

TAKEAWAYS >>

- Only “fair and reasonable” medical bills are admissible as evidence in Illinois and, pursuant to supreme court precedent, paid medical bills are *prima facie* evidence of the fairness and reasonableness of the medical expense. When a portion of a medical bill is paid by insurance, a plaintiff cannot make a *prima facie* case of reasonableness based on the bill alone.

Medical Bills in Illinois – What’s ‘Fair and Reasonable’?

BY THOMAS N. OSRAN



- Defense counsel should retain a medical billing expert. Counsel could also attack an admitted bill without an expert by questioning: (1) whether certain treatment was necessary or justified; (2) whether the plaintiff's complaints were genuine or exaggerated; (3) whether specific charges were reasonable; and (4) whether the doctors were biased or had interest in the case.

- When determining the reasonable value of a medical service, there are three "reasonableness factors" to consider: (1) the charges by similarly situated healthcare providers; (2) cost-to-charge ratios reported to Medicare; and (3) the amount the hospital accepts as payment in full for identical care.

Only "fair and reasonable" medical bills are admissible as evidence in Illinois. But what does that mean in a world where hospitals and doctors charge far more than they routinely accept as full payment? Lawyers – especially lawyers for defendants – should use experts to thoroughly review medical bills, this author says.

FROM THE 2011 DISCOVERY DEPOSITION OF A DIRECTOR OF HEALTHCARE finance at one of the largest hospitals in Illinois:¹

Q. Is [the hospital] free to charge whatever it likes in terms of marking up devices like this shown on Exhibits 6 and 7?

A. No, they're not free to charge whatever. There is a – you know, a limit.

Q. And what is that limit?

A. I don't know.

Q. Who would know?

A. I don't know.

Hospital bills are generated by a system within each hospital called a "chargemaster." If you ask a hospital finance director, he or she will tell you that every charge the chargemaster system issues is "fair and reasonable."

How do they know this? The answer is a mystery, because 40 percent of hospitals in the U.S. pay outside consultants to create and update their chargemasters on a yearly basis.²

And medical bills issued by the chargemaster are almost never paid in their entirety. "Overall, in 2004, for every \$257 that a hospital charged based on its chargemaster rates, it actually collected \$100. In other words, patients...charged chargemaster rates are actually being asked to pay at least two and a

half times the average amounts paid by health insurers for the exact same care."³ In healthcare, "there is a huge difference between the price charged and the price paid."⁴

Billing errors are also a problem, and experts who study medical bills can't agree on the error rate. One expert estimates 30 to 40 percent of bills contain errors while The Access Project, a Boston-based health-care advocacy group, estimates 80 percent.⁵

Given that hospital medical billing is so complex that 40 percent of all hospital finance directors hire outside vendors to maintain the billing system and hospitals charge "at least two and a half times" what they expect to be paid, how can a judge or jury decide what a "fair and reasonable" medical bill is? How can any attorney reasonably respond to a request to

1. Disclosed as the "person most knowledgeable" regarding the hospital's billing practices and chargemaster.

2. T. Neil Davis, Mired in the Health Care Morass 54–55 (2008).

3. George A. Nation III, *Determining the Fair and Reasonable Value of Medical Services: The Affordable Care Act, Government Insurers, Private Insurers and Uninsured Patients*, 65 Baylor L. Rev. 431 (2013) (citing Gerard F. Anderson, *From 'Soak the Rich' to 'Soak the Poor': Recent Trends in Hospital Pricing*, 26 Health Aff. 782 (2007)).

4. *Id.* at 432.

5. Jessica Silver-Greenberg, *How to Fight a Bogus Bill*, Wall Street Journal (Feb. 19, 2011), available at <http://www.wsj.com/articles/SB10001424052748703312904576146371931841968>.



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EXPERTS KNOW THAT PROVIDERS OFTEN ACCEPT REDUCTIONS OF THE MEDICALS BILLS IN AMOUNTS RANGING FROM 30 TO 80 PERCENT.

admit on the question?

More and more attorneys are turning to outside vendors as well, consultants who can analyze medical bills for errors, duplicate and improper charges, and other issues. This article will discuss how medical bills are generated, how to admit them into evidence, what “fair and reasonable” means, and how defense attorneys can use experts at trial and after to help their clients.

Medical bills – admitting them into evidence at trial

In *Arthur v. Catour*, the Illinois Supreme Court explained that paid medical bills are *prima facie* evidence of the reasonableness of the medical expense, thus satisfying the “fair and reasonable” prong of admissibility.⁶ But admissibility of the bill also requires evidence that the charges were caused by

the defendant’s negligence.⁷ “Only then have the evidentiary requirements for admission into evidence been satisfied,” which “simply allows the jury to *consider* whether to award none, part, or all of the bill as damages.”⁸

When only a portion of the bill is paid by the plaintiff because of health insurance or other reasons, she “cannot make a *prima facie* case of reasonableness based on the bill alone because she cannot truthfully testify that the total billed amount has been paid.”⁹ In those cases, the plaintiff must establish the reasonable cost by other means, as if the bill were unpaid or for future medical treatment.¹⁰

For unpaid bills, the plaintiff can establish reasonableness through testimony of a person who i) has knowledge of the services rendered and ii) the usual and customary charges for such services and can say iii) the bills in question are fair and reasonable.¹¹ Plaintiffs may establish these things through the testimony of a treating health care provider, hospital billing employee or record keeper, or a medical billing expert.

Defendants are also “free to challenge plaintiff’s proof on cross-examination and to offer their own evidence pertaining to the reasonableness of the charges.”¹² In *Wills v. Foster*,¹³ however, the Illinois Supreme Court held that while defendants can contest a medical bill’s reasonableness, they cannot introduce evidence of the amount paid because doing so would violate the collateral source rule by inference to health insurance:

Thus, defendants are free to cross-examine any witnesses that a plaintiff might call to establish reasonableness, and the defense is also free to call its own witnesses to testify that the billed amounts do not reflect the reasonable value of the services. Defendants may not, however, introduce evidence that the plaintiff’s bills were settled for a lesser amount because to do so would undermine the collateral source rule.¹⁴

How plaintiffs can admit bills into evidence – paid, unpaid, or partially paid. In the wake of *Arthur* and *Wills*, assuming the bills were caused by defendant’s negligence, the following is apparent:

1. A fully paid bill will be admitted as *prima facie* evidence of the reasonableness of the medical expense, allowing the jury to consider the bill;

2. An unpaid bill will need testimony that the bill is “fair and reasonable”; and

3. For partially paid bills, only the paid portion gets the presumption of reasonableness and the plaintiff will need to offer testimony that the unpaid portion is fair and reasonable. Without an expert, this can often be established by the medical treaters, record keeper, or by employing a Supreme Court Rule 216 Request to Admit.

How defendants can try to cut or contest admitted bills. In the post-*Arthur* and *Wills* landscape, defendants can still contest medical bills several ways.

First, on cross examination, medical bills, like any other evidence, can be contested as “inherently unbelievable,” contradicted by other testimony or circumstances, or impeached – leaving the jury to weigh the credibility of such testimony.¹⁵

The various ways to attack an admitted bill without an expert were outlined by the court in *Baker v. Hutson*: 1)

6. *Arthur v. Catour*, 216 Ill. 2d 72, 82-83 (2005).

7. *Id.* at 82.

8. *Id.* at 82-83 (citing *Baker v. Hutson*, 333 Ill. App. 3d 486 (5th Dist. 2002)).

9. *Id.* at 83.

10. *Id.*

11. *Id.* at 82.

12. *Id.*

13. *Wills v. Foster*, 229 Ill. 2d 393, 414 (2008).

14. *Id.* at 418.

15. *Elliott v. Koch*, 200 Ill. App. 3d 1, 12 (3d Dist. 1990); *Haleem v. Onate*, 71 Ill. App. 2d 457, 461 (1st Dist. 1966).

ISBA RESOURCES >>

- Brion Doherty, *A Primer on Medical Records as Evidence*, 101 Ill. B.J. 82 (Feb. 2013), <http://www.isba.org/ibj/2013/02/aprimeronmedicalrecordsasevidence>.
- James G. Meyer, Jonathan P. Tomes, and Lee Neubecker, *Electronic Medical Records as Evidence in Litigation*, 101 Ill. B.J. 442 (Aug. 2013), <http://www.isba.org/ibj/2013/08/electronicmedicalrecordsmetadataase>.
- Christ S. Stacey, *Using Requests to Admit to Prove Medical Expenses*, 99 Ill. B.J. 456 (Sept. 2011), <http://www.isba.org/ibj/2011/09/usingrequeststoadmittoprovemedicale>.

whether certain treatment was necessary or justified; 2) whether the plaintiff's complaints were genuine or exaggerated; 3) whether specific charges were reasonable; and 4) whether the doctors were biased or had interest in the case.¹⁶

The defense strategy of attacking a medical bill with an expert was illustrated in *Tsai v. Kaniok*, where a plastic surgeon sought the balance for the amount health insurance did not pay.¹⁷ Experts testified that the bill exceeded usual and customary charges in the area and that there were “unbundled” medical charges – i.e., services were broken down to component parts and billed separately – which one judge called “unfair.”¹⁸

While medical bills can be admitted or contested by an expert, they first must be obtained in a format that is uniformly understandable, which means getting certain documents directly from the billing entity.

How to litigate medical bills – what to obtain in discovery

Christine Kraft, an expert who analyzes medical bills, advises attorneys to obtain both a Universal Bill (“UB-04”) and an itemized bill from the hospital. A UB-04 will include the CPT (“Current Procedural Terminology”) and Healthcare Common Procedure Coding System (“HCPCS”) codes, which provide a common language across all hospitals in the U.S. describing medical, surgical, and diagnostic services.

An itemized hospital bill lists every charge issued to the patient by the chargemaster. A UB-04 is only required to include HCPCS and CPT codes for outpatient bills. A CPT code describes procedures or treatments performed and billed by physicians and other health care professionals in all settings: inpatient, outpatient, nursing facilities, home health, etc.

Experts can use these documents to identify excess, duplicate, or “unbundled” charges (i.e., charges improperly broken out and separately billed). According to Kraft, charges without codes are a red flag and may be for items that should not be separately billed, including surgical

charges for “routine supplies” like dressings, sponges, and other items.¹⁹ Procedures use CPT codes while supplies and items use HCPCS codes.

Billing experts need an itemized bill because it contains each line item that makes up the summary, or universal bill. But even without an expert, itemized bills will assist the litigator in cross-examining treating providers about the reasonableness of the bill. According to Craft, “a rule of thumb is if there is no code for a medical procedure, it probably is not billable”²⁰ and should probably not be admitted into evidence.²¹

Who should litigate the bills and why?

Assuming that chargemaster rates are not “fair and reasonable,” defense attorneys should consider litigating the amounts of sizable medical bills during a trial. But plaintiffs may also want to litigate the issue at the conclusion of the case over unpaid medical bills and liens. Experts can compute costs accurately, estimate reimbursement, and offer an opinion at trial as to what amount is fair and reasonable. That opinion can also be used to support denials of Rule 216 requests to admit facts regarding medical bills.

Experts know that providers often accept reductions of the medicals bills in amounts ranging from 30 to 80 percent. Cutting past or future medical bills by 30 to 80 percent – often the biggest item plaintiffs can “blackboard” for the jury – is of enormous value to the defense but may also be valuable to plaintiff after settlement or judgment, where a bill is entirely unpaid.

How an expert consultant can help reduce the medical bills

Medical billing consultants ask the following questions to help identify overcharges:

1. Was the service charged actually given?
2. Is it a duplicate charge?
3. Should it be separately charged or is it being improperly “unbundled” from another service?

BECAUSE CHARGEMASTER PRICES ON MEDICAL BILLS ARE GROSSLY INFLATED, DEFENSE ATTORNEYS SHOULD BE WARY OF STIPULATING TO A FULL ITEMIZED BILL OF CHARGES.

4. Is it appropriate and reasonable?

5. Adding up all appropriate charges, what is a fair and reasonable amount for the entire bill?

Hospitals routinely charge for items that are either billed in error or included for reporting purposes but not expected to be paid. An expert examines each line item of the bill to determine whether a charge is billable according to industry standards, whether it is duplicate, or whether the item or service was actually provided.

Even without errors, “[a] hospital invoice of itemized billed charges at chargemaster rates is, when it comes to measuring fair value, a complete fiction and should not be used by courts or others to establish the fair and reasonable value of medical services.”²² In reality, hospitals expect to receive, and happily accept as full payment, less than half of the

16. *Baker v. Hutson*, 333 Ill. App. 3d 486, 496-97 (5th Dist. 2002).

17. *Tsai v. Kaniok*, 185 Ill. App. 3d 602 (3d Dist. 1989).

18. *Id.* at 606 (Barry, J. specially concurring).

19. For a list of the most commonly billed medical supplies not eligible for separate reimbursement, see this list from BlueCross BlueShield of North Carolina available at: [http://www.bcbsnc.com/assets/providers/public/pdfs/Non-billable Medical Supplies list_final_BM04.19.2012.pdf](http://www.bcbsnc.com/assets/providers/public/pdfs/Non-billable%20Medical%20Supplies%20list_final_BM04.19.2012.pdf).

20. Hospital Chargemaster Guide 392 (2008).

21. While Illinois attorneys can't use what insurance actually paid without running afoul of *Foster v. Wills*, an expert can opine that certain charges are unreasonable, not customary, or otherwise invalid without discussing the fact that the charges were also rejected by insurance. Obtaining plaintiff's Explanation of Benefits (EOB) from health insurers is useful because it shows payment amounts and rejected charges.

22. See Nation, *supra* note 3, at 459.

totals issued by the chargemaster.²³ “To make sense of hospital billing one must understand that chargemaster prices are set to be heavily discounted, not paid.”²⁴

An expert can opine that a better measure of fair and reasonable is what health-care providers routinely accept as full and final payment for identical service or what it accepts from the largest single payer (Medicare) plus a reasonable markup of 30 to 40 percent.²⁵

Medical billing experts have access to medical pricing databases that contain total charges for specific procedures by specific hospitals. They may be able to opine, for example, that the procedure one hospital charged at \$8,000 costs \$4,500 at a nearby hospital.²⁶ Attorneys can use these comparison prices as fodder for cross examination.

Another fertile area for cross-examination and expert opinion is an analysis of the “reasonable value” of the services. Reasonable value is the value paid by the relevant community.

When determining reasonable value of a medical service, there are three “reasonableness factors” to consider: 1) The charges by similarly situated health-care providers; 2) cost-to-charge ratios reported to Medicare; and 3) the amount the hospital accepts as payment in full for identical care.

It is not clear, however, that a defendant may cross-examine a provider about the fact that it routinely accepts far less in actual payment than the amount billed. In *Collection Professionals, Inc., v. Schlosser*, a collection action on a past-due medical bill involving the “usual and customary” and not the “fair and reasonable” standard, the appellate court affirmed the trial court’s barring as irrelevant cross-examination regarding whether customary charges reflected what the hospital would normally receive for the treatment.²⁷

Sample cross-examination by defense

Even without an expert, the defense can cross-examine the proponent of medical bills, whether a doctor or record

keeper, by asking the hospital record keeper and the doctor some of the following questions.

Keeper of records cross-examination

- What did it cost hospital/treater to provide these services to the patient?
 - What is the hospital’s markup?
 - What did the hospital actually pay for items billed to the patient, including devices and drugs? (One well-known example included \$18 for a single baby aspirin.)²⁸
 - Does the provider ever make mistakes in its medical billing?
 - Did the charges here originate from the hospital’s chargemaster?
 - Did you personally verify the validity of the charges issued by the chargemaster?
 - Do you personally know if every charge was actually provided to the patient?
 - Are charges that lack CPT or HCPCS codes valid?

Doctor

- Did you personally verify every charge on your bill?
 - Were you personally involved in generating this bill?
 - How long did it take you to perform this procedure?
 - How many procedures did you perform that day?

Responding to Rule 216 requests to admit

Because chargemaster prices are grossly inflated, defense attorneys should be wary of stipulating to a full itemized bill of charges. Nor should a defendant faced with a Rule 216 request to admit the reasonableness of medical bills answer by claiming insufficient information.²⁹ Instead, a defendant should consult a medical billing specialist and deny bills that are not fair and reasonable.³⁰

Legislative limits on hospital billing

While the issue is beyond the scope of this article, it’s worth noting that few if any patients are required to pay full chargemaster prices. Illinois passed the

Fair Patient Billing Act³¹ and the Hospital Uninsured Patient Discount Act³² to try to protect Illinois patients from unfair hospital billing and collection practices. The Hospital Uninsured Patient Discount Act provides some limit on hospital charges for uninsured patients who meet low-income guidelines.³³

Conclusion

Because full chargemaster prices have little relationship to what is “fair and reasonable,” practitioners and judges should be skeptical about medical bills. Because medical bills are calculated knowing they will not be paid in full but instead heavily discounted, an award for the chargemaster amount would constitute a windfall to plaintiffs.

On the other hand, reducing all medical bills to the amount insurance paid could provide an unearned benefit to tortfeasors and arguably violate the collateral source rule. Judges must use common sense to assess the extent chargemaster prices are inflated when determining admissibility of bills at trial or in ruling on a request to admit medical bills as “fair and reasonable.” **EB**

23. *Id.* at 470.

24. *Id.*

25. *Id.* at 460-67 (discussing different approaches to fair and reasonable prices depending on the payer with the author arguing at p. 466 that the recovery for personal injury plaintiffs should be 110 to 115 percent of the average amount that private insurers would pay the treating hospitals for the treatment but not the full amount billed).

26. Similar data of hospital pricing has been made public starting in 2013 by the Centers for Medicare and Medicaid Services and is available at: <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/index.html>.

27. *Collection Professionals, Inc., v. Schlosser*, 2012 IL App (3d) 110519, ¶ 24.

28. Examples include \$18 for one aspirin and \$71 billed for one blood-pressure medication pill costing only 16 cents at the local drug store. Susan Jaffe, *\$18 For A Baby Aspirin? Hospitals Hike Costs For Everyday Drugs For Some Patients*, Kaiser Health News (Apr. 30, 2012), <http://kaiserhealthnews.org/news/observational-care/>.

29. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 126 (1st Dist. 2010).

30. Good reason for denying the request under Supreme Court Rule 219(c) should include that the charges were inflated chargemaster charges that many agree are not fair nor reasonable.

31. 210 ILCS 88/1 *et seq.*

32. 210 ILCS 89/1; *id.* §§ 89/5 - 89/20.

33. 210 ILCS 89/10.

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