BILLED v. PAID: PRESENT, PAST, FUTURE

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In June 2011, the North Carolina General Assembly enacted HB 542, titled "Tort Reform for Citizens and Businesses." Section 1.1 of HB 542 creates a new rule of evidence (Rule 414) that limits evidence of past medical expenses to "the amounts actually paid to satisfy the bills" and "the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied." Section 1.2 amends G.S. § 8-58.1, limiting the plaintiff's testimony about reasonable medical expenses to the amount "paid or required to be paid in full satisfaction" of the charges. Exhibit 1. In combination, the new provisions, commonly referred to as "billed v. paid," will significantly reduce the amount that injured plaintiffs can recover for their medical expenses.

The billed v. paid provisions are effective for all actions "arising on or after" October 1, 2011. Exhibit 2 (SB 586, Section 1.1).

In the past decade, many states have confronted the billed v. paid issue in their appellate courts. A handful of states have addressed the issue legislatively. This paper reviews the experience in other jurisdictions, traces the evolution of billed v. paid in North Carolina, and identifies a potential constitutional challenge to the new legislation.

I. Other Jurisdictions

A. States with no billed v. paid statute

Since 2000, in the absence of a specific statute, at least 26 state appellate courts have addressed the issue of whether evidence of the amount billed, or the amount paid, or both, is admissible to prove the amount of recoverable medical expenses. Exhibit 3.

Appellate courts in fifteen states and the District of Columbia have held that the injured plaintiff may recover the amount billed, and bar the defendant from presenting evidence of the lower amount that the health care provider accepted to satisfy the bill. Most of these courts ground their decision on the common law collateral source rule. The "billed only" rule applies in Arizona, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Massachusetts, Mississippi, Oregon, South Carolina, South Dakota, Virginia, and Wisconsin.[1]

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[1] Arizona: Lopez v. Safeway Stores, Inc., 129 P.3d 487 (Ariz. App. 2006); Colorado: Volunteers of America v. Gardenswartz, 242 P.3d 1080 (Colo. 2010); Delaware: Mitchell v. Haldar, 883 A.2d 32 (Del. 2005); Onusko v. Kerr, 880 A.2d 1022 (Del. 2005); District of Columbia: Hardi v. Mezzanotte, 818 A.2d 974 (D.C. App. 2003); Georgia: Olariu v. Marrero, 549 S.E.2d 121 (Ga. App. 2001); Hawaii: Bynum v. Magno, 101 P.3d 1149 (Haw. 2004); Illinois: Wills v. Foster, 892 N.E.2d 1018 (Ill. 2008); Kentucky: Baptist Healthcare Systems v. Miller, 177 S.W.3d 676 (2005); Louisiana: Bozeman v. State, 879 So.2d 692 (La. 2004); Massachusetts: Scott v. Garfield, 912 N.E.2d 1000 (Mass. 2009); Mississippi: Brandon HMA v. Bradshaw, 809 So.2d 611 (Miss. 2001); Oregon: White v. Jubitz Corp.,

Appellate courts in ten other states, without specific legislative guidance, interpret the collateral source rule or a general collateral source statute more favorably to the tortfeasor. Finding that discounted medical bills were not encompassed by the collateral source rule, the supreme courts of Iowa, Ohio, Indiana and Kansas each held that the jury may consider both the amount billed and the amount paid in determining the "reasonable value" of the medical services.[2] The supreme courts of Pennsylvania, Idaho and California ruled that only evidence of the amount paid is relevant and admissible.[3] Appellate courts in New York, Florida and Minnesota, applying their state's collateral source statute, required a post-verdict set-off of the difference between the amount billed and the amount paid.[4]

B. States with billed v. paid statutes

At least five other states – Texas, Arkansas, Maryland, Missouri, and Oklahoma – have enacted billed v. paid statutes.

1. Texas

The Texas statute, passed as part of a "tort reform" package in 2003, provides: "In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." Tex. Civ. Prac.& Rem. Code § 41.0105. In a series of appeals, plaintiffs' attorneys and the Texas Trial Lawyers Association unsuccessfully argued that the legislature's use of "paid *or incurred*" meant that the gross amount of the bill was recoverable. See, e.g., Matbon, Inc. v. Hutton, 288 S.W.3d 471, 480-82 (Tex. App. 2009); Mills v. Fletcher, 229 S.W.3d 765 (Tex. App. 2007). In Haygood v. Garza de Escabedo, 2011 Tex. LEXIS 514 (July 1, 2011), the Texas Supreme Court definitively resolved the issue, holding that the plaintiff may recover only the discounted amount, and limiting evidence of medical expenses to the amount paid.

In Mills v. Fletcher, 229 S.W.2d at 769-71, the Texas Court of Appeals considered and rejected a constitutional challenge. The court held that the statute "has a reasonable relation to a proper legislative purpose, and … is not arbitrary or discriminatory," does not violate the open courts provision of the Texas Constitution, and is not unconstitutionally vague.

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219 P.3d 566 (Ore. 2009); South Carolina: Covington v. George, 597 S.E.2d 142 (S.C. 2004); Haselden v. Davis, 579 S.E.2d 293 (S.C. 2003); South Dakota, Papke v. Harbert, 738 N.W. 2d 510 (S.D. 2007); Virginia: Radvany v. Davis, 551 S.E.2d 347 (Va. 2001); Acuar v. Letourneau, 531 S.E.2d 316 (Va. 2000); Wisconsin: Leitinger v. DBart, Inc., 736 N.W. 2d 1 (Wis. 2007).

[2] Pexa v. Auto Owners Insurance Co., 686 N.W. 2d 150 (Iowa 2004); Robinson v. Bates, 857 N.E.2d 1195 (Ohio 2006); Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009); Martinez v. Milburn Industries, Inc., 233 P.3d 205 (Kan. 2010).

[3] Moorhead v. Crozer Chester Medical Center, 765 A.2d 786 (Pa. 2001) (Exhibit 4); Dyet v. McKinley, 81 P.3d 1236 (Idaho 2003); Howell v. Hamilton Meats & Provisions, Inc., 2011 Cal. LEXIS 8119 (Cal. August 18, 2011).

[4] Kastick v. U-Haul Company of Western Michigan, 740 N.Y.S.2d 167 (N.Y. App. Div. 2002); Goble v. Frohman, 901 So. 2d 830 (Fla. 2005); Swanson v. Brewster, 784 N.W.2d 264 (Minn. 2010).

2. Arkansas

In its "Civil Justice Reform Act of 2003," the Arkansas legislature included a medical expenses provision that is indistinguishable from North Carolina's new Rule 414:

> Any evidence of damages for the costs of any necessary medical care, treatment, or services received shall include only those costs actually paid by or on behalf of the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible.

Ark. Code Ann. § 16-55-212(b).

In 2009, the Arkansas Supreme Court held that the billed v. paid provision violates the separation of powers provisions of the Arkansas Constitution:

> Our state constitution has long recognized the importance of separation of powers. It reads, "[n]o person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Ark. Const. art. 4, § 2. Most importantly, Amendment 80, § 3 to **the Arkansas Constitution instructs that the Arkansas Supreme Court "shall prescribe the rules of pleading, practice and procedure for all courts."**
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> …
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> It is undisputed that the rules of evidence are "rules of pleading, practice and procedure." Moreover, we have held that the rules of evidence are rules falling within this court's domain. See Ricarte v. State, 290 Ark. 100, 717 S.W.2d 488 (1986). Our review of the plain language of the medical-costs provision reveals that the instant statute promulgates a rule of evidence. Here, the provision clearly limits the evidence that may be introduced relating to the value of medical expenses to the amount of medical expenses paid or the amount to be paid by a plaintiff or on a plaintiff's behalf, thereby dictating what evidence is admissible. Because rules regarding the admissibility of evidence are within our province, we hold that the medical-costs provision … violates separation of powers under article 4, § 2 and amendment 80, § 3 of the Arkansas Constitution and, therefore, is unconstitutional.

Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 140, 142 (Ark. 2009) (emphasis added).

3. Missouri

In 2005, the Missouri legislature enacted a collateral source statute that included a unique billed v. paid provision:

> (1) Parties may introduce evidence of the value of the medical treatment rendered to a party that was reasonable, necessary, and a proximate result of the negligence of any party.
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> (2) **In determining the value of the medical treatment rendered, there shall be a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered.** Upon motion of any party, the court may determine, outside the hearing of the jury, the value of the medical treatment rendered based upon additional evidence, including but not limited to:
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> (a) The medical bills incurred by a party;
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> (b) The amount actually paid for medical treatment rendered to a party;
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> (c) The amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of a recovery.
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> Notwithstanding the foregoing, no evidence of collateral sources shall be made known to the jury in presenting the evidence of the value of the medical treatment rendered.

R.S. Mo. 490.715.5 (emphasis added).

The statute creates a "rebuttable presumption" that the amount paid represents "the value of the medical treatment," but sheds little light on how the presumption could be rebutted, and the respective roles played by the judge and jury. In Deck v. Teasley, 322 S.W.3d 536 (Mo. 2010), the Missouri Supreme Court made a pragmatic interpretation of the statute, preserving the jury's role as fact-finder. The court held that the statutory presumption had been rebutted by the plaintiff's abundant evidence that the true value of the medical services was greater than the amount paid. "When the presumption is rebutted, the party's other evidence of value, as well as the amount necessary to satisfy the financial obligations, is admitted at trial as though no presumption exists." Id. at 540.[5] The jury, not the judge, then weighs the competing evidence and determines the value. Id. at 541-42.

[5] The original Missouri bill, like the final version of HB 542, would have limited the evidence to the amount actually paid or necessary to satisfy the remaining obligation to the health care provider. See Deck, 322 S.W.2d at 541, n.2.

4. Maryland

In 2005, the Maryland legislature enacted a general "tort reform" statute that includes the following provision regarding medical expenses:

> (1) A verdict for past medical expenses shall be limited to:
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> (i) The total amount of past medical expenses paid by or on behalf of the plaintiff; and
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> (ii) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay.

Md. Code Ann. § 3-2A-09.

The Maryland statute clearly defines and limits the amount that can be recovered for past medical expenses, but does not provide clear guidance as to what evidence is admissible at trial. The Maryland Court of Appeals recently addressed that issue in Lockshin v. Semsker, 987 A.2d 18 (Md. App. 2010), a medical malpractice case. The court held that the common law collateral source rule prohibited the presentation of evidence of write-offs of medical expenses during trial. Instead, the defendant could present such evidence in a post-trial proceeding to reduce the verdict to the amount paid, in accordance with the statute.

5. Oklahoma

In 2011, the Oklahoma legislature passed a statute limiting evidence of medical expenses to the amount paid: "Upon the trial of any civil case involving personal injury, the actual amounts paid for any doctor 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." HB 2023. The bill passed the senate and house by wide margins, and was signed into law by the governor on May 10, 2011.

II. The Evolution of Billed v. Paid in North Carolina

Mindful of North Carolina's longstanding collateral source rule, Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987), our trial courts have consistently limited evidence of medical expenses to the amount billed. The North Carolina appellate courts have never addressed the billed v. paid issue.

The House passed a comparative fault bill (HB 813) in 2009. In the spring of 2010, the Senate bill sponsors proposed adding billed v. paid provisions. An early version of proposed Rule 414 provided that evidence of medical expenses "shall be limited to the amounts necessary to discharge the liability incurred by or on behalf of the injured party." In a modest nod to plaintiffs, proposed Rule 414 also provided that "the claimant may introduce evidence of any

obligation to reimburse a third party for payment of medical expenses." Exhibit 5 (HB 813, Proposed Senate Committee Substitute, 5/11/10 (Section 6)).

The Senate sponsors of HB 813 later modified the proposed rule to permit a broader array of evidence of past medical expenses, including:

> 1. The bills submitted by the provider of medical services.
> 2. The amount actually paid for the medical services;
> 3. The amount or estimate of the amount that is necessary to discharge the liability to the provider of medical services.

Exhibit 6 (HB 813, Proposed Senate Committee Substitute, 6/8/10 (Section 7)).

The comparative fault bill, including the billed v. paid provisions, died in the Senate Judiciary Subcommittee in June 2010.

The billed v. paid issue next surfaced early in the 2011 legislative session. The first version of HB 542, filed on February 1, 2011, included a new Rule 414, similar to the first version in 2010:

> Evidence offered to prove past medical expenses may include all bills reasonably paid and a statement of the amounts actually necessary to satisfy the bills that have been incurred but not yet paid. Evidence of source of payment and rights of subrogation related to the payment shall be admissible.

Exhibit 7 (Section 1.1).

HB 542 was ratified on June 17, 2011. The final version of Section 1.1 (Rule 414) was more explicit in limiting the evidence to the amount paid and eliminated the sentence that had allowed evidence of subrogation. Exhibit 1.

III. Potential Constitutional Challenge

Plaintiffs in North Carolina will not be able to make the same separation of powers argument that succeeded in Arkansas. The key constitutional provision relied on by the Arkansas Supreme Court declares: "**The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts.**" In direct contrast, Article IV, § 13(2) of our Constitution provides: "**The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions**...."

Other provisions of the North Carolina Constitution may support a challenge to new Rule 414. Article I, § 25 provides that the right to trial by jury "shall remain sacred and inviolable." While Article IV, § 13(2) gives the General Assembly the power to make rules for the trial courts, it also sets limits on that power: **"No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury."** Exhibit 8. The right to trial by jury encompasses the jury's determination of the amount of compensatory damages. Osborn

v. Leach, 135 N.C. 628, 633, 47 S.E. 811, 813 (1904) (Exhibit 9); see Rhyne v. K-Mart Corp., 358 N.C. 160, 176, 594 S.E.2d 1, 12 (2004) (compensatory damages "represent a type of property interest vesting in plaintiffs," protected by Article I, § 25).

The amount of reasonable medical expenses is a key element of compensatory damages that must be determined by the jury. By limiting the evidence of medical expenses to the amount paid, the legislature has adopted a "rule of procedure" that unconstitutionally "abridge[s] substantive rights" and "limit[s] the right of trial by jury," in violation of Article IV, § 13(2) and Article I, § 25.

CONCLUSION

North Carolina's billed v. paid rule is one of the most extreme in the nation. Of the twenty-six states that have addressed the issue judicially, only Pennsylvania, Idaho and California bar the jury from hearing evidence of the amount billed. Two other states – Arkansas and Oklahoma – have adopted the same one-sided rule by statute. The Arkansas law was struck down as unconstitutional and the Oklahoma statute, enacted in 2011, has not yet been tested in the courts. The Texas Supreme Court recently interpreted its statute as barring evidence of the amount billed.

In determining the reasonable value of the plaintiff's medical expenses, the jury should at least be permitted to consider the amount of the bill. By legislative fiat, Rule 414 deprives the jury of that relevant information, in violation of the constitutional right to trial by jury.