NEW MEXICO

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1. Does your jurisdiction maintain a collateral source rule?

New Mexico law strongly favors the collateral source rule. Sunnyland Farms, Inc. v. Central New Mexico Electrical Cooperative, Inc., 301 P.2d 387 (NM, 2013) addressed a tactic used by defendants who would settle directly with subrogated parties and attempt to use the settlement to affect damage awards. Sunnyland had suffered a crop loss but had insurance that paid it $3.2 million for the loss. Defendant settled with the subrogated carrier for $1.3 million and attempted to offset the damages by the full amount of the subrogation claim, the $3.2 million. The trial court allowed the offset; the Supreme Court disallowed it based primarily on the collateral source rule. In doing so, the court set out the multiple justifications for the rule. The court noted that double recovery is not favored but that the collateral source rule is an exception. The court explained the justifications for the rule. First, plaintiff is in a position to reimburse the collateral source if plaintiff obtains a full recovery. Second the tort feasor should not be the beneficiary of a third party’s generosity or payment. Third, the third party is more likely to make the payments if it knows that it can be reimbursed. Fourth, the collateral source rule assists the plaintiff by having bills paid promptly rather than having to wait until the outcome of the tort litigation. Fifth, the double-recovery argument is more theoretical than realistic since plaintiffs rarely receive their full damages since a portion of the damages go to plaintiffs’ attorneys as a contingency fee for services. Fundamentally, the court held that if the choice is between a so-called double recovery and an offset for the tortfeasor, public policy supports the double recovery.

The collateral source rule applies when the payment is made by third parties and not by the defendant. In Yardman v. San Juan Downs, Inc., 906 P.2d 742 (NM App 1995), the defendant race track had purchased medical and disability insurance for the jockeys, non-employees. Because the insurance was provided by the defendant, the collateral source rule did not apply and recovery for the expenses covered by the insurance was denied.

2. Does your jurisdiction allow plaintiff recovery for expenses written off by the healthcare provider?

The New Mexico decision on Medicare write-offs came from federal court in Pipkins v. TA Operating Corporation, 466 F.Supp.2d 1255 (D. NM, 2006). The issue was whether the collateral source rule applied to “medical expenses written off or adjusted by a healthcare provider pursuant to an agreement with the federal government under Medicare.” Predicting how the New Mexico appellate courts would rule, Judge Lynch held that the collateral source rule applied to the write-offs. In reaching his conclusion, Judge Lynch first had to decide if the write-off would be...
considered a benefit from a collateral source and second, had to determine if New Mexico policy would apply the collateral source rule.

        On the first question, Judge Lynch acknowledged that some courts hold that the write-offs are a benefit while other courts regard the write-offs as rendering that part of the expense as illusory. The latter analysis notes that a portion of the bill is never paid and therefore not within the traditional definition of collateral source, namely a payment made by third parties. Concluding that offsets were similar to gratuitous payments, Pipkin held that offsets are a benefit from a third party.

        The second question addressed whether any of the policy reasons for the collateral source rule would militate against its application to offsets. Specifically, the offset is clearly a windfall since it allows recovery for an unpaid expense for which there is no subrogation or other repayment due. But, consistent with the rationale in Sunnyland, above, the windfall in New Mexico would go to plaintiffs rather than to the defendants.

3. **Must a plaintiff prove medical services were reasonable and necessary in order to recover?**

        New Mexico has Uniform Jury Instructions which set out specifically the requirement of proof for medical expenses. Plaintiff is allowed to recover.

        The reasonable expense of necessary medical care, treatment and services received [including prosthetic devices and cosmetics aids] [and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future].

UJI 13-1804, NMRA.

        The directions for use of the instruction also note that there must be “adequate evidence that such expenses are reasonably certain to be incurred.”

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

        Hospitals are entitled to lien plaintiff’s recovery pursuant to statute, New Mexico Hospital Liens Act, NMSA 1978 §§ 48-8-1 to 48-8-7. But the statute is limited to hospitals and does not authorize liens by independent physicians and healthcare providers.

        Private, non-government hospitals are required to pay a proportionate share of the cost of recovery. Because of a state constitutional provision, hospitals run by state or county entities receive full reimbursement and do not pay a portion as recovery costs.

        New Mexico, however, honors agreements by attorneys who provide a letter of protection to a medical provider. An attorney was disciplined for failing to fulfill a letter of protection. Of course, the provider has recourse against the patient for payment of outstanding bills.
But, a provider cannot obtain an assignment from the patient by which the provider is assigned a share of the recovery to cover the medical bills. In Quality Chiropractic, P.C. v. Farmers Insurance Company of Arizona, 51 P.3d 1172 (NM 2002) the court held that a chiropractor’s use of an assignment was prohibited. The court discussed assignability of personal injury claims but based its ruling on an analysis comparing subrogation to assignments. The court held that assignments would interfere with the litigation and settlement of cases and are therefore void.

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)?

Plaintiff can blackboard whatever number a doctor testifies is the reasonable and necessary charge for the services rendered. The Pipkin case, above, directly holds that the collateral source rule allows the full amount to be presented.

The New Mexico Court of Appeals had the opportunity to address the issue in Rodriguez v. Williams, 355 P.3d 25 (NM App 2015). Defendant argued that plaintiff had contested the amount of the hospital bill and successfully negotiated the amount down from $111,000 to $37,000. Defendant argued that the medical expense award should have been “capped” out at $37,000. The court refused to consider the issue because defendant cited no authority for his position.

One final note on what a plaintiff can blackboard. In Lewis v. American General Media, 355 P.3d 850 (NM App 2015), the court held that medical marijuana constituted reasonable and necessary medical care.

This section of the Compendium was prepared by an attorney not licensed in the State of New Mexico. Although the attorney used his/her best efforts to set forth the current law, users of this section of the Compendium should rely solely on counsel licensed in the State of New Mexico.