of whether a third-party decides to negotiates those bills later on.

Public policy arguments

In many cases, the third-party carriers that have directly negotiated medical bills with healthcare providers have failed to disclose that they are unconnected third parties with no privity of contract with the patient. They have also failed to notify plaintiffs' attorneys that they have communicated with and negotiated their clients' medical bills until settlement negotiations begin to be discussed. Public policy disfavors misleading omissions such as these, as they cause healthcare providers to be misled as to who they are discussing confidential patient information with, while also causing providers to unknowingly work adversely to their patients' best interests in receiving full and fair compensation for pain and suffering.

Plaintiffs' attorneys have a fiduciary duty to best represent their client's interests, and they should be notified of any actions that work against their client's interests in receiving full and fair compensation. Moreover, there is no way for plaintiffs to hold third-party carriers accountable for bad-faith practices, since plaintiffs may only sue their own insurers for insurance bad-faith practices. Finally, for personal-injury patients who decide not to hire legal representation, these omissions could undermine rights and interests that the unrepresented patients might be completely unaware of and have no financial or legal means of combating. Therefore, public policy disfavors the omissions that are being made by third- party carriers in negotiating patients' medical bills directly with healthcare providers.

Conclusion

California statutes, case law, and public policy interests all likely disfavor the practice of third-party carriers negotiating patients' medical bills directly with healthcare providers. Healthcare providers and insurance companies violate federal and California law in discussing patients' confidential medical-billing information. In addition, California case law demonstrates that even in light of these negotiations, the fully billed medicals could still be introduced into trial as evidence of the reasonable value of medical services provided. And lastly, public policy does not support allowing unconnected third-party carriers to undercut plaintiff 's attorneys and omit representing themselves as working against patients' best interests. For the following reasons, direct negotiations between third-party carriers and healthcare providers are likely improper in California personal-injury cases.

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