STRATEGIES FOR DEFENDING INFLATED DAMAGE CLAIMS IN AUTO & GL LITIGATION

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Trends in litigation practice which account for problem:

1. Apparent coordination between Plaintiff's counsel and so-called "treating physician" or surgery center to artificially and arbitrarily inflate medical bills.

2. Apparent coordination between providers, surgery centers and factoring/funding companies which purchase receivables from providers.

3. Restrictions on ability of defense counsel to discover evidence of bias and challenge reasonableness of medical bills.

4. Restrictions on ability of defense counsel to introduce evidence of these cozy relationships at trial.

Issue: Artificial inflation of medical bills

Actual Medical Bills Resulting from this Accident
Plaintiff #1

Provider	Amount Billed	Amount Paid	Amount Written Off	Amount Owed
New Smyrna Imaging	$1,695.00	$804.82 (primary insurance)	$890.18 (contractual adjust)	-0-
Titusville Chiropractic & Injury Center	$10,096.88	$4,556.31 (PIP/ Direct General)	-0-	$5,540.57 (no LOP)
Wuesthoff Medical Center Rockledge	$3,820.86	$2,292.51 (PIP/Direct General)	$955.22 (PPO adjustment)	$573.13 (no LOP)
National Orthopedics and Neurosurgery	$1,575.00	-0-	-0-	$1,575.00 (LOP)
Coastline Imaging	$2,697.00	-0-	-0-	$2,680.00 (LOP)
MB Spine and Orthopedic Specialists of Central Florida	$36,329.00	-0-	-0-	$36,329.00 (LOP)
Total	**$56,213.74**	**$7,653.64**	**$1,845.40**	**$46,697.70**

Actual Medical Bills Resulting from this Accident
Plaintiff #2

Provider	Amount Billed	Amount Paid	Amount Written Off	Amount Owed
New Smyrna Imaging	$1,695.00	$853.02 (primary insurance)	$628.72 (contractual adjust)	$213.26 (no LOP – no longer in business)
Titusville Chiropractic & Injury Center	$8,911.57	$5,013.30 (PIP/ Direct General) $1,321.49 (Plaintiff paid)	-0-	$2,576.78 (No LOP)
Wuesthoff Medical Center Rockledge	$2,835.89	$901.54 (Cash)	$1,934.35 (PPO adjustment)	-0-
National Orthopedics and Neurosurgery	$1,575.00	-0-	-0-	$1,575.00 (LOP)
Coastline Imaging	$2,790.00	-0-	-0-	$2,770.00 (no LOP)
MB Spine and Orthopedic Specialists of Central Florida	$32,598.00	-0-	-0-	$32,598.00 (LOP)
Total	**$50,405.46**	**$8,089.35**	**$2,563.07**	**$39,733.04**

Law governing plaintiff's introduction of medical bills into evidence at trial

1. Unpaid Medical bills
   Plaintiff can "board" and recover total amount of reasonable and necessary medical expenses causally related to incident.

2. Bills paid by Medicare/Medicaid
   Plaintiff only allowed to "board" and recover the amount paid by those agencies (i.e. lien).

ThyssenKrupp Elevator Corp., v. Lasky, 868 So. 2d 547 (Fla. 4th DCA 2004)

Why is this happening?
(cont'd)

1. Bills paid by private health insurance

   Plaintiff able to "board" the entire bill, but post-verdict judge shall reduce the amount of past medical expenses which Plaintiff is entitled to recover, to the amount actually paid by health insurer.

Goble v. Frohman, 901 So. 2d 830 (Fla. 2005); *Coop. Leasing, Inc. v. Johnson*, 872 So.2d 956, 959 (Fla. 2d DCA 2004)

2. PIP

Traditionally plaintiff in auto case would routinely apply for and receive PIP benefits - providing up to a $10,000 setoff for defendant.

Why is this happening?
(cont'd)

Medical providers frustrated by fee schedules and contractual discounts imposed by Medicare, Medicaid and private insurance groups.

Deem it financially beneficial to circumvent the traditional health insurance payment structure for patients asserting bodily injury claims.

Loopholes in tort law make it more lucrative for medical providers to forego insurance reimbursement and play "Litigation Lotto."

10 Arrested in Florida Patient-Brokering Scheme

Five Florida attorneys and five of their accomplices are accused in a patient-brokering scheme that brought in more than a half-million dollars in profits.

Sept. 21, 2017, at 11:39 a.m.

FORT LAUDERDALE, Fla. (AP) — Five Florida attorneys and five of their accomplices are accused in a patient-brokering scheme that brought in more than a half-million dollars in profits.

Broward Sheriff's officials said in a news release that the arrests were made Sept. 6 following a two-year investigation by the Organized Crime Unit.

The investigation revealed that several personal injury attorneys were paying people to unlawfully solicit unsuspecting vehicle accident victims to make insurance claims for damages or personal injury benefits.

Investigators say the attorneys paid the solicitors on a per-client basis, and then referred the accident victims to a health care facility in exchange for cash kickbacks of $1,500 to $2,500 per patient.

Each suspect faces numerous charges, including organized fraud, criminal solicitation and patient brokering.

Officials say the group received more than $521,000.

Recent changes in litigation strategy/practice

PIP

Plaintiffs/providers electing not to automatically seek payment of medical expenses by PIP, resulting in elimination of the setoff. No requirement that plaintiff or provider submit medical expenses to PIP.

- Amendments to PIP law make it more difficult for providers to recover PIP.
- 14 day deadline to initiate treatment and trigger PIP eligibility – § 627.736(1)(a) F.S.
- Limitation of benefits to $2,500 for chiropractic care, etc.

Recent changes in litigation strategy/practice

(cont'd)

Plaintiff's lawyers and doctors/surgery centers working together in a cozy relationship to refer bodily injury patients back and forth and cooperate on the prosecution of the litigation.

- More and more physicians are electing not to accept Medicare/private insurance and/or plaintiff/provider elect not to submit bills to insurance for bodily injury cases.
- No legal requirement for them to do so - even if they have available coverage.

Grell v. Bank of America Corp., No. 05-1237, 2007 WL 1362728 (Fla. M.D. 2007) (Court refused to reduce an award for past medical expenses to the amount that "…. ***could have been paid by the plaintiff's health insurance carrier"*** , in case involving a treating doctor with an LOP)

Recent changes in litigation strategy/practice

(cont'd)

Allstate Ins. Co. v. Rudnick, 761 So.2d 289 (Fla. 2000) (The phrase "otherwise available" in 768. 76(1) F.S. (collateral setoff statute) was interpreted to mean "those benefits that have already been paid or that are presently due and owing, rather than those benefits potentially payable in the future."

Florida Drum Co. v. Thompson, 668 So.2d 192 (Fla. 1996) (Evidence of available insurance coverage is generally not admissible to show the failure to utilize such coverage to mitigate damages).

Recent changes in litigation strategy/practice

(cont'd)

Instead seeing physicians increasingly treating BI claimants pursuant to a Letter of Protection (LOP).

Explanation of LOP

Recent changes in litigation strategy/practice

(cont'd)

- Physician now has a vested interest in outcome of litigation - payment of his bill dependent upon plaintiff securing favorable judgment/settlement – bias.
- Unless the physician or surgery center has sold the bill to a medical funding/factoring company, then they claim to have no interest in the outcome of recovery of the bill.
- No independent review or assessment as to whether amount of bill is reasonable (usual and customary).
- No CPT coding of medical services for purposes of apples to apples comparison of service rendered

Recent changes in litigation strategy/practice

(cont'd)

1. Physician ownership interest in diagnostic/rehabilitation facility

   Contributes to potential bias, lack of transparency, self-dealing, duplication of billing charges.

2. Practice of selling receivables to factoring/funding companies

   a. Difficulty compromising lien prior to trial.

   b. Obscures "true value" of medical services rendered- receivables are often sold for pennies on the dollar.

   c. Lack of transparency with court/jury.

Problems which these practices represent for defendants:

Increases overall expense of litigation:

a. Increased discovery- depositions, written discovery.
b. Increased motion practice- motions to compel, hearings, confidentiality orders.
c. Requirement to hire specialized damage experts- coding or billing experts to testify as to reasonableness of bills.
d. Extend length of trial.
e. Artificially inflate overall value of case for settlement and at trial.

Limitations placed by courts on ability of defense to conduct full discovery and introduce evidence at trial regarding the potential bias of plaintiff's so-called "treating physicians."

Worley v. Central Florida YMCA, 2017 WL 1366126
(Fla. Sup. Ct.- April 13, 2017)

- Bodily injury premises liability suit brought against YMCA by Plaintiff who was represented by Morgan & Morgan.
- At issue: YMCA sought to discover the extent of the referral relationship and financial dealings between M & M and the treating physician, surgery center and anesthesiologist.
- Medical bills seemed unusually high and there was a reasonable suspicion that there was a "cozy agreement" between law firm and physician with respect to referral, treatment, testimony and billing.

At trial court level, defense counsel:

- asked plaintiff during her deposition the identity of the person who had referred her to the treating physician.
- served interrogatories directed to plaintiff, seeking information as to the nature and extent of the financial relationship between her lawyers and her treating physicians.
- served request to produce directed to M & M seeking: (1) any agreements regarding the referral of patients and billing; (b) all litigation where M & M clients were referred to physician.

M & M - OBJECTION!

Privilege; unduly burdensome; chilling effect on physician's willingness to testify.

Boecher Discovery

- Important to note that a defendant involved in BI litigation is required to provide this type of information to the plaintiff with respect to any physician retained by defense to perform a CME - *Boecher* discovery.

Allstate Ins. Co. v Boecher, 733 So.2d 993 (Fla. 1999)

- Parties are entitled to discover the extent of an adverse party's relationship with an expert retained for litigation and the financial remuneration paid by the party to the expert witness over a period of time (usually three years).

Boecher Discovery
(cont'd)

- Relevant to establish potential bias of the witness.

"The more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing."

***Boecher,* 733 So.2d at 997**

Boecher Discovery

(cont'd)

- Subsequent DCA decisions applied this rule of discovery equally to both plaintiffs and defendants and to experts retained by the party and/or law firm, including "treating physicians" where plaintiff had been referred by his attorney.
- See *Morgan, Colling & Gilbert, P.A. v. Pope*, 798 So.2d 1 (Fla. 2d DCA 2001); *Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay,* 133 So.3d 1178 (Fla. 4th DCA 2014); *Brown v. Mittelman*, 152 So.3d 602 (Fla. 4th DCA 2014).

Good for the goose, good for the gander.

Boecher Discovery
(cont'd)

In Worley, trial court held:

- If defense had exhausted all other avenues for obtaining that information, could ask plaintiff in deposition whether lawyer referred her to treating physician.
- Overruled law firm's objection that requirement of responding to request to produce violated attorney-client privilege or was unduly burdensome.
- Plaintiff appealed to 5th DCA.

Boecher Discovery

(cont'd)

Fifth DCA agreed with the trial court:

- Information regarding law firm's referral to treating physicians was discoverable.
- Agreement describing financial/referral relationship between law firm and physician was discoverable.
- Law firm could be compelled to produce this information if it was not known/available to plaintiff.
- Plaintiff's objection that the costs and burdens of providing this information outweighed its probative value was overruled.

Boecher Discovery

(cont'd)

Fifth DCA certified their decision to be in conflict with *Burt v. GEICO*, 603 So.2d 125 (Fla. 2d DCA 1992)

- Sole issue on appeal: Whether attorney-client privilege protects a part from being required to disclose whether her attorney referred her to a physician for treatment for injuries related to litigation.
- Supreme Court elected to expand scope of appeal - did not limit themselves to that question.
- Did so by saying that in order to answer certified question, they first had to decide whether that information was discoverable in the first place.

Boecher Discovery

(cont'd)

Supreme Court held:

- Lawyer's act of referring client to a physician was a privileged communication and not discoverable by the other side.
- Intellectually, don't have a lot of disagreement with that limited scope of the decision.
- But where they have really created an uneven playing field is seemingly expanding their decision to suggest that this information is not discoverable at all, from any source. Exactly what plaintiff's lawyers are now arguing.

Boecher Discovery

(cont'd)

Supreme Court stated that *Boecher* is distinguishable and not controlling:

- Unlike *Boecher*, where Allstate Insurance was sued for UM benefits, plaintiffs law firm was not a party to the case.
- Also, *Boecher* involved "retained experts" not "treating physicians," which Court distinguished.
- "Treating physicians do not acquire their expert knowledge for purposes of litigation, but rather simply in the course of attempting to make their patients well."
- Problem is that these treating physicians have a "dog in the fight."

Boecher Discovery

(cont'd)

Additionally found that the discovery sought by defendant was "unduly burdensome."

- "Even in cases where a plaintiff's medical bills appear to be inflated for purposes of litigation, we do not believe that engaging in costly and time-consuming discovery to uncover a "cozy relationship" between the law firm and physician is an appropriate response."
- Court held that a defendant could adequately demonstrate the bias of a treating physician by offering evidence that the treatment had been provided pursuant to a LOP or by demonstrating that the physician's practice is based entirely upon LOP. Also, evidence that the physicians' bills are higher than normal can be offered, to dispute the reasonableness or necessity of those bills.

Boecher Discovery

(cont'd)

- Court expressed concern that allowing discovery into lawyer/physician financial/referral relationship would have a chilling effect upon doctors willingness to treat injured persons involved in litigation.
- Also expressed a concern that plaintiff's lawyers would be deterred from taking on these case because of the increased costs associated with having to provide this discovery!
- Not aware of any anecdotal, much less factual, support for that expressed concern.
- Does it demonstrate willful ignorance of the facts and new reality of personal injury litigation in the state?

"There are two ways to be fooled. One is to believe what isn't true; the other is to refuse to believe what is true."

— Søren Kierkegaard

Boecher Discovery

(cont'd)

Judge Polston wrote a common sense dissent:

- Referral of client to physician is for medical care not legal advice and, therefore, should be discoverable.
- Rules of discovery broad enough to encompass this information and all witnesses who testify place their credibility at issue.
- No difference between plaintiff's law firm and party/insurance company when physician referrals are routine.
- Argument that costs of discovery are unduly burdensome is without merit since prevailing plaintiff can recover costs of litigation at end of case.

Strategies for combatting

- Discovery directed to Plaintiff.
- Discovery directed to medical providers (treating physician, surgery center).
- Discovery directed to factoring/funding company.
- Retain defense physician to opine on reasonable and customary charges for like services.
- Retain coding expert.

Legal Arguments

Information/Discovery of billing practices is relevant to show:

- bias
- reasonableness of bills
- failure to plaintiff to mitigate damages

Also necessary to promote justice and equity and avoid windfall recovery by plaintiff

Recent Case Experience

- Motor vehicle collision case in Polk County, FL. Plaintiff had a low back fusion.
- Portions of plaintiff's treatment was under an LOP. The following bills are unpaid:

Physicians fee for surgery	**=**	**$39,959.00**
Surgery Center Fee	=	$21,941.64
Anesthesiology Fee	=	$2,250.00
Total	=	$64,150.64

- The Surgery Center and Anesthesiology bills were sold to a "medical funding" company.

Recent Case Experience

(cont'd)

We attempted to depose a representative of the "medical funding" company and the funding company filed a motion for protective order to bar the deposition and to bar obtaining any documents related to the purchase of the bills. At the hearing on the motion the attorney for the funding company acknowledged there was a written contract between his company and the surgery center. The funding company claimed what we were seeking was not relevant and constituted their trade secrets.

The court granted the motion for protective order and held that we could not depose the funding company rep, we could not obtain any documents related to the purchase of the bills, and we could not obtain a copy of the contract between the surgery center and the funding company.

Recent Case Experience

(cont'd)

The funding company is located in Hillsborough County, FL. In support of their motion for protective order counsel for the funding company relied on three (3) bare bones orders from circuit judges in Hillsborough County and one order from a circuit judge in Pinellas County where the judges ruled that a defendant cannot depose the funding company and cannot obtain their records.

This appears to be a concerted effort by the plaintiff's bar in conjunction with the funding company to obtain favorable rulings from favorable judges and then use those orders to persuade other judges that this issue has been settled.

This may be a problem that can only be resolved by the Legislature.

Some cases that may be of assistance to the defense bar

Laser Spine Institute, LLC v. Makanast, 69 So.3d 1045 (Fla. 2nd DCA 2011)

Court held that discovery of LSI's billing and collection practices, to the extent they are trade secrets, are discoverable but subject to a confidentiality agreement. Although, not directly on point as to what information is discoverable, to the extent they claim it is a trade secret, it is still discoverable, but you must put in place a confidentiality agreement.

Some cases that may be of assistance to the defense bar

(cont'd)

Gulfcoast Surgery Center, Inc. v. Fisher, 107 So.3d 493 (Fla. 2nd DCA 2013)

The court held that a non-party surgery center's documents relating to their internal cost structure were relevant and discoverable as to the reasonableness of medical charges.

Some of the documents that may be relevant to this analysis could include the following:

1. LOPs;
2. Billing records;

Some cases that may be of assistance to the defense bar

(cont'd)

3. Payments received on behalf of plaintiff;
4. Correspondence from physicians, factoring companies and service providers;
5. Correspondence between surgery center and physician regarding the procedure performed on the plaintiff;
6. Contracts between the surgery center and any medical funding company;
7. Documents regarding any sale of the plaintiff's medical bills;
8. CPT codes used in the bills and their definition;
9. Compensation to anyone involved in the plaintiff's care.

Some cases that may be of assistance to the defense bar

(cont'd)

Crespo v. Home Depot U.S.A., Inc., 2016 WL 3854585 (S. D. Fla. July 15, 2016)

Court denied in part and sustained in party a non-party orthopedic center's motion for protective order which sought to bar discovery by Home Depot. The magistrate judge that ruled on this dispute looked at 10 categories of discovery that Home Depo was seeking from the orthopedic center. After reviewing and analyzing each request the judge did permit Home depot to obtain the following discovery:

1. The names of all persons or entities who hold or have held direct or indirect ownership interest in the practice for a one year period while the plaintiff treated with the practice.

Some cases that may be of assistance to the defense bar

(cont'd)

2. The percentage of the center's revenue generated from treating patients with injury claims for 6 months preceding and 6 months following the accident date.
3. Whether the practice accepts Medicare or any private insurance and, if so, amounts you agreed to accept for the types of treatment rendered to the plaintiff.
4. If any of the treating physicians have an ownership interest in the facility where treatment was rendered and provide the number of patients treated for three years who have been referred by plaintiff's law firm and the total billed for these patients. (pre-*Worley* case).

Some cases that may be of assistance to the defense bar

(cont'd)

5. Your policies and procedures regarding the handling of unpaid bills for personal injury plaintiffs. This includes policies regarding collections, lawsuits, lawsuit settlements, and jury verdicts.
6. Whether you have accepted less than the full face value of a medial bill generated under an LOP, and if so, the approximate average percentage discount you have accepted during the 6 months preceding and the 6 months following plaintiff's first treatment date.

Some cases that may be of assistance to the defense bar

(cont'd)

7. Whether any bills issued under an LOP have ever been sold and/or transferred to a third party in the last three years and the average percentage of discount from face value these bills were sold for.
8. The total face value of all bills sold and/or transferred to a third party within the last three years and the total amount paid for these bills.

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