

April 17, 2017

Colorado State Legislature
House State, Veteran and Military Affairs Committee

sent via email to:
Committee Members

RE: SB 181, Collateral Source Rule in Insurance Claims - NAMIC's written testimony in support

Dear Representative Foote, Chair; Representative Lontine, Vice Chair; and honorable members of the House State, Veteran and Military Affairs Committee:

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony for the public hearing on SB 181.

The National Association of Mutual Insurance Companies (NAMIC) is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC members represent 40 percent of the total property/casualty insurance market, serve more than 170 million policyholders, and write nearly \$225 billion in annual premiums. NAMIC has 163 members who write property/casualty in the State of Colorado, which represents 45% of the insurance market.

The collateral source rule generally states that in a civil action for damages, the jury should not be informed about insurance coverage or other sources (collateral sources) which provided compensation (collateral benefits) to the plaintiff in addition to the damages sought by the plaintiff from the at-fault defendant for injuries or damages sustained in the accident.

The proposed legislation would modernize the application of the collateral source rule in insurance claims cases. SB 181 provides the plaintiff with two evidence of medical damages options at trial: a) let the jury see *all* the evidence on medical damages, including both the "billed" and "paid" medical services costs, unless the defendant has been convicted of repeated DUIs resulting in injury, or b) exclude the evidence of the collateral source benefit, which would mean that the jury would only hear evidence on the "billed" amount of the medical costs, but not the "paid" amount of the medical services costs, i.e. only the over-inflated fictitious medical damages evidence would be presented to the jury.

If the plaintiff decides to exclude from trial the evidence on the "paid" medical costs, the plaintiff's medical damages award would be reduced to the "paid" amount of the medical bills as a result of the collateral source benefit or the amount the plaintiff paid in premium or cost to secure the collateral source benefit in the first place, whichever is of greater value to the plaintiff.

The only thing SB 181 really does is that it eliminates juror confusion created by the current application of the collateral source rule. The current language of the collateral source rule prevents the jury from hearing evidence on both the "billed" amount of the plaintiff's medical damages and the actual "paid" amount of the plaintiff's medical damages. There is frequently a significant difference in the amount of the "billed" medical damages and the actual "paid" medical damages. Consequently, the jury only hears

evidence that supports the artificially inflated medical damages, which unfairly and improperly influences and misleads jurors into believing that the plaintiff is more seriously injured than he may actually be and deserving of higher bodily injury pain and suffering damages.

Why is SB 181 needed, and how will it resolve the current collateral source application problem?

When the age-old collateral source legal doctrine was created, the medical industry was totally different from how it is today. A medical service rate was quoted and that amount was paid. In today's world, no one pays the quoted or "billed" amount of the medical services. Everything is repriced pursuant to contracts between medical providers and health insurers, so the *actual* price of the medical services is the "paid price". In effect, pricing of medical services is somewhat akin to pricing of new automobiles, where the "sticker price" is not the actual price of the motor vehicle; the "paid price" is the actual price, and the difference between the "sticker price" and the "paid price" can be substantial.

Although this differential in pricing may not create ancillary problems for parties in the motor vehicle sales transaction, but it does create serious problems in the civil litigation realm, where the total of medical damages are considered by jurors when evaluating the plaintiff's bodily injury pain and suffering claim (subjectively measured damages). In fact, the long-standing rule of thumb taught in law school is that jurors typically award plaintiffs in bodily injury pain and suffering damages approximately *three times the amount of the medical damages*. Consequently, plaintiffs economically benefit from having a higher medical damages amount presented in their case to the jury.

The current language of the collateral source rule has been strictly interpreted by courts to exclude a defendant from being able to introduce evidence of the *actual* price (the "paid" price not the "billed" price) of the medical services provided. In effect, the defendant is prevented from being able to fully develop his/her defense to the plaintiff's damages claim.

The current application of the collateral source rule has created a patently unfair litigation process, where the defendant is unable to legally challenge, via introduction of credible evidence to the jury, that some of the medical services damages alleged by the plaintiff are fictitious in nature (not actual damages, because the medical provider repriced the "billed" amount down to the "paid" price), so the plaintiff's alleged "billed" price is an artificially higher number than it should be and a fictitious medical damages amount.

These fictitious medical services damages are often referred to as "phantom damages" or "phantom medical costs", because they don't really exist and are only being offered by the plaintiff at trial to inflate their medical damages, which helps them inflate their bodily injury pain and suffering damages, which are subjective, nebulous, difficult to value damages by their very nature.

Not only is the current application of the collateral source rule unfair to the defendant, but it also denies the jury the opportunity to thoroughly evaluate all of the evidence that is available, relevant, and necessary for the jury to comprehensively and accurately evaluate the plaintiff's medical damages claim.

Since a primary objective of the judicial system is to "get to the truth of the matter" and "provide a just resolution" to the legal dispute, NAMIC believes that the proposed amendments to the collateral source rule articulated in SB 181 are reasonable and necessary to promote the sound public policy objective of jurisprudence.

What is the proposed fix to the current collateral source application problem that results in jurors being misled as to the plaintiff's actual medical damages?

The proposed legislation would provide the plaintiff with two options: 1) Allow the introduction of evidence pertaining to *both* the “billed amount” (the medical “list” price) of the medical services and the “paid amount” (the medical “in-fact” price) of the medical services, so that the jury has *all* the relevant and probative evidence of medical damages necessary for the jury to fully consider and evaluate *all* of the plaintiff’s damages claims, including the plaintiff’s bodily injury pain and suffering damages claim; OR 2) Agree to exclude evidence of the collateral source benefit, so that only the “billed” amount of the medicals information is introduced to the jury. In essence, the jury gets to be influenced by the artificially higher “billed” amount of the medical damages. If the plaintiff selects this option, the plaintiff will be limited to an award of either the amount the plaintiff paid in premium or cost to purchase or procure the collateral source that provided the collateral source benefit or the amount of the collateral source payment (i.e. the “paid” amount of the medical charges). The plaintiff gets the benefit of whichever amount is *greater* (the cost of procuring the collateral source or the benefit derived from the collateral source).

NAMIC fully supports this proposal as being a fair, balanced, and thoughtful approach to make sure that the plaintiff secures the benefit of their collateral source and the defendant secures the benefit of a fair damages assessment (one that is not improperly slanted in favor of awarding the plaintiff a higher than medically justified award of bodily injury pain and suffer damages).

For the aforementioned reasons, please **VOTE YES on SB 181, because it is a pro-judicial fairness bill that balances and protects the reasonable needs and legal rights of *both* plaintiffs and defendants.**

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC’s written testimony.

Respectfully,



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