MONTANA

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1. Does your jurisdiction maintain a collateral source rule?

Yes. Montana’s collateral source rule is outlined in MCA § 27-1-308 as follows:

(1) In an action arising from bodily injury or death when the total award against all defendants is in excess of $50,000 and the plaintiff will be fully compensated for the plaintiff’s damages, exclusive of court costs and attorney fees, a plaintiff’s recovery must be reduced by any amount paid or payable from a collateral source that does not have a subrogation right.

(2) Before an insurance policy payment is used to reduce an award under subsection (1), the following amounts must be deducted from the amount of the insurance policy payment:

   (a) the amount the plaintiff paid for the 5 years prior to the date of injury;
   (b) the amount the plaintiff paid from the date of injury to the date of judgment; and
   (c) the present value of the amount the plaintiff is obligated to pay to keep the policy in force for the period for which any reduction of an award is made pursuant to subsection (3) . . .

2. Does your jurisdiction allow plaintiffs to recover expenses that were written off by the healthcare provider?

Yes, but it depends on reasonableness. They can also be adjusted downward in a post-verdict hearing under the collateral source rule. In Meek v. Mont. Eighth Judicial Dist. Court, 2015 MT 130, 379 Mont. 150, 349 P.3d 493 (Mont. 2015), the Montana Supreme Court held that a plaintiff could introduce evidence of the full amount of past medical expenses that were billed – an amount nearly three times as high as the amount that the insurer actually paid. The court held that the plaintiff could introduce these amounts, yet that defendant could introduce evidence contesting the reasonableness of those bills as a measure of damages, including evidence of the amount that Medicare pays to other health care providers for the same or similar services. Id. at 22. Defendant was prohibited, however, from introducing any evidence or argument that Plaintiff was covered by Medicare or other insurance, or that Medicare or an insurer paid any part of her medical bills. Id. The court has separately held that “[t]he reasonableness of the medical bills as a measure of damages is a matter to be determined by the jury.” Burley v. Burlington Northern, 2012 MT 28, ¶ 91, 364 Mont. 77, 273 P.3d 825. The court held that the defendant could additionally contest the damages award in a post-verdict hearing due to the amount written off by the insurer under the collateral source rule. Meek at 19.

3. Must a plaintiff prove that medical services were reasonable and necessary to
recover?

Yes. Montana law requires that “[d]amages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered.” MCA § 27-1-302; Tidyman’s Management Services v. Davis, 2014 MT 205, ¶ 40, 376 Mont. 80, 330 P.3d 1139.

4. Must a plaintiff guarantee reimbursement payment to a healthcare provider if a judgment is rendered or settlement achieved?

The answer depends on whether the party has a subrogation right. Montana’s collateral source statute states that “a plaintiff’s recovery must be reduced by any amount paid or payable from a collateral source that does not have a subrogation right.” MCA § 27-1-308(1) (emphasis added). This amount is reduced by the conditions of MCA § 27-1-308(2).

Montana also has a ‘made whole’ provision, whereby, the Supreme Court has held that:

[It is the public policy in Montana that an insured must be totally reimbursed for all losses as well as costs, including attorney fees, involved in recovering those losses before the insurer can exercise any right of subrogation, regardless of any contract language providing to the contrary.


In terms of parties that have a right of subrogation, however, Montana is in the minority of jurisdictions to hold that medical payment subrogation clauses are invalid as against public policy. See Swanson v. Hartford Ins. Co., 309 Mont. 269, 277 (2002); Allstate Ins. Co. v. Reitler, 192 Mont. 351, 355-56 (1981) (“Whether an insurance policy provides for subrogation . . . or provides that the carrier has a lien on the proceeds of an insured’s third-party recovery, that policy has the effect of assigning a part of the insured’s right to recover against a third-party tortfeasor. We hold that such an assignment is invalid.”)

5. If an insurance carrier maintains a contractual agreement with a healthcare provider that reduces payments, what can a plaintiff “blackboard” as damages? (i.e. what effect does a pre-existing agreement between an insurance carrier and healthcare provider have on a plaintiff’s ability to recover medical bills?)

The plaintiff can blackboard the “billed” amounts, regardless of any contractual agreement that reduces or discounts what actually is paid. The defendant may not introduce evidence of the contractual agreement. However, under Meek, as outlined in the response to part II, evidence contesting the reasonableness of the bills as a measure of damages can be introduced during a trial. Meek at 22. This could be done in part by demonstrating what an insurance company pays to a provider for similar procedures. Id. A party could also conduct a post-verdict hearing to attempt to have the liability reduced under the collateral source rule. Id. at 19.