Recent Developments in Colorado Law Demonstrate Important Exceptions to the Collateral Source Rule

Jonathan M. Abramson* and
Daniel J. Bristol**

How Medical Lien Finance Arrangements and Workers' Compensation Benefits May Not Be Subject to the Collateral Source Rule

Colorado is known for having a particularly arduous collateral source rule. When it comes to admitting the costs of a plaintiff's medical treatment at trial, Colorado is generally a "billed" rather than a "paid" state. This means the state's collateral source rule allows plaintiffs to admit the full amounts "billed" by their health care providers as damages. Defendants are generally precluded from introducing evidence of the amounts actually "paid" by the plaintiff's insurer. Recent developments, however, are finally limiting the scope of the rule. First, trial courts in Colorado–along with other states–are beginning to recognize that medical lien finance companies are not collateral sources. Second, in two landmark Colorado Supreme Court cases, *Gill v. Waltz and Delta Air Lines, Inc. v. Scholle,* the Court held that the collateral source rule does not apply when a third-party tortfeasor settles a workers' compensation subrogation claim because the settlement "extinguishes" the plaintiff's right to recover any damages paid by insurance.[1]

* Kissinger & Fellman, P.C. (Denver, CO)
** Hall & Evans, LLC (Denver, CO)

Background: Colorado's Collateral Source Rule

Colorado's collateral source rule consists of two components: (1) a post-verdict setoff rule, codified at C.R.S. § 13-21-111.6; and (2) a pre-verdict evidentiary component, codified at C.R.S. § 10-l-135(10)(a).[2] With respect to the pre-verdict evidentiary piece of the rule, C.R.S. § 10-1-135(10)(a) provides that:

> The fact or amount of any collateral source payment or benefits shall not be admitted as evidence in any action against an alleged third-party tortfeasor . . . .[3]

This rule prohibits a jury or trial court from ever considering payments or compensation that an injured plaintiff receives from a third party.[4]

A collateral source "is a person or company, wholly independent of an alleged tortfeasor, that compensates an injured party for that person's injuries."[5] The applicable statute defines a benefit as "payment or reimbursement of health care expenses, health care services, disability payments, lost wage payments, or any other benefits of any kind, including discounts and write-offs, provided to or on behalf of an injured party under a policy of insurance, contract, or benefit plan."[6] Based on this definition, to be a collateral source payment, a payment needs to be made to the plaintiff or must have reduced the plaintiff's obligation to a third party.

Specifically, the collateral source statute states:

> [T]he court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which [the plaintiff] . . . has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund . . . except that the verdict shall not be reduced by the amount by which [the plaintiff] … has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of [the plaintiff].[7]

Effectively, this means the amounts paid to a plaintiff from a collateral source reduce the amount of the verdict. The reduction, however, is applied by the court after the jury verdict. Thus, in almost all instances, evidence of payments from a collateral source is not permitted during the trial.

Furthermore, the statute's "contract exception" precludes a defendant from attempting to reduce a plaintiff's damages award for any benefit the plaintiff received as a result of a contract entered into and paid for by or on behalf of the plaintiff. This means there is no post-trial

offset for payments made by a plaintiff's private health insurer.[8] Because insurance or other types of benefits that a plaintiff either purchases or obtains through an employer fall under the contract exception, additional benefits that arise from these agreements also cannot be used to reduce or offset a plaintiff's jury award.

Health insurance companies, as well as Medicare, Medicaid and workers' compensation insurance carriers, generally pay health care providers per negotiated contractual rates. Where such insurance carriers have an agreement with a plaintiff's care provider to pay discounted rates for the provider's services, the discounted rates are not admissible at trial. A defendant cannot introduce these discounted rates for the purpose of demonstrating the reasonable value of the services provided.[9] A plaintiff may recover the full amount of the medical expenses as billed, without any reduction or offset for the amounts that were actually paid by the insurance carriers for such services.[10]

In *Jeppsen*, the Colorado Supreme Court addressed the question of whether C.R.S. § 10-1 -135 "precludes admission of evidence of the amounts paid by the plaintiff's insurance company pursuant to the plaintiff's medical expense coverage."[12] The Court noted that the rule is intended to prevent a jury from "improperly reducing the plaintiff's damages award on the grounds that the plaintiff has already recovered his loss from the collateral source." The Court concluded, because the plaintiff's insurance company "is wholly dependent of [the tortfeasor], and it paid for [the plaintiff's] medical expenses after the accident," it was a collateral source.[13]

In *Smith v. Kinningham,* the Colorado Court of Appeals determined that Medicaid benefits were a collateral source, citing *Jeppsen's* definition of "collateral source" and because "the alleged Medicaid benefits were paid on Smith's behalf."[14] Similarly, in *Forfar v. Wal-Mart Stores, Inc.,* the Court of Appeals relied on *Jeppsen*'s definition and concluded that Medicare benefits were also a collateral source.[15] The *Forfar* Court also noted that the purpose of the collateral source rule is to ensure that "making the injured plaintiff whole is solely the tortfeasor's responsibility" and, therefore, "third-party sources" of benefits should be "irrelevant in fixing the amount of the tortfeasor's liability."[16] Further, in *Wal-Mart Stores, Inc. v. Crossgrove,* the Colorado Supreme Court noted that the pre-verdict component of the collateral source rule is intended to prevent the factfinder from "improperly reduc[ing] the plaintiff's damages award on the grounds that the plaintiff already recovered his loss from the collateral source."[17]

Medical Lien Finance Companies

Though Colorado trial courts are split on the issue, many district courts have concluded that the collateral source rule does not apply to medical lien finance companies. As background, personal injury attorneys often utilize private companies that fund the plaintiff's medical treatment. As part of this scheme, plaintiffs' attorneys refer their clients to pro-plaintiff doctors who are part of a medical lien "network." The lien companies then pay the medical expenses at a discount in exchange for a lien against the lawsuit proceeds for a larger "billed" amount. In addition to creating a large profit for the lien company, this system allows plaintiffs' attorneys to inflate damages by seeking the "billed" amount of medical expenses without regard for the lien company's discount. These arrangements also allow plaintiffs' attorneys to control the medical treatment and utilize plaintiff-oriented doctors who are experienced advocates.

Though plaintiffs' attorneys try to treat medical lien finance arrangements as insurance, there is one key difference between medical lien finance arrangements and traditional collateral sources like insurance. The collateral source rule applies only when the third party compensates or indemnifies the plaintiff.[18] Some trial courts have held that a medical lien company "does not compensate [its client]," instead, it "steps into the shoes of the medical providers and becomes [its client's] creditor."[19] The Adams County District Court describes this concept:

> [T]he court is not persuaded by plaintiff's argument that the above financing contract is for a collateral source. Unlike a collateral source contract, plaintiff receives no indemnification or compensation for injuries over and above what a jury awards. Rather, plaintiff is obligated to repay an entity for financing part of the litigation. There is no possibility of a defendant receiving the benefits of a contract entered into by the plaintiff or of plaintiff receiving benefits which could constitute a double recovery. The 'benefit' for which plaintiff contracts is essentially a greater probability for obtaining a more favorable verdict. In summary, medical lien financing is essentially a litigation financing device, not a collateral source.[20]

Defense firms frequently face resistance from lien companies regarding discoverability of the lien arrangement, including the amounts paid. Pursuant to Colo. R. Civ. P. 26(B)(1), discovery requested must be relevant and proportional to the needs of the case. In the context of a litigation funding company, a defendant can assert that the amount paid for a plaintiff's medical care is relevant, proportional and discoverable as to the reasonable value of plaintiff's medical care. At trial, the correct measure of damages for medical expenses is the necessary and reasonable value of services rendered.[21] Colorado courts have held that both the amount billed and the amount paid provide some evidence of the reasonable value of medical services.[22] "In *Crossgrove,* the Colorado Supreme Court held that, as long as the collateral source rule does not apply, *'Kendall* allows trial courts to admit evidence of the amount paid for health care for the purpose of ascertaining the reasonable value of those medical expenses.'"[23] Accordingly, a defendant can assert that not only is the amount a litigation funding company paid to a medical provider discoverable, but also it is admissible at trial.

In response to the argument that evidence of medical lien financing is irrelevant or prejudicial, the defense may benefit

from focusing on the bias the medical lien scheme creates. Courts outside Colorado have sometimes rejected arguments that a lien company's payment of a discount is relevant to the reasonableness of the billed medical expenses.[24] Defendants have had more success, however, arguing that the scheme is evidence of bias. For example, the Nevada Supreme Court in *Khoury* held that evidence of a medical lien agreement is irrelevant to show the reasonableness of medical expenses but is relevant to show bias.[25] Likewise, the federal district court in Georgia held "[The lien company's] involvement in Plaintiff's treatment is highly relevant to the issue of Plaintiff's treating physicians' credibility and potential bias."[26] The Georgia court gave a detailed explanation of the bias a medical lien arrangement creates:

> [A] medical lien funder is an investor in its client's lawsuit. If Plaintiff receives a large verdict amount, then [the medical lien company] has a near certain chance of fully and quickly recovering the money it has fronted Plaintiff. On the other hand, if Plaintiff does not recover at trial, [the medical lien company's] chances of being reimbursed are doubtful at best. Added to this arrangement is the fact that [the medical lien company] referred Plaintiff to many of her treating physicians. . . . These physicians have a patent financial interest in receiving more case referrals from [the medical lien company]. If Plaintiff is awarded a recovery, then [the medical lien company] would arguably be more inclined to refer cases to those physicians in the future. Thus, the physicians have a financial motivation to testify favorably for Plaintiff. Consequently, the jury should consider the relationships between Plaintiff, [the medical lien company], and Plaintiff's physicians when assessing the credibility of Plaintiff's physicians' testimony.[27]

Arguing bias creates another avenue to admitting evidence of the four-party relationship between the attorney, the plaintiff, the medical providers, and the medical lien company.

By admitting evidence of the medical lien finance arrangements, defense counsel can demonstrate not only that the medical expenses are inflated, but also that the plaintiff's medical providers are biased. Plaintiffs attempt to treat medical lien finance arrangements like insurance, where the payment terms are inadmissible. Therefore, it is important to establish that the collateral source rule does not apply to these schemes.

Settlement of Workers' Compensation Liens

Another important exception to the collateral source rule arises when a defendant settles a workers' compensation carrier's subrogation claim. In a sea change for Colorado law, the Colorado Supreme Court in *Gill v. Waltz,* and its companion case, *Delta Air Lines, Inc. v. Scholle,* held a plaintiff cannot recover medical expenses that were paid by the plaintiff's workers' compensation insurance carrier if the defendant already paid for those expenses by settling the carrier's subrogation claim. This is the first appellate court holding in decades that narrows the scope of Colorado's strict collateral source rule. The Supreme Court held that the collateral source rule is not implicated when a defendant has settled a workers' compensation carrier's subrogation claim because the settlement "extinguishes" the plaintiff's claim to recover the damages paid by insurance.[29]

In *Gill v. Waltz,* Plaintiff received workers' compensation benefits following an automobile accident, including medical expenses totaling $57,227.13 pursuant to Colorado's statutory fee schedules, which limit the amount medical providers are permitted to charge workers' compensation patients. Nonetheless, Plaintiff's medical providers issued bills totaling $627,809.76–far in excess of the statutory limits. Before Plaintiff filed suit, Defendants settled the workers' compensation carrier's subrogation claim. After Plaintiff filed suit, Defendants moved the trial court to preclude evidence of Plaintiff's past medical expenses on the grounds that Defendants had already paid those expenses when they settled the workers' compensation subrogation claim. In response, Plaintiff argued he should be permitted to recover the difference between the amount "billed" and the amount "paid" under Colorado's collateral source rule.

Defendants argued the collateral source rule does not apply because the settlement of the workers' compensation subrogation claim resolved the claim for past medical expenses, regardless of the amount paid. When the workers' compensation carrier paid Plaintiff's medical expenses, it received an assignment of Plaintiff's "cause of action" to recover those damages from the tortfeasor.[30] As a result of the assignment, the carrier became the real party in interest regarding the damages the carrier paid.[31] When the carrier settled the assigned claim while "standing in the shoes" of Plaintiff, the settlement extinguished Plaintiff's cause of action. Defendants relied upon Colorado case law regarding assignment and standing, including the holding in a property damage case that "once the subrogated insurer has resolved the claim, either through litigation or settlement, the insured is no longer entitled to recover the reimbursed portion of the loss from the responsible party."[32]

Defendants pointed out that Colorado's line of cases regarding the collateral source rule are all distinguishable for one fundamental reason: none of the cases involve circumstances where a defendant already paid a plaintiff's past medical expenses in full by settling an assigned claim. In the traditional collateral source rule cases, Colorado courts grappled with the question of what evidence should be admitted to assist the jury to determine the "reasonable value" of the plaintiff's medical expenses, which presupposes that the plaintiff has a valid claim for such expenses. Specifically, the *Crossgrove* Court sought to resolve the "friction" between (1) admitting evidence relevant to establishing the reasonable value of medical expenses, i.e., amounts

paid, while (2) avoiding evidence of insurance.[33] The Court resolved this tension by holding that evidence of amounts paid is inadmissible because such evidence "carries with it an unjustifiable risk that the jury will infer the existence of a collateral source–most commonly an insurer–from the evidence, and thereby improperly diminish the plaintiff's damages award."[34]

However, the question of "billed vs. paid" medical expenses, which the collateral source rule seeks to address, does not matter if the plaintiff's claim for past medical expenses has been assigned and settled, and therefore the plaintiff has no valid claim for medical expenses in the first place. Defendants argued that no evidence of past medical expenses–billed or paid–should be admitted because there is no remaining claim for such expenses.

The Colorado Supreme Court accepted Defendants' argument, holding the settlement between Defendants and the workers' compensation carrier "extinguished any claim for damages arising out of the services for which [Defendants] paid." When Defendants settled the subrogation claim, the settlement extinguished Plaintiff's entire cause of action for past medical expenses totaling nearly $630,000.00. In so holding, the Colorado Supreme Court overturned a recent Colorado Court of Appeals opinion that reasoned to the contrary, clarifying Plaintiff cannot recover such extinguished amounts.

This landmark holding will limit windfalls while helping to make injured workers whole. The decision should benefit employers and employees alike by encouraging settlement of workers' compensation subrogation claims, helping to minimize workers' compensation premiums while ensuring that employees receive fast and efficient access to medical benefits. The holding should also prevent plaintiffs' attorneys from seeking inflated medical expenses that exceed the reasonable charges established by the State of Colorado in third-party claims on behalf of plaintiffs who received workers' compensation benefits for on-the-job injuries they sustain allegedly at the hands of a third-party tortfeasor.

Conclusion

For decades, courts have been expanding the collateral source rule to the point of creating windfall damages that encourage litigation and discourage settlement. Recent developments in Colorado finally push against this trend and demonstrate important exceptions to the collateral source rule that should help to limit windfall damages. The *Gill* and *Scholle* cases, in particular, open a new line of arguments that other state courts have not yet considered. The holding in *Gill*, for example, extinguished $630,000.00 in windfall damages. Unfortunately, plaintiffs' attorneys are already lobbying the Colorado legislature to change the law. The trucking industry–and the entire insurance defense industry–should resist these efforts.

Endnotes

1 *Gill v. Waltz,* 2021 CO 21; *Delta Air Lines, Inc. v. Scholle,* 2021 CO 20.
2 *Wal-Mart v. Crossgrove,* 276 P.3d 562, 565 (Colo. 2012).
3 C.R.S. § 10-l-135(10)(a).
4 *Id.* at 566.
5 *Smith v. Jeppsen,* 277 P.3d 224, 228 (Colo. 2012).
6 C.R.S. § 10-l-135(2)(a).
7 C.R.S. § 13-21-111.6.
8 *See Wal-Mart Stores, Inc. v. Crossgrove,* 276 P.3d 562, 565 (2012).
9 *See Crossgrove, supra.*
10 *Volunteers of Am. Colo. Branch v. Gardenswartz,* 242 P.3d 1080, 1083 (Colo. 2010).
11 *Jeppsen,* 277 P.3d at 225.
12 *Id.*
13 *Id.*
14 *Smith v. Kinningham,* 328 P.3d 258, 262 (Colo. App. 2013).
15 *Forfar v. Wal-Mart Stores, Inc.,* 436 P.3d 580, 585 (Colo. App. 2018).
16 *Id.* (quotations omitted).
17 *Wal-Mart Stores, Inc. v. Crossgrove,* 276 P.3d 562, 564 (Colo. 2012).
18 *See Smith v. Jeppsen,* 227 P.3d 224, 228 (Colo. 2012).
19 *See Ortiviz v. Follin,* 2017 U.S. Dist. LEXIS 113143 *8 (D. Colo. 2017).
20 *Id.* at *3-4; *Rowley v. Dossal,* 2018 Colo. Dist. LEXIS 2197 *3 (Colo. 2018).
21 *Lawson v. Safeway, Inc.,* 878 P.2d 127, 131 (Colo. App. 1994); Palmer Park Gardens, Inc. v. Poller, 425 P.2d 268, 272 (Colo. 1967).
22 *Pyles-Knutzen v. Bd. of County Com'rs of County of Pitkin,* 781 P.2d 164, 169 (Colo. App. 1989).
23 *See Ortiviz* at *13, citing *Wal-Mart Stores Inc. v. Crossgrove,* 276 P. 3d. 562, 566-67 and *Kendall v. Hargrave,* 349 P.2d 993, 994 (Colo. 1960).
24 *See, e.g., Moore v. Mercer,* 4 Cal. App. 5th 424, 445 (2016).
25 *Khoury v. Seastrand,* 377 P.3d 81, 93-94 (Nev. 2016).
26 *Rangel v. Anderson,* 202 F. Supp. 3d 1361, 1373 (S.D. Ga. 2016).
27 *Id.* at 202 F. Supp. 3d at 1373-74 (citing *Houston v. Publix Supermarkets, Inc.,* 2015 U.S. Dist. LEXIS 102093, 2015 WL 4581541, at *2 (N.D. Ga. July 29, 2015).
28 *Gill v. Waltz,* 2021 CO 21; Delta Air Lines, Inc. v. Scholle, 2021 CO 20.
29 *Gill v. Waltz,* 2021 CO 21, ¶ 1.
30 C.R.S. § 8-41-203(1)(b).
31 *Edis v. Edis,* 742 P.2d 954, 955 (Colo. 1987).
32 *Ferrellgas, Inc. v. Yeiser,* 247 P.3d 1022, 1027 (Colo. 2011).
33 *Crossgrove,* 276 P.3d at 567.
34 *Id.*