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Winning the Collateral Source Hearing

THE COLLATERAL SOURCE HEARING COMES AFTER A VERDICT TO PREVENT DOUBLE RECOVERY BY REDUCING DAMAGES IF INSURANCE OR GOVERNMENT PROGRAMS WILL PAY FOR FUTURE CARE. BUT THESE HEARINGS OFTEN BECOME MINI-TRIALS WHERE DEFENSES ARGUE FUTURE PAYMENTS ARE CERTAIN, DESPITE LAW REQUIRING PROOF OF ACTUAL, NOT SPECULATIVE, REPLACEMENT. EXPERTS TESTIFYING ABOUT SYSTEM DISCRETION AND UNCERTAINTY MAKE "REASONABLE CERTAINTY" HARD TO PROVE. LAWYERS MUST CROSS-EXAMINE TO EXPOSE THESE ISSUES AND PROTECT THE JURY'S DAMAGES AWARD FROM UNJUST REDUCTIONS.

By Ben B. Rubinowitz and Evan Torgan

The collateral source hearing is the phase of a civil case most trial lawyers don't think about until they believe the fight is finally over. The hearing is a post-verdict proceeding where the defense gets one last opportunity—after the jury has already decided liability and damages—to argue that a portion of the future medical award should be reduced because some governmental entitlement or private insurer will allegedly step in and pay for that care instead. At this stage, the court is asked to reduce a jury's award for future damages not because the jury erred, but because the defendant claims that those damages will later be replaced by a collateral source with reasonable certainty.

The collateral source hearing is a fight trial lawyers typically don't prepare for because it arises only after they believe they've already won. The jury has spoken. Damages have been determined. Post-trial motions are decided. And then the defense asks for another hearing. Before the trial lawyer fully realizes what's happening, counsel is back in court litigating future medical care all over again—this time while a witness with no medical credentials attempts to explain why the plaintiff's life care plan should cost less because some insurance program *might* pay something, *someday*.

In theory, the collateral source hearing is supposed to be narrow. The statute authorizing it, CPLR 4545, was enacted for a limited purpose: to prevent true double recovery where a

future loss will actually be replaced or indemnified by a collateral source. Because CPLR 4545 is in derogation of the common law, which disallowed all evidence of collateral sources, it places a demanding burden on the defendant and must be strictly construed. It was never intended to function as a second damages trial, a second bite at the apple for the defense, or a forum for second-guessing the jury's findings.

Yet in practice—particularly when defendants invoke Medicare to attack large future physical and occupational therapy awards—the hearing often becomes exactly that. Courts are asked to substitute speculative, taxpayer-funded reimbursement projections for detailed medical proof the jury has already accepted. And because these hearings are decided by individual judges, each with different experiences, instincts, and perspectives, nearly identical post-trial evidence can produce starkly different outcomes.

This problem is not limited to Medicare. It arises with Medicaid and private insurance as well. The name of the collateral source may change, but the analysis does not—and neither does the uncertainty. Regardless of the payer invoked, the statutory burden remains the same. CPLR 4545 places that burden squarely on the defendant. The defense must prove, with reasonable certainty, that the future costs awarded by the jury will be replaced or indemnified by the collateral source. That standard is intentionally demanding. It is not enough to show that coverage exists, that payment is possible, or that an expert "can't imagine" a denial in such a catastrophic case. The statute requires proof of actual replacement—not the possibility or likelihood of replacement.

Keep this in mind when you walk into these hearings: the burden does not fluctuate depending on who is allegedly paying. Medicare does not enjoy a presumption of certainty that Medicaid or private insurance does not. All three systems depend on the future professional judgment of treating physicians, discretionary decisions by claims reviewers, and administrative processes beyond the control of the plaintiff. Once that reality is acknowledged, the same analytical and cross-examination framework applies in every case.

The cross-examination should begin by establishing what the defense expert is not: a physician. Defense experts — whether they call themselves Medicare specialists, insurance analysts, or damages consultants — do not treat patients. They do not prescribe therapy. They do not approve or deny claims. They testify about systems they do not control. That must be established immediately.

Q: You do not treat patients, correct?

Q: You do not prescribe physical or occupational therapy?

Q: You do not approve or deny Medi\care claims?

Q: You will not be the person deciding whether this plaintiff receives therapy in the future?

Q: You have no idea who that person will be?

Q: or their qualifications or experience?

Those concessions matter. A witness who does not make treatment or coverage decisions can only speculate about how others might decide in the future.

With Medicare, coverage determinations for outpatient physical and occupational therapy are governed by Chapter 11 of the Medicare Benefit Policy Manual and administered by Medicare Administrative Contractors (MACs) such as Noridian or National Government Services. These contractors are not physicians. They do not examine patients. They are not even government employees. They are private claims examiners that review paperwork and apply coverage criteria. That is where discretion enters the process—and where reasonable certainty collapses. Expose that discretion and uncertainty directly:

Q: There are entities in the Medicare system known as Medicare Administrative Contractors, correct?

Q: They employ the individuals who make the ultimate decisions about whether my client gets the care her doctor requests?

Q: Those individuals are not physicians?

Q: Not physician assistants either?

Q: They do not examine the patient?

Q: They are basically claims examiners, true?

Q: They can disagree with the treating doctor's opinion of medical necessity?

Q: And if they disagree, they can deny or limit coverage?

Q: Even if they agree with most of the treatment plan?

Once those answers are established, the claim of reasonable certainty begins to unravel.

The Medicare manual itself underscores the uncertainty. Section 220.2 requires that therapy be an accepted standard of medical practice, require skilled providers, demonstrate improvement or justify skilled maintenance, and be reasonable in amount, frequency, and duration. Every one of those conditions must be satisfied—and re-satisfied—over time. Coverage approvals are time-limited, and at each reevaluation, coverage may be reduced or denied entirely. Make the expert acknowledge that reality:

Q: The jury decided that the plaintiff should get Physical Therapy and Occupational Therapy three time per week for life, correct?

Q: You would agree that Medicare does not approve therapy for life in a single decision, correct?

Q: Approvals are time-limited?

Q: Meaning that it might award those therapies for 60 or 90 days, but then they get to re-evaluate the need, true?

Q: And at each re-evaluation, coverage can be reduced, true?

Q: Or denied outright?

Q: So there is no guarantee that the plaintiff will receive the care the jury awarded for life?

When pressed, defense experts often retreat to the same refrain: "I can't imagine coverage being denied in a case like this." That answer should never be left standing.

Q: You can't imagine it happening—but it can happen, correct?

Q: There is nothing preventing a claims examiner from disagreeing with a physician?

Q: Nothing preventing a future treating doctor from changing course?

Q: Nothing ensuring that the doctor's office provides the correct paperwork to Medicare, true?

Q: And nothing guaranteeing that the specific care the jury awarded will be provided for life?

Q: And the jury already decided what care was necessary, didn't they?

That discretion is not theoretical. The Office of Inspector General found that 61 percent of Medicare Part B outpatient physical therapy claims failed to comply with Medicare requirements due to issues involving medical necessity, coding, or documentation errors. That finding reflects a systemic reality, not an isolated risk.

Defendants often try to shortcut the analysis by pointing to reimbursement rates. Medicare pays a certain amount per visit; Medicaid pays less. Therefore, they argue, the verdict should be reduced. But a reimbursement rate is not a replacement. A rate guarantees nothing about provider participation, frequency, duration, or continuity of care. A fee schedule does not establish reasonable certainty.

The expert's testimony ultimately collapses under statute's own language:

Q: “Reasonable certainty” does not mean possible, correct?

Q: It does not mean likely?

Q: It does not mean “I can’t imagine”?

Q: As a matter of fact, it means clear and convincing evidence, true?

Q: You cannot guarantee future physician prescriptions?

Q: You cannot guarantee contractor approvals?

Q: So you cannot say the jury’s award will be replaced item-for-item with reasonable certainty?

That answer ends the hearing.

Collateral source hearings are not second trials. The jury has already decided medical necessity and fixed damages. That verdict must be protected. The collateral source hearing exists for one reason only: to prevent true double recovery—not to relieve a defendant of the consequences of a substantial verdict. By effectively cross-examining defense witnesses, trial counsel exposes speculation for what it is, dismantles hypothetical assumptions, and makes clear that “could be” does not mean “will be,” that eligibility for benefits does not equal approval, and that the mere availability of coverage does not guarantee replacement of the jury’s award.

The collateral source hearing may be the last battle in the case. But it is a battle that must be fought and a battle that must be won. If the trial lawyer does not prevail at this stage, the verdict itself is at risk.

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