



TENNESSEE SUPREME COURT REAFFIRMS COLLATERAL SOURCE RULE IN PERSONAL INJURY CASES



J. Eric Harrison ...

"In practical effect, a plaintiff who prevails in the case receives a windfall in the form of the difference between the total medical bills charged [by medical providers] and the amount paid to satisfy those bills."

..... for the medical expenses incurred as a result of the defendant's conduct. However, the reality of how medical costs are billed, versus the amounts that are actually paid to the medical providers, creates an interesting issue that the Tennessee Supreme Court recently addressed.

As is well known, the total medical bills charged by a medical provider are frequently reduced or written off, typically due to negotiated agreements between the medical providers and the health insurers. Medical providers nearly always accept, as payment in full, the lesser amount. This reduction is almost always substantial, typically exceeding 50% of the total bill. Therefore, the amount actually paid by the plaintiff (through deductibles and co-pays), combined with the payments made by the plaintiff's medical insurance, is usually only a fraction of the total amount actually billed by the medical provider.

Despite the variance between the amounts billed versus

The collateral source rule bars a defendant in a personal injury case from introducing evidence of payments or benefits the plaintiff received from a third-party for the plaintiff's damages. The issue typically revolves around the introduction of medical bills by the plaintiff to prove damages caused by the negligent acts or omissions of the defendant. The rationale underlying the collateral source rule in personal injury cases is that the defendant should be responsible for the total damages the defendant caused, without regard to any payments made by the plaintiff's medical insurance. Or put another way, the defendant should not benefit from the fact that the plaintiff chose to carry medical insurance which ultimately helped pay for

amounts paid and accepted, under the collateral source rule the trial court excludes from the jury evidence of any payments made by the plaintiff's medical insurance carrier. Thus, when calculating the damages due from the defendant to the plaintiff, the jury is only able to consider the total medical bills charged by the medical providers, and is never made aware of the amount of the discount or write-off. In practice, this essentially allows the plaintiff to receive compensation from the health insurance carrier to pay the medical bills, without lessening the amount the plaintiff can recover from the defendant for medical bills.

This state of affairs has been accurately described by many in the legal profession as creating a "legal fiction" whereby a plaintiff is able to present evidence to the jury of the total medical bills charged by the medical providers, while on the other hand actually owing only a fraction of that total to the providers. In practical effect, a plaintiff who prevails in the case receives a windfall in the form of the difference between the total medical bills charged and the amount paid to satisfy those bills. In addition, while only "reasonable and necessary" medical expenses are recoverable, most states have statutes which, in conjunction with the collateral source rule, create a presumption that the total amount of the medical bills, not including any reductions or write-offs, is reasonable.

Though the collateral source rule has been around for more than a century in most jurisdictions, in more modern times part of the rationale for keeping the collateral source rule is driven by the way personal injury plaintiffs typically finance their lawsuits. As most of us know, most every lawyer that handles personal injury cases works for the plaintiff on a contingent fee basis, where the lawyer's fee is a percentage of the total amount recovered for the plaintiff. Thus, the argument goes that this windfall helps the plaintiff pay his/her attorney without having to dip into the recovery for the plaintiff's actual damages. Additionally, where health insurance has paid all or part of the medical bills incurred as a result of the personal injury, the health insurer typically enjoys the right of subrogation against the plaintiff's recovery in the personal injury suit. (Subrogation is the right of the

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ARE ARBITRATION AGREEMENTS REALLY THE BIG BAD WOLF?



Howard B. Jackson

“Supporters [of bills pending in Congress] claim that arbitration agreements keep harassment complaints and settlements secret, and serve to protect harassers.”

In December, bills were introduced in the House and Senate, both of which are referred to as the Ending Forced Arbitration of Sexual Harassment Act. The bills were introduced by Democrats, but have Republican co-sponsors. Supporters claim that arbitration agreements keep harassment complaints and settlements secret, and serve to protect harassers.

Gretchen Carlson is a vocal proponent of the proposed law. She has stated that “Forced arbitration is a harasser’s best friend.” She asserts that such agreements “allow harassers to stay on their jobs, even as victims are pushed out or fired.”

Are arbitration agreements in the employment setting really forces of evil? Let’s take a closer look.

The Federal Arbitration Act (“FAA”) favors arbitration as a means of resolving disputes, and the courts have generally done a good job policing the fairness of such agreements. In the employment law setting, where an agreement maintains the available remedies for employees and does not impose undue costs or hurdles on employees bringing claims the courts have found such agreements enforceable. On the other hand, where the agreements purported to reduce or eliminate remedies available to employees, or created significant barriers such as costs materially above those an employee would bear in court litigation, the courts have refused to enforce the arbitration agreement. In short, when an arbitration agreement changes little other than the identity of the decision-maker, it is likely to be enforced. The farther an agreement strays from that spot the greater the likelihood it will not be enforced.

What of the claims that arbitration agreements promote secrecy, protect harassers, and permit punishment of the alleged victims?

With respect to secrecy, a plaintiff who wishes to make the matter public can initially file her claim in court. The Complaint is a matter of public record. If the employee has signed an enforceable arbitration agreement the employer can file a motion asking the court to refer the claim to arbitration. That does not result in withdrawal of the Complaint, however, nor change its publicly available nature.

If a case is referred to arbitration the arbitral proceedings are not public. As a practical matter, the discovery phases of a lawsuit are by and large non-public as well. The primary difference is that a court trial is public, whereas an arbitration is not. Unless the defendant employer is Fox News or some

other well-known entity, or a high profile player in the locality, one might ask whether the public nature of the trial makes a significant difference.

The bottom line is that an enforceable arbitration agreement can result in somewhat greater secrecy of the proceedings. But such an agreement obviously does not keep all matters related to the claim secret. Gretchen Carlson was subject to such an agreement, and the press and public learned a great deal about her claims.

Nothing about an arbitration agreement inherently protects harassers. When a claim becomes known to the employer, hopefully before any form of litigation begins, the employer must investigate and take appropriate action. If the employer fails to do so and the harassment victim pursues a claim, the employer faces consequences for its failure. This is true regardless of whether the claim is heard by a judge, jury, or arbitrator. Any employer who believes that having an arbitration agreement excuses it from investigating and taking appropriate corrective action is being foolish. Taking Ms. Carlson’s case as an example again, it certainly appears that Fox News did not handle her concerns properly when they were first raised. How did that work out for Fox News? Ms. Carlson received a \$20 million settlement and the Company ultimately fired its founder and CEO.

Nothing about an arbitration agreement inherently allows employers to punish those who raise complaints of harassment. When an employee complains and is thereafter pushed out or otherwise retaliated against, the law provides a remedy. The victim can file a retaliation claim as well as a harassment claim. When an employer engages in retaliation, there are consequences regardless of whether the retaliation case is heard by a judge, jury, or arbitrator. In Ms. Carlson’s case it certainly appears that Fox News retaliated against her. Again, however, that did not work out so well for Fox News in the end.

Determining whether the law should permit enforceable arbitration agreements in the employment setting is a public policy decision for Congress. That said, the contentions that arbitration agreements in and of themselves create undue secrecy, protect harassers or permit punishment of victims are not accurate.

As a legal point, one wonders whether the bill in its current form is constitutional. As submitted to the House and Senate it applies only to claims based on sexual discrimination. What is the basis for excluding claims based on race or other protected statuses? If the bill is passed in its current form a constitutional challenge may follow.

The bill has not become law and its passage is uncertain. In the meantime, employers who are considering implementing arbitration agreements should think through the pros and cons of doing so very carefully. Such agreements are obviously under attack, and will be scrutinized closely if challenged.

DOL PROPOSED RULE REVISING TIP POOLING RULES



Carol R. Merchant

“Under the 2011 regulations ... managers, cooks and dishwashers were prohibited from receiving tips from the tip pool. The newly proposed regulations will lift this prohibition under certain circumstances.”

On December 4, 2017, the Federal Department of Labor (DOL) announced a Notice of Proposed Rulemaking (NPRM) that will rescind a 2011 regulation prohibiting restaurants, bars and other service industry employers from requiring tipped employees, such as servers, to share tips with non-tipped employees such as cooks, dishwashers and managers.

The Fair Labor Standards Act (FLSA) requires covered employers to pay employees at least a Federal minimum wage, which is currently \$7.25 per hour. However, it also allows employers to only pay a cash wage of \$2.13 per hour to tipped employees as long as these tipped employees receive sufficient tips on a weekly basis to equal at least the difference between \$7.25 and \$2.13 (\$5.12

per hour). This provision for paying the sub-minimum hourly rate also provides that the tipped employee retains

all tips received except for tips contributed to a valid tip pool.

Under the 2011 regulations an employer can require tipped employees to contribute to a valid tip pool. These regulations define a valid tip pool as being limited to customarily and regularly tipped employees such as servers, bussers, bartenders and food runners. Managers, cooks and dishwashers were prohibited from receiving tips from the tip pool. The newly proposed regulations will lift this prohibition under certain circumstances.

The DOL proposal only applies where employers pay the full minimum wage to tipped employees. In other words, under the proposal, only tipped employees being paid a cash wage of at least \$7.25 per hour (or the State minimum wage, if higher) could be required to contribute to a tip pool that would be shared among non-tipped employees such as cooks, dishwashers and even managers.

The DOL also issued a nonenforcement policy on July 20, 2017, whereby the Wage and Hour Division no longer enforces the Department’s regulation on the retention of employees’ tips with respect to any employee who is paid cash wage of not less than the full FLSA minimum wage and for whom their employer does not take a tip credit, either for 18 months or until the completion of the new rulemaking.



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insurer to be reimbursed from the plaintiff's recovery in the suit for the amounts it paid on behalf of the plaintiff.) While the amount of the subrogation is often subject to negotiation between the plaintiff and the insurer, in theory and practice health insurers typically take a significant portion of the plaintiff's award.

Currently, the collateral source rule is controversial and subject to a great deal of criticism. Much of this criticism comes from corporate and insurance interests, which see the abolition of the collateral source rule as a way to reduce the overall value of each individual lawsuit, which would in theory reduce the overall number of lawsuits filed. The collateral source rule has also come under fire as being an outdated doctrine given the growing disparity between the total bills charged and the amount actually paid by insurers and accepted as payment in full by medical providers. Decades ago the amount the insurers paid the medical providers was much closer to the total bill charged. Over time the amount of the medical bills charged and the amount paid by the insurers to satisfy the bill has widened substantially. Thus, the windfall effect described above has become exacerbated.

Some states have modified or reduced the impact of the collateral source rule in personal injury cases. However, Tennessee courts have long adhered to the pure form of the collateral source rule, with limited exceptions such as in medical liability suits. Last year in the case of *Dedmon v. Steelman*, W2015-01462-SC-R11-CV (2017), the Tennessee Supreme Court was asked to revisit the collateral source rule in personal injury suits.

In *Dedmon*, the defendant argued that the definition of “reasonable” medical charges under the Tennessee Hospital Lien Act, T.C.A. sec. 29–22–101, et seq., should be applied to personal injury cases in Tennessee. In the case of *West v. Shelby County Healthcare Corp.*, 459 S.W.3d 33 (Tenn. 2014), the Tennessee Supreme Court held that “reasonable charges” for medical services under the Tennessee Hospital Lien Act are the discounted amounts a hospital accepts as full payment from patients' private insurers, not the full, undiscounted amounts billed to patients. *West*, 459 S.W.3d at 46. In *Dedmon*, a lengthy forty-five page opinion, Justice

Holly Kirby, writing for a unanimous court, rejected the suggestion to use the Hospital Lien Act standard in personal injury cases and held that the pure collateral source rule still applies in personal injury cases in Tennessee.

In *Dedmon*, the court analyzed the collateral source rule at great length, including its history and application in various jurisdictions across the United States. As if to highlight the discrepancy between the amount charged for medical services versus the amount paid by insurance, Justice Kirby noted the total medical bills charged were \$52,482.87, and that the plaintiff's health insurer actually paid only \$18,255.42 to fully satisfy the bills. While recognizing this disparity, Justice Kirby also pointed out the difficulty of pinpointing the exact cause of the disparity, stating that:

[The court] does not pretend to fully understand medical economics or the pricing of medical services in today's environment. Even without a full understanding, however, it is evident that medical expenses cannot be valued in the same way one would value a house or a car, pegging the ‘reasonable value’ at the fair market value, that is, the amount a buyer is willing to pay. Health care services are highly regulated and rates are skewed by countless factors, only one of which is insurance.

Dedmon at p. 38.

After an exhaustive analysis, the Supreme Court ultimately left the collateral source rule intact in Tennessee in personal injury cases. Thus, the total charged medical bills will continue to drive the value of personal injury cases in Tennessee.

This may not be the last word however. The Tennessee legislature could abolish the collateral source rule by statute, a move which would no doubt draw a constitutional challenge from the plaintiff's bar. The outcome of such a challenge is unclear. Certainly, the Tennessee Supreme Court appears interested in preserving and protecting the traditional collateral source rule. In any event, for now the pure collateral source rule remains the law of the land in Tennessee.

NOTICE OF DEADLINE TO DOWNLOAD HISTORICAL E-VERIFY RECORDS

On March 1, 2018, the U.S. Citizenship and Immigration Services (USCIS) must dispose of E-Verify records that are over ten years old - those dated on or before December 31, 2007. E-Verify employers have until February 28, 2018, to download case information from the “Historic Records Report” if they want to retain information about each E-Verify case that will be purged. For more information, and guidance on downloading the Historic Records Report, please see the following documents prepared by the USCIS:

“*Fact Sheet: E-Verify Records Retention and Disposal*,” which can be found at https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Fact-Sheet-E-Verify-NARA.pdf

“*Instructions to Download Historic Records Reports in E-Verify*,” which can be found at https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Instructions_to_Download_NARA_Reports_in_E-Verify.pdf