MEDICAL FUNDING COMPANIES: A NEW PROBLEM FOR AN OLD RULE

By Clay Knowles, Rachel Reed and David Glustrom



Clay Knowles, Rachel Reed and David Glustrom are associates with Adelman, Waldon, Castilla, Hiestand & Prout. Their focus is on the defense of involving matters insurance coverage, automobile liability claims, and other civil matters.

I. INTRODUCTION

Viewing claims or lawsuits as economic assets to be developed and profited from, funding companies have changed the landscape upon which we litigate. Funding companies do this by financing medical studies or procedures that may be medically unnecessary and are often unduly expensive. Often times, the relationship between funding companies and the spike in a claim's healthcare costs may not be presented to the juries by virtue of the collateral source rule. This leaves a quandary insofar as the collateral source rule allows funding companies to occupy and pervert the principles underlying the collateral source rule.

II. THE COLLATERAL SOURCE RULE IN GEORGIA

The Georgia collateral source rule bars defendants from presenting evidence that a plaintiff received recovery for a tortious injury and also prohibits defendants from reducing potential liability by that recovery amount.¹

In 1885, the Georgia Supreme Court first introduced and conceptualized this rule in *Western and Atlantic Railroad v. Meigs.*² In *Meigs* a passenger train struck and killed a man. Justice Samuel Lumpkin feared that if the Court reduced the widow's damages by the amount of the life insurance policy and the jury awarded less than the policy limits, then the defendant might seek to collect from the widow the excess above the amount of the judgment. The theory would be that the husband's death bestowed a "positive pecuniary benefit."³

Over time, the basis for the rule has encompassed three fundamental rationales. First, no portion of an injured party's benefits should be credited to the tortfeasor's liability because the tortfeasor would then receive a windfall.⁴ Second, the plaintiff should retain any recovery above the amount of a judgment or settlement. ⁵ Third, the rule should serve the punitive function of creating a disincentive for potential tortfeasors to cause harm.⁶

III. APPLICATION OF THE COLLATERAL SOURCE RULE

The collateral source rule applies to various types of plaintiff recoveries. Payments made by contractually bound insurance companies are the most common example of such payments.⁷ Payments made by operation of law such as those by government entities like Medicare, Medicaid, the Veteran's Administration, unemployment and disability benefits are also included.⁸ Lastly, evidence of gratuitous payments such as free or reduced rate medical care; continued salary or wage payments; ⁹ and payments made by beneficent employers or helpful relatives are also inadmissible.¹⁰

The collateral source rule does not apply to prior payments by the defendant, the defendant's insurer, or a joint tortfeasor. This limitation prevents defendants from paying an amount greater than their full share of the claim's value.¹¹ Evidence of such payments is admissible to offset the defendant's damages.¹² Evidence of plaintiff's debts that have been discharged through bankruptcy is also admissible to mitigate defendant's damages.¹³ The dual rationale is that there is no third party acting as an additional source of recovery to the plaintiff in bankruptcy.¹⁴ Prohibiting defendants from offering evidence that a plaintiff has discharged their debts in bankruptcy.¹⁵

Also, parties can contract around the collateral source rule. In *Doyle v. Liberty Mut. Ins. Co.*, the Georgia Court of Appeals held that a defendant may offer evidence of a payment by a collateral source if the plaintiff has agreed, pursuant to an unambiguous contractual provision, that the defendant may use evidence of third party payments. ¹⁶ Interestingly, the court noted that this was only to be allowed if such application is not against public policy.¹⁷

Lastly, in contrast to tort actions, the collateral source rule does not apply to contract disputes.¹⁸ This is illustrative of both the difference between damages in tort and contract cases and the role of the collateral source rule. Collateral source evidence can be admitted in contract disputes if it is relevant to demonstrate the extent of the plaintiff's actual loss caused by the breach.¹⁹ The reason being; "the collateral

source rule is punitive; contractual damages are compensatory. The collateral source rule, if applied to an action based on the breach of contract, would violate the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance."²⁰

IV. AUTHORIZED USE OF COLLATERAL SOURCE EVIDENCE

Defendants may utilize collateral source evidence in specific instances other than for the purpose of mitigating their liability. Defendants may present collateral source evidence for impeachment purposes if the testimony is related to a material issue.²¹ For example, a defendant may impeach a plaintiff with evidence of health insurance coverage if the plaintiff testifies that they delayed or declined treatment because they could not afford it.²² Such testimony goes to the issue of the extent of plaintiff's damages and whether defendant's negligence proximately caused the injuries and, therefore, is admissible for the limited purpose of impeachment.²³ However, the court has made it clear that collateral source evidence cannot then be used to mitigate the defendant's damages.²⁴

Georgia courts have set a high bar in regards to what may amount to a material issue and has opted for other remedies before allowing collateral source evidence to be admitted. The Supreme Court of Georgia held that a defendant could not impeach the plaintiff with evidence of plaintiff's health insurance when the plaintiff testified about their anxiety related to their inability to pay medical bills.²⁵ The Court reasoned that because recovery was not permitted for this anxiety, the testimony was not related to a material issue. This ruling overrode the trial court's discretion to balance the probative value of collateral source evidence against its prejudicial impact.²⁶

The Supreme Court concluded that the testimony was objectionable and that the trial court was obliged to exclude the testimony upon such objection and, if requested, give curative instructions to the jury. Furthermore, upon such objections, sanctions or а mistrial might be appropriate.²⁷ Interestingly, Justice Sears, concurring specially in part and dissenting in part, made the point that, if the plaintiff had been seeking damages for this anxiety, or had their financial hardship been the immediate consequence of plaintiff's injury, collateral evidence would source have been admissible.28

V. MEDICAL FUNDING COMPANIES AND THE COLLATERAL SOURCE RULE

Courts have yet to clearly identify the extent to which the collateral source rule applies to funding companies. A funding company, otherwise referred to as a "litigation investment company,"²⁹ "medical factoring company,"³⁰ or "medical receivable factoring company,"³¹ is a non-party that enters into an arrangement with an injured party's medical providers to finance medical treatment and litigation. 32 Unlike traditional factoring companies, medical funding companies agree in advance to fund treatment in exchange for an assignment of the bill. They are not simply purchasing receivables. A funding company may enter into an agreement with plaintiff's medical providers with or without plaintiff being a party to the transaction.³³ Funding companies do not collect premiums from the plaintiff and receive no payment of any kind until after the conclusion of the claim through settlement or litigation.³⁴ If a settlement is reached or a judgment for the plaintiff is entered, the funding company may then receive up to the full amount of the medical bills owed by the injured party.

This process enables medical providers to shift the risk of collection onto funding companies while also receiving immediate cash for services rendered. Theoretically, medical providers discount the plaintiff's bills to compensate the funding company for the time value of money and the risk of collection. The funding company analyzes its investment by weighing whether a settlement will be reached or a judgment entered in favor of the plaintiff to cover enough of plaintiff's medical bills to enable them to earn an acceptable return.

It is interesting to note that the plaintiff may not be a party to the transaction and could be negatively impacted by the purchase of discounted medical bills in that the funding company will have no incentive to accept the same amount or a lesser amount than the provider agreed to accept in payment from the funding company. On the other side, the transaction has removed a potential conflict of interest of the provider in giving testimony because her payment is no longer contingent upon the outcome of the case. That is, unless the medical provider has an interest in the repeat business of the funding company or is considered a "panel" physician for funding company.

Other than noting that funding companies are "not in the nature of the traditional collateral source,"³⁵ Georgia courts have not delineated the differences between a funding company and other collateral sources in regards to the collateral source rule.

However, at least one court in Georgia has already signaled a willingness to allow evidence of payments made by medical funding companies at trial for impeachment purposes or to establish the reasonable value of services despite the collateral source rule. As more of the state's courts are faced with this fairly novel issue, the tide should turn in favor of widespread admission of evidence of such payments.

In Georgia, the landmark decision concerning the admissibility of payments by medical funding companies came in an order issued by Judge Thomas W. Thrash, Jr. for the Northern District of Georgia in Houston v. Publix Supermarkets, Inc. ³⁶ In Houston, the evidence showed that a medical funding company, ML Healthcare Services, LLC, had referred the plaintiff to two of her expert witness healthcare providers in a slip and fall case. In response, the defendant argued that the expert physicians' opinions as to causation of the plaintiff's injuries were affected by the doctors' desire to continue receiving similar referrals.³⁷ In his order, Judge Thrash observed that evidence of funding company payments was not being entered to mitigate the defendant's liability under the collateral source rule. Therefore, the judge held that

evidence of the relationship between the funding company and the plaintiff's physicians was admissible to (1) attack the plaintiff's causation experts' credibility and (2) determine the reasonable value of the medical services provided to the plaintiff.³⁸

Moreover, in finding that the evidence of medical funding company payments was admissible, Judge Thrash specifically noted that the funding company "is not in the nature of a traditional collateral source." 39 For example, although a plaintiff would pay a premium to an insurance company prior to litigation, a funding company only serves as an investor that receives its payments from plaintiff after the conclusion of the lawsuit.⁴⁰ Further, the defense was not seeking to offer evidence of the funding company's relationship with the plaintiff and her physicians to mitigate its liability, which the collateral source rule is intended to prevent. Instead, the evidence was being offered for the purposes of impeaching the plaintiff's causation witnesses and the reasonable value of the medical services received.⁴¹ Therefore, the medical funding company evidence in Houston did not fall within the bounds of the collateral source rule.

Although few courts have specifically addressed the admissibility of funding company payments, another court in this state has considered whether such payments are at least discoverable. In Bowden v. The Medical Center,⁴² the Supreme Court of Georgia also addressed a discovery dispute where the reasonableness of the plaintiff's medical charges was at stake. The plaintiff in Bowden sought to avoid having to pay off a hospital lien in a personal injury case as part of a Consequently, the uninsured settlement. plaintiff argued that the hospital's charges were unreasonable when compared to similar charges for an insured patient.⁴³ The Supreme Court of Georgia held that the injured motorist was allowed access to the hospital's billing schedules in discovery since these documents were relevant the to reasonableness of the charges under O.C.G.A. § 9-11-26(b)(1).44

Courts from other jurisdictions have also recognized the importance of accessing funding company payments in discovery. For example, the Western District of Texas faced this issue in *Galaviz v. C.R. England Inc.*⁴⁵ In *Galaviz*, the court held that a discovery request regarding payments from Key Health to the plaintiff's healthcare providers was relevant to a determination of whether the amounts paid for healthcare services were reasonable and necessary regarding the plaintiff's claimed damages.⁴⁶ Interestingly, the plaintiff and Key Health also objected to the discovery requests on the basis that the information sought would reveal privileged or proprietary material.⁴⁷ However, the court there noted that the parties had entered into a confidentiality agreement which provided sufficient protections to Key Health's proprietary interests. 48 Therefore, defense counsel in Georgia could likewise enter into similar confidentiality agreements to ensure enough protection is in place to allow funding company information to be held discoverable and, possibly, admissible at trial.

Similarly, the California Court of Appeal held that funding company information discoverable was in an unpublished opinion in Dodd v. Cruz.49 In Dodd, the plaintiff's attorney was also the president of the involved funding company, and the funding company's vice-president was the brother of a partner at the plaintiff's surgery provider.⁵⁰ When defense counsel sought certain documents regarding the funding company's payments on "lien contracts," the funding company filed a motion to quash on the basis that the requested documents were confidential, proprietary, and irrelevant.⁵¹ Noting the broad scope of California's Civil Discovery Act, which is in line with Georgia's Civil Practice Act, the court in *Dodd* held that the documents were discoverable since they

showed what the funding company believed to be the reasonable value of the services it paid for, apart from its calculation of the expense and risk of the debt collection. This would be evidence of the reasonable value of the surgery provider's services.⁵² In addition, the requested documents showed discoverable information regarding the amount of medical expenses the plaintiff actually incurred. 53 While the *Dodd* court noted that its decision did not go so far as to address the admissibility of the evidence, the court observed that nothing in its opinion prevented the plaintiff from arguing and admitting evidence showing that the funding company's payments for its liens were less than the reasonable value of the healthcare provider's fees.⁵⁴ This point suggested a counterbalance that defense counsel could possibly use to establish fairness in seeking to have the requested documents later admitted at trial.

Ultimately, while several courts in Georgia and other jurisdictions have held that evidence of medical funding company payments is at least discoverable, few courts have yet to opine whether this evidence is *admissible*. Based on Judge Thrash's recent order in *Houston* and the Supreme Court of Georgia's holding in *Bowden*, the trend appears to favor admissibility in Georgia.

When dealing with such evidence, the key for defense counsel is to know what to ask for in discovery and how to ask for it. For example, in Galaviz, defense counsel sought documents showing "the amounts initially charged by the medical/healthcare provider, the amounts paid by Key Health to the medical/healthcare provider, and the amounts not being requested by Key Health after the purchase of the medical/healthcare provider's accounts receivable." 55 Similar discovery requests under Georgia's Civil Practice Act should elicit the information necessary to hopefully impeach a plaintiff's causation expert at trial or challenge the reasonableness of the plaintiff's medical expenses.

VI. A PROPOSED LEGISLATIVE SOLUTION

As with many issues currently facing Georgia's legal system, the clearest solution may come from our General Assembly. While there is some law on point in Georgia, the current law does not go far enough to adequately address the challenges posed by funding companies. O.C.G.A. § 33-24-53, Georgia's "Runner Statute," may take into account the attorney/funding company relationship insofar as attorneys and funding companies reap benefits from the funding company's involvement in the case.

However, the violation penalties may not pose any deterrence as the first offense constitutes a misdemeanor, with possible \$1,000 fines, and any subsequent violations a felony, with a fine no greater than \$100,000. ⁵⁶ The legislature could strengthen the statute by mandating disclosure of the amount paid to the healthcare provider in contrast to the amount actually billed.

To more definitively clarify the status of payments from funding companies, Georgia's legislature could regulate the industry from the standpoint of plaintiffs as consumers. For example, other states require that funding companies contract directly with plaintiffs rather than working indirectly through attorneys or healthcare providers. States such as Tennessee, Oklahoma, Maine, Nebraska, and Ohio have statutes that mandate that that the contract between plaintiffs and funding providers be well defined. Part of what provides for that delineation are the following requirements: required disclosures, fee limitations, and certain safeguards.

While most of the statutes have requirements governing the funding contract language's readability and transparency, these states require disclosure of material terms. For example, Maine and Nebraska require that every agreement must contain the total amount received, itemization of all fees, the annual interest rate, the frequency at which that interest rate is compounded, and finally the total repayment amount in six (6) month increments.⁵⁷ Oklahoma mandates that each agreement contain a provision that the funding provider will only be repaid through proceeds of the legal claim.⁵⁸ If there are no available funds, then the plaintiff owes nothing to the funding provider unless that person violated a material portion of the Such а provision agreement. would disincentive players from boosting a claim's apparent face-value with costly procedures that may not be medically necessary.

In terms of the fee limitations imposed on the funding agreements, some states book-end the length of time which a funding company may assess fees. In Nebraska, a funding provider may not assess fees for any period exceeding three years and those fees may only be compounded semiannually. 59 Tennessee provides that plaintiffs/consumers will not pay an annual fee of more than ten 10% of the original principal amount borrowed and that the term will be no longer than three years.⁶⁰ Maine requires that the funding company must register with the state every two years in order even conduct business. 61 These to requirements highlight the extent to which the

funding company possesses a financial interest rather than being what has been typically construed as a collateral source (i.e., insurance).

States also build in safe-guards as an immediate prophylactic. Nebraska requires that the funding company cannot pay or accept commission or referral fees to/from anyone involved in the cause of action (i.e., attorneys, doctors, chiropractors, physical therapists, etc).⁶² Oklahoma and Tennessee additionally provide that the funding company cannot make referrals to a specific law firm, medical provider, or chiropractor.⁶³ In a further move by Oklahoma, a funding company cannot provide funds to a plaintiff who has other outstanding funding agreements.64

While disclosing the materials terms of the funding agreement seems to be basic contract law, requiring the explicit disclosure of those terms not only educates potential plaintiff consumers about their choices but may also make them reconsider what they sign. By controlling the extent to which fees may be accrued and added to the principal, states can control potential personal financial exposure and prevent run-away loans from dominating the potential outcome of a claim. Such procedures should return funding companies to the position of only offering financial resources to aid plaintiffs in undergoing procedures that are actually needed and not just prescribed.

¹ *Hoeflick v. Bradley*, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006).

- ³ Western and Atlantic Railroad v. Meigs,74 Ga. 857, 868 (1885).
- ⁴ *Amalgamated Transit Union Local 1324 v. Roberts*, 263 Ga. 405, 406, 434 S.E.2d 450, 451 (1993).

⁶ Id.

- ¹⁶ Doyle v. Liberty Mut. Ins. Co., 160 Ga. App. 138, 286 S.E.2d 475, 476 (1981).
- ¹⁷ Id.
- ¹⁸ Amalgamated Transit Union Local 1324 v. Roberts, 263 Ga. 405, 408, 434 S.E.2d 450, 452 (1993).
- ¹⁹ Id.
- ²⁰ Id.
- ²¹ Warren v. Ballard, 266 Ga. 408 (1996).
- ²² Matheson v. Stilkenboom, 251 Ga. App. 693, 696 (2001).
 ²³ Id.
- ²⁴ Kelley v. Purcell, 301 Ga. App. 88, 90 (2009).
- ²⁵ Warren v. Ballard, 266 Ga. 408, 409 (1996).

- ²⁹ Houston v. Publix Supermarkets, Inc., NO.1:13-CV206-TWT.
- ³⁰ Galaviz v. C.R. England Inc., 2012 WL 1313301 (W.D. Tex.).
- ³¹ Hinojosa v. Chowning, 2011 WL 2173638 (W.D. Tex).
- ³² Houston v. Publix Supermarkets, Inc., No. 1:13-CV-206-TWT.
- ³³ Hinojosa v. Chowning, 2011 WL 2173638 (W.D. Tex).

² 74 Ga. 857 (1885).

⁵ Id.

⁷ Hoeflick v. Bradley, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006).

⁸ Olariu v. Marrero, 248 Ga. App. 824, 825, 549 S.E.2d 121, 122-23 (2001) and Hammond v. Lee, 244 Ga. App. 865, 868 (2000).

⁹ Bennett v. Haley, 132 Ga. App. 512, 523, 208 S.E.2d 302, 310 (1974) *citing* 22 Am.Jur.2d 286, 287, Damages s 206.

¹⁰ Hoeflick v. Bradley, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006) and Bennett v. Haley, 132 Ga. App. 512, 523, 208 S.E.2d 302, 310 (1974).

¹¹ Id.

¹² Id.

¹³ Id. at 123-24.

¹⁴ Id.

¹⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ *Id.* at 408, 411.

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34 Houston v. Publix Supermarkets, Inc., No. 1:13-CV-206-
   TWT.
<sup>35</sup> Id.
<sup>36</sup> No. 1:13-CV-206-TWT, 2015 WL 4581541, at *1
   (N.D. Ga. July 29, 2015).
<sup>37</sup> Id.
<sup>38</sup> Id.
<sup>39</sup> Id., at *2.
<sup>40</sup> Id.
<sup>41</sup> Id.
42 297 Ga. 285 (2015).
<sup>43</sup> Id.
<sup>44</sup> Id. at 296.
<sup>45</sup> No. A-12-MC-82 LY, 2012 WL 1313301, at *1
   (W.D. Tex. Apr. 17, 2012).
<sup>46</sup> Id., at *3.
<sup>47</sup> Id.
<sup>48</sup> Id.
<sup>49</sup> 167 Cal. Rptr. 3d 601 (Ct. App. 2014).
^{50} Id. at 604.
<sup>51</sup> Id.
<sup>52</sup> Id. at 607-08.
<sup>53</sup> Id. at 608.
<sup>54</sup> Id.
55 Galaviz, supra note 46, at *1.
<sup>56</sup> O.C.G.A. § 33-24-53.
<sup>57</sup> ME. REV. STAT. TIT. 9-A, § 12-104; NEB. REV. STAT.
   ANN. § 25-3303.
<sup>58</sup> OKLA. STAT. ANN. TIT. 14A, § 3-807.
<sup>59</sup> NEB. REV. STAT. ANN. § 25-3305.
<sup>60</sup> TENN. CODE ANN. § 47-16-110.
<sup>61</sup> ME. REV. STAT. TIT. 9-A, § 12-106.
<sup>62</sup> NEB. REV. STAT. ANN. § 25-3304.
<sup>63</sup> Okla. Stat. Ann. Tit. 14A, § 3-814; Tenn. Code
   ANN. § 47-16-105
<sup>64</sup> OKLA. STAT. ANN. TIT. 14A, § 3-814.
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