

## Expert Analysis

### Write This Down: California Supreme Court Rejects Recovery of 'Written Down' Amount of Medical Bills

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How to appropriately compensate tortiously injured plaintiffs for their medical damages has flummoxed courts in recent years.

Courts have struggled to calculate a plaintiff's medical expenses in a world where health care provider bills rarely reflect the amounts actually paid and accepted as payment for medical services.

For both publicly and privately insured plaintiffs, health providers typically accept as full payment less, often much less, for medical services than appears on the face of their invoices.

Given the often large difference between the face amount of medical providers' bills and what is often accepted as payment in full on the plaintiff's behalf, in the aggregate, this is a multibillion-dollar issue for tort defendants and liability carriers.<sup>1</sup>

The question has been whether a plaintiff can recover the difference between the two amounts, variously known as a discount, a "negotiated rate differential" or a "write-down"?

Several courts have said "yes."

A nearly unanimous California Supreme Court bucked that trend Aug. 18 with a resounding "no."

In *Howell v. Hamilton Meats & Provisions Inc.*, 52 Cal. 4th 541 (2011), the Supreme Court held that a personal injury plaintiff's economic medical damages are limited to the lesser of the amount actually paid for medical services, including by the plaintiff's health insurer, or the reasonable value of services.<sup>2</sup>

It rejected the plaintiff's argument that she could recoup as "damages" the difference between the face amount of a medical bill and the discounted amount that the plaintiff's health insurer pays, and what the health care provider accepts as payment in full.<sup>3</sup>

### ACTUAL LOSSES AND THE COLLATERAL SOURCE RULE

The key to the court's holding were two principles.

The first was that damages, statutorily defined in California as detriment proximately caused, are limited to losses actually suffered.

No recovery is allowed for "the undiscounted sum stated in the provider's bill but never paid by or on behalf of the injured person ... for the simple reason that the injured plaintiff did not suffer any economic loss in that amount."<sup>4</sup>

In this, the *Howell* decision concluded that "[t]he Restatement rule is to the same effect ... '[i]f ... the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him.'"<sup>5</sup>

The second principle was that the collateral source rule "ensures that plaintiff here may recover in damages the amounts her insurer paid for her medical care [but] 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."<sup>6</sup>

The California Supreme Court concluded that any discount, "write-off" or "negotiated rate differential is not a collateral payment or benefit subject to the collateral source rule."<sup>7</sup>

The collateral source rule continued to "appl[y] with full force" in that "[p]laintiff here recovers the [actual] amounts paid on her behalf by her health insurer as well as her own out-of-pocket expenses. ... Plaintiff thus receives the benefits of the health insurance for which she paid premiums: her medical expenses have been paid per the policy, and those payments are not deducted from her tort recovery."<sup>8</sup>

The *Howell* decision held that the policies underlying the collateral source rule were not violated by declining to allow a plaintiff to recover as damages amounts that were never paid.

In particular, the plaintiff received the full benefit of her health insurance.

The discounted pricing or negotiated rate differential that the health insurer received was not an insurance benefit to the plaintiff. Rather, negotiated lower health care provider reimbursement rates benefitted the insured plaintiff through lower health insurance premiums.<sup>9</sup>

Likewise, the plaintiff received the benefit of her thrift in having health insurance. Her medical bills had been paid, and those payments were not deducted from her damages.

And, *Howell* held "while [health care] providers presumably did obtain some commercial advantages by virtue of their agreements with ... plaintiff's [health] insurer, the *global* value of those advantages cannot be equated to the amount of the negotiated rate differential for plaintiff's *individual* care."<sup>10</sup>

Finally, surveying the sometimes artificial world of health care provider billing (including so-called "Chargemaster" rates), *Howell* concluded "it is not possible to say generally that providers' full bills represent the real value of their services, nor that the discounted payments they accept from private insurers are mere arbitrary reductions.

***For both publicly (e.g., Medicare and Medicaid) and privately insured plaintiffs, health providers typically accept as full payment less — often much less — for medical services than appears on the face of their invoices.***

Accordingly, a tortfeasor who pays only the discounted amount as damages does not generally receive a windfall, and is not generally underdeterred from engaging in risky conduct."<sup>11</sup>

From an evidentiary standpoint, the *Howell* decision's bottom line is that evidence of an amount a health care provider has accepted as full payment for services is relevant to provide plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, admissible.<sup>12</sup>

Nonetheless, evidence as to who made the payments, *i.e.*, that an insurer made them, remains generally inadmissible under the collateral source rule.<sup>13</sup>

In contrast, "[w]here the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses."<sup>14</sup>

### REASONABLE VALUE OF MEDICAL SERVICES

The amount actually paid might not represent some generic "reasonable value" of medical services.

Although "California courts have referred to the 'reasonable value' of medical care in delineating the measure of recoverable damages for medical expenses, in this context, '[r]easonable value' is a term of limitation, not of aggrandizement."<sup>15</sup>

In dissent, Justice Joan D. Klein of the California Court of Appeal, sitting *pro tem* because of a vacancy on the state Supreme Court, argued that the reasonable value of medical services should be the sole standard for plaintiff's economic medical damages.<sup>16</sup>

Justice Klein agreed with the majority that the plaintiff should not be entitled to recover the gross amount of her medical bills.

Thus, *Howell* unanimously rejected plaintiff's "face amount of the medical bill" theory.

Rather, the dissent disagreed with the majority's stance that recovery should be capped at the discounted amount, instead arguing that a plaintiff should recover the reasonable value or market value of the services as determined by expert testimony.<sup>17</sup>

### IMPACT OF THE HOWELL DECISION

The *Howell* decision is a great victory for the defense bar and insurers in general.

Not only did the Supreme Court stanch a potential \$3 billion annual hit in California to tort defendants and liability insurance carriers as to medical expenses, the principles of its decision preclude damages expansion for everything from the cost of repairing a dented fender to rebuilding a home covered by first-party insurance that has negotiated discounted service provider rates.

Like many groundbreaking decisions, *Howell* left open numerous issues:

- How to prove insurance payment.
- Who has the burden of proof on actual payment and reasonableness.
- How post-services discounts would affect damages recovery.
- Whether unpaid bills are admissible to prove noneconomic damages.<sup>18</sup>

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The *Howell* decision also distinguished circumstances, such as liens, assignments and charity care, where there may be no negotiated discount, and the reasonable value standard may be the only one to apply.<sup>19</sup>

*Howell* is only the most recent decision to address these issues. As a recent decision by a leading jurisdiction, it is likely to be influential. That said, the state of the law nationally is a checkerboard.

The *Howell* decision itself characterized its holding as aligned with perhaps “presently ... the minority view.”<sup>20</sup>

Recent decisions from Arizona, the District of Columbia, Hawaii, Illinois, New Mexico, Oregon, South Dakota and Kansas all have been at odds with *Howell's* reasoning.<sup>21</sup> But *Howell* is by no means an isolated decision. Recent decisions in other jurisdictions, including Florida, Louisiana, New York and Pennsylvania, are consistent with the California Supreme Court’s approach.<sup>22</sup>

Nevertheless, the law nationally remains in flux.

Many of the decisions addressing these issues are not by a state’s highest court, and many states’ courts have yet to address these issues.

*Howell* will undoubtedly figure prominently in such considerations.<sup>23</sup>

## NOTES

<sup>1</sup> See Dan Walters, *California Supreme Court Plays Role in Tort War*, *MODESTO BEE*, Aug. 15, 2011, available at <http://www.modbee.com/2011/08/15/1816272/dan-walters-california-supreme.html> (reporting insurance industry estimate of a \$3 billion per year effect in California alone).

<sup>2</sup> *Howell v. Hamilton Meats & Provisions*, 52 Cal. 4th 541, 566 (Cal. 2011).

<sup>3</sup> *Id.* at 566-67.

<sup>4</sup> *Id.* at 548; *see id.* at 551, 553.

<sup>5</sup> *Id.* at 565-66 (citing Restatement (Second) of Torts § 911, cmt. h, at 476-77 (1979), italics added in *Howell*).

<sup>6</sup> *Id.* at 548.

<sup>7</sup> *Id.* at 565.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 563-64.

<sup>10</sup> *Id.* at 564 (original emphasis).

<sup>11</sup> *Id.* at 562.

<sup>12</sup> *Id.* at 567.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 553 (internal quotation marks and citation omitted).

<sup>16</sup> *Id.* at 568.

<sup>17</sup> *Id.* at 568-69.

<sup>18</sup> See *Greer v. Buzgheia*, 141 Cal. App. 4th 1150, 1157 (Cal. Ct. App., 3d Dist. 2006) (full billed amount admissible to show extent of injury for noneconomic damages); *cf. Pac. Gas & E. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 42-43 (Cal. 1968) (following majority view that unpaid bills or charges are inadmissible to prove charges’ reasonableness).

<sup>19</sup> *Howell*, 52 Cal. 4th at 557-59; *see Katiuzhinsky v. Perry*, 152 Cal. App. 4th 1288 (Cal. Ct. App., 3d Dist. 2007) (plaintiff remained liable for full amount on lien claimant’s assigned claim).

<sup>20</sup> *Howell*, 52 Cal. 4th at 566 n. 10.

- <sup>21</sup> *Lopez v. Safeway Stores*, 212 Ariz. 198, 129 P.3d 487, 491-97 (Ariz. Ct. App. 2006); *Calva-Cerqueira v. United States*, 281 F. Supp. 2d 279 (D.D.C. 2003); *Bynum v. Magno*, 106 Haw. 81, 101 P.3d 1149, 1155-62 (Haw. 2006); *Wills v. Foster*, 229 Ill. 2d 393, 892 N.E.2d 1018, 1029-31 (Ill. 2008); *Rose v. Via Christi Health Sys.*, 78 P.3d 798 (Kan. 2003); *Pipkins v. TA Operating Corp.*, 466 F. Supp. 2d 1255 (D.N.M. 2006); *White v. Jubitz Corp.*, 347 Or. 212, 219 P.3d 566, 576-83 (Or. 2009); *Kostel v. Schwartz*, 2008 S.D. 85, 756 N.W.2d 363 (S.D. 2008).
- <sup>22</sup> *E.g.*, *Coop. Leasing v. Johnson*, 872 So. 2d 956 (Fla. 2d Dist. Ct. App. 2004); *Boutte v. Kelly*, 863 So. 2d 530, 552-553 (La. Ct. App., 4th Cir. 2003); *Kastick v. U-Haul Co. of W. Mich.*, 292 A.D.2d 797, 740 N.Y.S.2d 167, 169 (N.Y. App. Div., 4th Dep't 2002); *Moorhead v. Crozer Chester Med. Ctr.*, 564 Pa. 156, 765 A.2d 786, 789 (Pa. 2001), *overruled on other grounds by Northbrook Life Ins. Co. v. Commonwealth*, 597 Pa. 18, 949 A.2d 333 (Pa. 2008).
- <sup>23</sup> See order at 2, *Tri-County Equip. & Leasing v. Klinke*, No. 55121 (Nev. Sept. 13, 2011), available at <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=22961> (pending Nevada Supreme Court case regarding damages effect of "medical write-downs," and specifically asking counsel to address *Howell*).



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