Collateral Damage

Is an Insurance Company "Write-Off" a Collateral Source for Purposes of MCL 600.6303?

|| By Christopher Doyle ||

A hypothetical tort plaintiff is billed $50,000 for medical services. If the plaintiff's insurance company pays $25,000 in full satisfaction of the bill, how much is the plaintiff entitled to recover for medical expenses?

This type of insurance discount, often referred to as a "write-off" or "write-down," has given rise to serious questions regarding the interpretation of MCL 600.6303, which provides for a post-verdict reduction of damages for medical expenses that were paid by a collateral source.[1] In particular, insurance discounts cloud the task of defining the term "collateral source" for the purposes of MCL 600.6303.[2]

The impact on tort damages of insurance discounts was brought to the fore in *Greer v Advantage Health*.[3] This article discusses the statutory mechanics and policy considerations implicated by *Greer*.

Mechanics of MCL 600.6303

MCL 600.6303 provides that in a personal injury action in which the plaintiff seeks to recover for the expense of medical care, the court shall reduce any portion of the judgment representing medical expenses paid or payable by a collateral source. Subsection 4 of the statute defines "collateral source" as:

> benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or Medicare benefits.

However, the next two sentences of Subsection 4 set forth several categories of benefits that are excluded from the definition of "collateral source":

> Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).

Thus, for present purposes, MCL 600.6303 provides that benefits paid by insurance are subtracted from the verdict *unless* the insurance provider has exercised a lien against the plaintiff's recovery.

Greer v Advantage Health

Greer v Advantage Health arose out of the birth of Makenzie Greer. The plaintiffs asserted claims of negligence against the physicians attending Elizabeth Greer during Makenzie's delivery. The parties agreed that the plaintiffs were billed $425,533.75 for medical care arising from the alleged malpractice. After the jury awarded the plaintiffs $425,533.75 in medical expenses, the defendants moved the court to reduce the award for medical expenses to $212,714.75, the amount the plaintiffs' insurers paid in full satisfaction of the plaintiffs' medical bills. The trial court rejected the defendants' contention, determining that the award for medical expenses should not be reduced because the plaintiffs' insurers had exercised liens against the plaintiffs' recovery.

On appeal, the defendants contended that the trial court erred by not reducing the award for medical expenses to the amount actually paid by the plaintiffs' insurers. In support, the defendants asserted that the discount was a "benefit received" under an insurance policy and should be considered a collateral source for the purposes of MCL 600.6303. The defendants further contended that the plaintiffs' insurers exercised liens only to the extent of the amounts actually paid, thereby rendering the amount of the discount—$212,819—a windfall to the plaintiffs.

The Michigan Court of Appeals found some merit in the defendants' position, but concluded that the plaintiffs could recover the full amount of the medical bills. In an opinion authored by Judge Markey, the Court of Appeals emphasized the last sentence of Subsection 4, providing that "[c]ollateral source does not include benefits paid or payable by a person… or other legal entity entitled by contract to a lien…if the contractual lien has been exercised." In relying on this provision, the Court of Appeals noted that "[t]he statute nowhere specifies that this exclusion from the statutory collateral source rule is limited to the amount of the lien exercised or the amount actually paid."[4]

On appeal to the Michigan Supreme Court, the defendants asserted that the Court of Appeals erred by concluding that any benefit "received or receivable" under the definition of collateral source was also a benefit "paid or payable" for purposes of the exclusion. The defendants contended that the legislature intended for the exclusion to cover only those benefits that were paid or payable by an insurer as opposed to the broader category of discounts received or receivable by policyholders. According to the defendants, the insurance discount at issue was a benefit received by the plaintiffs, not a benefit paid by the plaintiffs' insurers.[5]

The plaintiffs asserted that the Court of Appeals properly interpreted MCL 600.6303. In particular, the plaintiffs contended that a benefit is not a collateral source when it is provided by an entity that has exercised a lien against the plaintiff's recovery, regardless of whether the amount of the lien matches the amount of the benefit. The plaintiffs also contended that when there is any doubt regarding the interpretation of a statute, the statute should be given the effect that makes the least change in the common law.[6]

On July 8, 2016, the Michigan Supreme Court vacated its own order granting leave to appeal. Justice Zahra, in a concurring opinion that was signed by Justice Markman and Chief

Fast Facts

MCL 600.6303 provides for a post-verdict reduction of damages for medical expenses that were paid by a collateral source.

Medical-expense benefits paid by insurance are subtracted from the verdict *unless* the insurance provider has exercised a lien against the plaintiff's recovery. This exclusion from the statutory collateral source rule is not limited to the amount of the lien exercised or the amount actually paid.

Effective April 10, 2017, MCL 600.1482 will limit recovery in medical-malpractice cases to amounts actually paid.

"Given this legislative purpose, it seems counterintuitive that the Legislature would enact the statute with a loophole that permits a plaintiff to recover for medical expenses never owed or paid."

Justice Young, wrote separately to "bring this case to the attention of the Legislature."[7] Echoing the concerns expressed by the defendants, Justice Zahra cited the legislative intent of preventing double recovery, stating, "Given this legislative purpose, it seems counterintuitive that the Legislature would enact the statute with a loophole that permits a plaintiff to recover for medical expenses never owed or paid."[8]

Drawing particular attention to the issue of insurance discounts, Justice Zahra concluded, "To the extent the Legislature did not intend MCL 600.6303(4) to exclude from the statutory collateral-source rule anything greater than the actual amount of a contractual lien exercised by a lienholder, it needs to amend the statute to expressly state its intent."[9] As noted by the Court of Appeals, the legislature could revise the statute to make clear that the collateral source exclusion is limited to the "amount of" a validly exercised lien.[10]

In vacating the order granting leave to appeal, the Supreme Court effectively upheld the Court of Appeals' interpretation of MCL 600.6303. Justice Zahra supported the Court of Appeals' construction of the statute, noting that "the Legislature did not expressly limit its exclusion from the collateral-source rule to the amount actually paid for medical services by the lienholder."[11]

Policy arguments and comparative approaches

The *Greer* defendants asserted that MCL 600.6303 is intended to prevent double recovery for medical expenses that were covered by insurance.[12] This characterization has been supported by some of the courts called on to interpret MCL 600.6303, including the Court of Appeals in *Greer*.[13] Avoiding double recovery would seem to be consistent with the general justification of tort damages as compensating the injured party and making that party whole.[14] In contrast, Justice Zahra noted that the justifications for the common-law, collateral-source rule included the "punishment objective and deterrent effect in tort law."[15]

The common-law, collateral-source rule provides that "the recovery of damages from a tortfeasor is not reduced by the plaintiff's receipt of money in compensation for his injuries from other sources."[16] The rationale for the common-law rule is that the policyholder has given up consideration in the form of premiums and is entitled to the contractual benefits.[17] Therefore, in at least one sense, the common-law rule does not permit double recovery. A plaintiff who has paid for insurance derives the benefit of that private contract and is also entitled to be compensated by the tortfeasor. MCL 600.6303(2) accommodates this rationale by crediting the plaintiff for the premiums paid in consideration of coverage for medical expenses.[18] Thus, under MCL 600.6303, while the plaintiff does not receive the benefit of the bargain, the plaintiff is at least no worse off for having obtained insurance.

Other states facing this issue have adopted various approaches.[19] Academics and practitioners addressing this issue have categorized these systems as (1) adherence to the common-law, collateral-source rule; (2) hybrid approaches (similar to Michigan's post-verdict adjustment mechanism); and (3) abrogation of the common-law, collateral-source rule to allow evidence of amounts paid only.[20]

Proponents of the latter approach contend that the "market value" of services is the amount actually paid because "providers often overcharge and do not bill the actual amount in order to compensate for the uninsured."[21]

This argument suggests an alternative solution for the defendants. The plaintiff is entitled to recover the reasonable expenses of necessary medical care.[22] The reasonable value

of the medical care must be established.[23] Why not simply contend that the "reasonable and necessary" medical expenses are limited to the amount actually paid? This tactic was addressed briefly during oral argument before the Supreme Court in *Greer*, with counsel for the plaintiffs raising the significant challenge of explaining to the jury why the bills were discounted without mentioning insurance.[24]

Conclusion

As emphasized by the Supreme Court, MCL 600.6303(4) is ambiguous when applied to discounted medical expenses. The statute should be clarified to exclude from the statutory collateral-source rule anything greater than the actual amount of a contractual lien exercised by a lienholder. This would better serve the legislature's purpose of eliminating double recovery in tort litigation.

Epilogue

Justice Zahra's concurrence was taken to heart by the Michigan legislature, at least with respect to medical-malpractice cases. Effective April 10, 2017, MCL 600.1482 will provide that "in…any action that alleges a medical malpractice claim… damages recoverable for past medical expenses…shall not exceed the actual damages for medical care that arise out of the alleged malpractice."[25] Furthermore, the Court shall not permit evidence of past medical expenses except for evidence of "actual damages," which are defined as both of the following:

> (i) The dollar amount actually paid for past medical expenses or rehabilitation service expenses by or on behalf of the individual whose medical care is at issue, including payments made by insurers, but excluding any contractual discounts, price reductions, or write-offs by any person.
>
> (ii) Any remaining dollar amount that the plaintiff is liable to pay for the medical care.[26]

While this statute resolves the ambiguity at issue in *Greer*, interpretation of the collateral-source statute will remain cloudy outside of medical-malpractice cases. ■

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ENDNOTES

1. MCL 600.6303(1) ("[I]f the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2).").
2. *Greer v Advantage Health*, 305 Mich App 192, 208; 852 NW2d 198 (2014) (noting that "[t]he heart of the issue centers on the definition of 'collateral source' found in MCL 600.6304(4)").
3. *Id.*
4. *Id.* at 207.
5. Brief of Appellant at viii ("In this case Makenzie's healthcare insurers claimed a lien on the medical expenses they 'paid,' and claimed no lien with respect to the insurance discount which is clearly an insurance benefit 'received.'").
6. Brief of Appellee at 10–11, citing *Velez v Tuma*, 492 Mich 1, 11–12; 821 NW2d 432 (2012).
7. *Greer v Advantage Health*, 499 Mich 975; 880 NW2d 786 (2016).
8. *Id.* at 976.
9. *Id.* at 975.
10. *Greer*, 305 Mich App at 212.
11. *Greer*, 499 Mich at 977.
12. This argument was also made by the Michigan State Medical Society. Brief of Amicus Curiae Michigan State Medical Society at 12–13 (asserting that, "[b]y allowing recovery for amounts not paid, *Greer* has seriously undermined the intended purpose and effect of MCL 600.6303, and has expanded the meaning of 'damages'").
13. *Greer*, 305 Mich App at 211; see, e.g., *State Auto Mut Ins Co v Fieger*, 477 Mich 1068, 1072; 730 NW2d 212 (2007) (Young, J, concurring); *Heinz v Chi Rd Inv Co*, 216 Mich App 289, 306; 549 NW2d 47 (1996) (noting that the purpose of MCL 600.6303 is "preventing 'double recovery'").
14. *Murray v Ferris*, 74 Mich App 91, 95; 253 NW2d 365 (1977).
15. *Greer*, 880 NW2d at 976.
16. *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984), citing *Motts v Michigan Cab Co*, 274 Mich 437; 264 NW 855 (1936); *Perrott v Shearer*, 17 Mich 48 (1868).
17. *Id.*
18. MCL 600.6303(2) ("Except for premiums on insurance which is required by law, that amount shall then be reduced by a sum equal to the premiums, or that portion of the premiums paid for the particular benefit by the plaintiff or the plaintiff's family or incurred by the plaintiff's employer on behalf of the plaintiff in securing the benefits received or receivable from the collateral source.")
19. See generally Matlock, *The Collateral Source Rule & Write-Offs: What is the True Value of Medical Services?*, US Law (Fall/Winter 2013) <http://web.uslaw.org/wp-content/uploads/2013/10/Malinda-S.-Matlock-USLAW-mag-article.pdf> (accessed February 15, 2017).
20. *Id.*; see also Balasko, *A Return to Reasonability: Modifying the Collateral Source Rule in Light of Artificially Inflated Damage Awards*, 72 Wash & Lee L Rev Online 16 (2015).
21. *Id.* at 3.
22. *Foley v Detroit & M RY Co*, 193 Mich 233; 159 NW 506 (1916).
23. *Herter v Detroit*, 245 Mich 425; 222 NW 774 (1929); M Civ JI 50.05; see also *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990) (interpreting MCL 500.3107 as providing that "an insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular product or service, or if the product or service itself is not reasonably necessary").
24. Video of oral argument available online at <https://www.youtube.com/watch?v=CzE9S8-zovA> (accessed February 15, 2017).
25. MCL 600.1482(1)(a); 2016 PA 556.
26. MCL 600.1482(2)(a)(i) and (ii).