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Demanding Fairness In Evaluating Past Medical Damages

By **Asir Fiola** (May 16, 2018, 1:21 PM EDT)

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A recent ruling from the California Court of Appeals for the Second Appellate District in Pebley v. Santa Clara Organics LLC[1] encourages plaintiffs in personal injury actions, who are covered by medical insurance, to continue the trend of seeking medical treatment that would normally be covered by their insurance plans from physicians who are outside their coverage plans. The result will be to dramatically increase the amount of medical expenses incurred for the sole purpose of driving up the potential settlement value and verdict awards. This will result in an unjust windfall for plaintiffs, higher costs for society at large and will also conflict with the policy goal of encouraging settlements.

Hold on: Was that a bit too harsh? Did I tip my hand too early as a soulless lawyer usually retained by parties seeking to defend themselves from such claims? Hopefully not. The goal here is not to bury the Pebley decision or plaintiffs, generally. There are good people on both sides of the issue of what exactly qualifies as reasonable and just compensation for past medical expenses. The goal, however, is to point out that Pebley goes too far in tipping the scales in favor of insured plaintiffs who have the ability to have their medical treatment paid for by insurance, but do not avail themselves of their coverage.

The Howell Principle

Since the seminal case of Howell v. Hamilton Meats,[2] and later cases expounding upon Howell, there have been more and more creative ways to get around the straightforward principle that plaintiffs may recover the amount paid for past medical treatment, not necessarily the amount billed. The court in Corenbaum v. Lampkin[3] explained that the full amount billed for a plaintiff's past medical treatment is not admissible for the purpose of determining past or future medical expenses, or noneconomic damages.[4] As anyone who has had to seek medical treatment knows, the amount billed is often much higher than what a medical provider will accept as payment for services rendered.

In cases involving medically insured plaintiffs, the amount of past medical damages is, theoretically, easy to calculate, based on the total amount paid by plaintiff's medical insurer(s) for incurred medical treatment. One of the ways that insured plaintiffs have tried to get around the Howell principle is to seek treatment from outside providers who treat plaintiffs on a lien basis. The court in Pebley was "confronted with an insured plaintiff who has chosen to treat with doctors and medical facility providers outside his insurance plan."[5] The plaintiff initially sought treatment through Kaiser. However, after he

filed his lawsuit, and likely at the direction of his attorneys, the plaintiff sought treatment with an orthopedic surgeon who was outside of the Kaiser network. The trial court allowed evidence of the amount billed by the outside doctor to be admitted into evidence.

Counsel for the defendants argued that such treatment with providers outside the plaintiff's insurance network, on a lien basis, was a deliberate attempt to drive up the costs of the treatment, and thereby dramatically increase the settlement value. Defense counsel also argued that while the plaintiff had a right to choose his doctors, he also had a duty to mitigate his damages, which he failed to do by going outside his network.

The Pebley court did not buy the defense arguments, and found that "[a] tortfeasor cannot force a plaintiff to use his or her insurance to obtain medical treatment for injuries caused by the tortfeasor. That choice belongs to the plaintiff."[6] The court further held that a plaintiff who chooses to seek treatment outside of her or his medical insurance plan should be treated the same as an uninsured plaintiff under the law.

The appropriate measure of past medical damages is not as straightforward in cases involving uninsured plaintiffs. Courts have held, such as in Bermudez v. Ciolek, that in the case of an uninsured plaintiff, "[t]he billed amounts are also relevant and admissible with regard to the reasonable value of [the uninsured plaintiff]'s medical expenses."[7]

Thus, the court in Pebley ultimately held that an insured plaintiff who seeks treatment outside of her or his medical plan, on a lien basis, shall be considered uninsured for the purpose of determining economic damages. Pursuant to Bermudez, such insured plaintiffs can introduce evidence of the amount billed for outside treatment. Importantly, however, the Pebley court recognized that the billing, by itself, is insufficient to establish the reasonable value of the services rendered. Plaintiffs must also use expert testimony to show that the billed amounts are "reasonable," pursuant to Bermudez.

"Pay No Attention to the Man or Woman Behind the Curtain!"

Respectfully, the court's reasoning in Pebley is flawed. The discussion centers on the supposed poor quality of the medical care provided within Kaiser, the plaintiff's medical network. Yet there appears to have been zero evidence that the plaintiff would have received subpar medical treatment at Kaiser. Further, the court does not require a plaintiff to present any evidence that appropriate medical care was not available to her or him, forcing the plaintiff to seek outside treatment. In any event, the court's rule would apply if the plaintiff had the finest medical plan available.

For example, the plaintiff in Pebley underwent a cervical fusion procedure, performed by a surgeon outside of Kaiser. There was no evidence that a Kaiser surgeon was unable to provide a competent, equivalent level of skill in performing the procedure. At a minimum, the court should have required the plaintiff to show that, due to demonstrable lack of available, competent medical care, he or she had to go outside of the Kaiser network.

Instead, the Pebley decision sanctions "doctor shopping." If you don't like being limited to recover what is paid for your treatment, go to a doctor outside of your network. If that doctor doesn't believe there is anything wrong with you, go to the next doctor. And so on, and so on. This places a burden on an already taxed health care system, driving up the costs for everyone.

The decision also goes against the public policy undergirding Howell and its progeny. As referenced

in Howell, "[c]ompensatory damages are moneys paid to compensate a person who “suffers detriment from the unlawful act or omission of another."[8] "Damages must, in all cases, be reasonable ..."[9]

It is patently unreasonable to allow an insured plaintiff to obtain a windfall by intentionally seeking treatment outside of her or his network. As set forth in Pebley, the plaintiff's counsel, in an article authored prior to the litigation, candidly wrote that sending plaintiffs to lien doctors, outside of their health care plan, "effectively allows the plaintiff and his or her attorney to sidestep the insurance company and the impact of Howell, Corenbaum and Obamacare."[10]

Let's at least give points to the attorney for honesty. But like the Wonderful Wizard of Oz, the attorney wants the jury to believe that the plaintiff "chose" to seek treatment with an outside doctor, all the while ignoring the "person behind the curtain," the attorney, who is sending the plaintiff outside of network to "sidestep" Howell, etc. This could not have been the result envisioned by the California Supreme Court when it issued its decision in Howell.

Finally, the Pebley court ties defense counsel's hands when it ruled that the trial court did not abuse its discretion by excluding evidence of the plaintiff's insured status, stating that evidence of insurance "would have confused the issues."[11] Instead of confusing the issues, evidence that plaintiff was insured through Kaiser would have given the jury the complete picture of the reasonable value of past medical treatment and plaintiff's priorities regarding his medical care. The jury could have learned that there was a less expensive option which would have provided the same quality of care ultimately received by the plaintiff, which the plaintiff chose to forego.

Where Do We Go From Here?

In the aftermath of Pebley, we can expect a dramatic increase in insured plaintiffs seeking treatment outside of their network, in order to drive up the amount of medical damages, and increase the potential settlement value and/or verdict award.

In such cases, it will be critical to identify and retain a qualified medical expert to review the outstanding bills, and comment on the reasonable value of the treatment received. As part of an analysis, case law is clear that the medical expert can conduct a "wide-ranging inquiry into the reasonable value of medical services provided."[12] This wide-ranging inquiry should include, among other factors, what a provider would accept from an insurer as payment for the services provided, which is often much less than the full amount billed.

In addition, as part of the wide-ranging inquiry into the reasonable value of medical services, the argument should be developed that quality medical care was, in fact, available in the plaintiff's network, the plaintiff chose not to avail himself of this quality medical care, and instead decided to seek treatment elsewhere.

As part of this analysis, qualified medical personnel within the plaintiff's health care plan should be identified and consulted, and possibly retained as a medical expert. Such physicians can be invaluable in showing that the plaintiff (1) had excellent medical care at his or her disposal, and (2) the reasonable value of such care was significantly lower than the medical treatment sought by plaintiff out of network. These facts can be used to show that the plaintiff deliberately "sidestepped" Howell in order to drive up the recovery. This assumes that the trial court will allow evidence that the plaintiff had medical insurance to be admitted, which should be allowed as more fully explained above.

Finally, the Pebley decision will almost certainly be challenged through a request for depublication and/or review by the California Supreme Court. If the Supreme Court looks at the issue, it should go back to the principles espoused in Howell, and as a matter of fairness, determine that insured plaintiffs who seek treatment outside of their insurance plans should not be treated as uninsured under the law. This is a false equivalency, and unjust to many individuals who do not have the means to obtain medical insurance.

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[1] Pebley v. Santa Clara Organics, LLC, 2018 WL 2112307.

[2] Howell v. Hamilton Meats (2011) 52 Cal.4th541.

[3] Corenbaum v. Lampkin (2013) 215 Cal.App.4th1308.

[4] Corenbaum, supra,at 1330-31.

[5] Pebley, supra,at 1.

[6] Pebley, supra,at 6.

[7] Bermudez v. Ciolek (2015) 237 Cal.App.4th 1311.

[8] Howell, supra,at 551.

[9] Bermudez, supra,at 1328.

[10] Pebley, supra,at 2.

[11] Pebley, supra,at 7.

[12] Bermudez, supra,at 1330-31.

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