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## BILL ANALYSIS



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Senate Bill 1104 (as enacted)  
Sponsor: Senator Mike Shirkey  
Senate Committee: Michigan Competitiveness  
House Committee: Insurance

**PUBLIC ACT 556 of 2016**

Date Completed: 3-1-17

**RATIONALE**

Michigan statute contains provisions that require a plaintiff's recovery in a personal injury action to be reduced by amounts paid by other sources, subject to certain exceptions. This "collateral source rule" is found in Section 6303 of the Revised Judicature Act (MCL 600.6303). (As discussed below, the statutory rule is a departure from the common law collateral source rule.) Under Section 6303, evidence that an expense has been paid by a collateral source may be admitted to the court after a verdict for the plaintiff but before the judgment is entered. Within 10 days after the verdict, the plaintiff's attorney must notify people who are entitled to a lien on the amount awarded to the plaintiff, such as insurers that have paid the plaintiff's medical expenses. Lienholders then have 20 days to assert their right to recovery. In this situation, a statutory exception to the collateral source rule allows the plaintiff to recover the amount of his or her expenses paid by a lienholder. This exception was the subject of a case that the Michigan Supreme Court declined to review in July 2016, *Greer v. Advantage Health*, leaving in place the decision of the Michigan Court of Appeals (305 Mich App 192).

The issue in *Greer* was whether the exception to the collateral source rule also applied to the amount of a *discount* on a health care provider's bill. It is not uncommon for a provider, such as a hospital, to write down the amount it bills for services, based on negotiations with the patient's insurance company. In this situation, the insurer pays the discounted bill but the plaintiff's damages award might be for the full amount of the original bill. In *Greer*, the defendants claimed that the discount was a collateral source and should have been excluded from the plaintiff's recovery.

Based on the definition of "collateral source" in Section 6303 (described below), the Court of Appeals held that insurance discounts were, in fact, subject to the exclusion. The Court stated that "both the cash payments and discount...are excluded as statutory collateral source benefits", meaning that the plaintiff's recovery could not be reduced by those benefits. The Court of Appeals decided *Greer* in May 2014. The following December, the Michigan Supreme Court issued an order granting leave to appeal, but the Court vacated that order on July 10, 2016, leaving the Court of Appeals decision in place.

Some people believe that the outcome of the case created a windfall for the plaintiff, and contravened the purpose of the rule "to prevent personal injury plaintiffs from being compensated twice for the same injury".<sup>1</sup> In an opinion concurring with the July 2016 order, one Supreme Court justice stated, "To the extent that the Legislature did not intend to allow a windfall recovery of the retail price for medical services that were provided at a discount, the statute needs to be amended." Two other justices agreed with this opinion, and a number of other people agreed that the Court of Appeals holding should be reversed by a statutory amendment specific to medical malpractice cases.

<sup>1</sup> *Greer v. Advantage Health*, 499 Mich 975, Zahra concurring opinion, quoting *Heinz v. Chicago Rd Investment Co*, 216 Mich App 289.

## **CONTENT**

### **The bill amends the Revised Judicature Act to limit damages for past medical expenses or rehabilitation service expenses to actual damages for medical care that arise out of the alleged malpractice, in a medical malpractice action.**

Specifically, the bill adds Section 1482 to the Act to provide that, notwithstanding any other law to the contrary, both of the following apply in an action that alleges a medical malpractice claim:

- The damages recoverable for past medical expenses or rehabilitation service expenses may not exceed the actual damages for medical care that arise out of the alleged malpractice.
- The court may not permit a plaintiff to introduce evidence of past medical expenses or rehabilitation service expenses at trial, except for evidence of the actual damages for medical care.

The bill defines "actual damages for medical care" as both of the following:

- The dollar amount actually paid for past medical expenses or rehabilitation service expenses by or on behalf of the individual whose medical care is at issue, including payments made by insurers, but excluding any contractual discounts, price reductions, or write-offs by any person.
- The remaining dollar amount that the plaintiff is liable to pay for the medical care.

The bill defines "person" as an individual, partnership, corporation, association, governmental entity, or other legal entity.

Section 1482 will apply to an action filed on or after the bill's effective date.

The bill will take effect on April 10, 2017.

MCL 600.1482

## **BACKGROUND**

The common law collateral source rule prevents the admission of evidence that a plaintiff was compensated for his or her injuries by some source other than the damages sought from the defendant. In a personal injury action, for example, evidence that a plaintiff's medical expenses are covered by insurance cannot be admitted in evidence. According to the concurring opinion in *Greer v. Advantage Health*: "The rule was first recognized in 1854, at about the same time the theory of liability based on fault was established. Under the common-law rule, an injured party was allowed to retain the proceeds of insurance paid to him or her as a policyholder and recover a second time from a tortfeasor. The justifications underlying the common-law rule included its punishment objective and deterrent effect in tort law." (Footnotes omitted.)

The collateral source rule in the Revised Judicature Act is a modification of the common law rule. As the *Greer* concurrence stated: "In 1986, the Legislature abrogated the common-law collateral-source rule for tort claims when it enacted MCL 600.6303...as part of a wave of comprehensive tort reforms. In contrast to the common-law rule, the statute allows for the reduction of a plaintiff's award for past economic damages by payments from collateral sources after a verdict has been rendered. The legislative intent in enacting the statutory collateral-source rule was 'to prevent personal injury plaintiffs from being compensated twice for the same injury.'" (Footnotes omitted.)

The language of the MCL 600.6303 is as follows:

Sec. 6303. (1). In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to

the court...after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source...

[Subsections (2) and (3) omitted.]

(4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits... *Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).* [Emphasis added.]

(5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits.

The Court of Appeals in *Greer v. Advantage Health* found it necessary to interpret the language of the statute in deciding whether a discount on an incurred medical expense negotiated between medical services providers and health care insurers was a "collateral source" that could reduce a jury award for the medical expense. The Court indicated that, because the statute was "in partial derogation of the common-law collateral source rule", an interpretation that made "the least change in the common law" was required. Although the Court found that the payments made by the insurance companies in the case, including the insurance discounts, were a collateral source within the meaning of the *first* sentence of Section 6303(4), the Court concluded that both the insurance payments and the discounts were excluded under the *last* sentence of the subsection.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Michigan courts have made it clear that the purpose of the statutory collateral source rule is to prevent plaintiffs from receiving a double recovery for a single loss. This purpose is defeated when a plaintiff receives both the amount actually paid by his or her insurer (which the insurer has a lien on) and the amount of a discount that the insurer did not pay (which the plaintiff keeps). A simple example illustrates how this might occur: A plaintiff brings a successful medical malpractice action against a physician; the amount of the plaintiff's economic loss includes \$500,000 in hospital expenses; and the hospital accepts \$450,000 in payment from the plaintiff's health insurer, giving a discount of \$50,000. The plaintiff's insurer then has a lien against the plaintiff's judgment for the \$450,000 that it paid, and asserts this lien after the verdict. The plaintiff is able to collect the \$450,000, since that is not considered a "collateral source" under the statute due to the insurer's lien. In addition, however, the plaintiff is able to collect the \$50,000 that was not actually paid, as a result of the holding in *Greer*. This amount represents a windfall to the plaintiff.

Given the purpose of the collateral source rule, "it seems counterintuitive that the Legislature would enact the statute with a loophole that permits a plaintiff to recover for medical expenses never owed or paid", according to the concurring Michigan Supreme Court opinion in *Greer*. As the concurring justice also stated, "The Court of Appeals' opinion will ultimately authorize some amount of recovery for medical expenses never incurred by injured plaintiffs." Since the *Greer* decision was based on the language of the statute, it became necessary to amend the law to close the loophole.

Senate Bill 1104 does so by adding a new section to the Revised Judicature Act. For medical malpractice actions brought on or after the bill's effective date, the damages recoverable for

medical expenses and rehabilitation expenses cannot exceed the actual damages for medical care, meaning *the dollar amount actually paid*, including payments by insurers but *excluding* contractual discounts, price reductions, or write-offs. Defendants and their insurers will no longer be required to pay plaintiffs for costs they never incurred. Since these payments are ultimately passed on to patients and policyholders, this change is in the interest of consumers.

### **Opposing Argument**

A plaintiff's recovery for the amount of a negotiated discount is not a windfall, but a benefit of the insurance the plaintiff purchased. When a consumer pays premiums for a health insurance policy, he or she is not just entitled to reimbursement or payment of medical expenses. The consumer also is paying for the negotiating power of the insurer, which has far more leverage than the individual has. If the insurer is able to secure a discount from a health care provider, that is one benefit of the policy. The Court of Appeals in *Greer* did not change the law, but clarified that this is what it meant: "[B]oth the cash payments and the discount, i.e., the 'benefits received or receivable from an insurance policy,' are excluded as collateral source benefits."

Senate Bill 1104, in effect, will deny an injured plaintiff a benefit that he or she has paid for, by preventing recovery of a negotiated discount. Rather than achieving fairness, this will reward doctors, hospitals, and others who commit medical malpractice, and their insurers, at the expense of injured plaintiffs. One reason for the common law collateral source rule, and the "hybrid" version found in statute, is that a person who is prudent and purchases insurance should not be punished for doing so, and a wrongdoer should not benefit from the injured party's prudence.

Furthermore, by preventing a plaintiff from recovering the amount of a negotiated discount, the bill might make it unaffordable to bring a medical malpractice action. This type of litigation can be very expensive and difficult. Michigan law requires an injured party to meet certain conditions even before getting to court. In particular, when filing his or her complaint, a plaintiff also must file an "affidavit of merit", which must be signed by a health professional who meets the statutory qualifications for expert witnesses. Also, a person may not testify as an expert witness on the appropriate standard of care unless he or she meets those stringent criteria. Then, if the plaintiff does prevail, the judgment is subject to caps on noneconomic damages that do not apply in other types of actions. After the insurance company collects its share from the plaintiff's award, and after the plaintiff pays attorney fees, expert witness fees, and other costs, he or she might have little left. Without being able to recover the discount negotiated on billed amounts, a person might find that it is not economically feasible to bring suit. Instead of preventing a victim of medical malpractice from being overcompensated, this legislation will prevent wrongdoers from being held accountable for their actions.

### **Opposing Argument**

Although it might appear fair to limit an injured party's recovery to "actual damages" that do include the amount of a discount or write-off, defining damages in this singular manner, rather than using the reasonable and customary value of the health care provider's services, makes the legislation fundamentally unfair. As described in a law review article, "The collateral source rule works in conjunction with the reasonable value principle to ensure that triers-of-fact calculate the plaintiff's damages for past medical expenses not by the actual cost the plaintiff incurred but by the reasonable value of the medical care."<sup>2</sup> Health care providers use the reasonable value of their services for billing purposes, for collection purposes, and, if the amounts are uncollectible, for tax write-offs. When it comes to their own exposure to liability, however, hospitals and physicians want to use a discounted amount.

**Response:** In reality, plaintiffs rarely pay billed amounts for medical expenses, and there can be vast differences between the amounts initially billed for medical treatment and the amounts providers ultimately accept as payment.<sup>3</sup> This makes it questionable whether the amount billed can be presumed to represent the reasonable value of medical services. The legislation retains the

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<sup>2</sup> Balasko, J. Zachary, "A Return to Reasonability: Modifying the Collateral Source Rule in Light of Artificially Inflated Damage Awards", *Washington and Lee Law Review Online*, Volume 72, Issue 1, July 1, 2015.

<sup>3</sup> *Id.*

basic protections of Michigan's collateral source rule without requiring defendants to pay inflated damages.

**Opposing Argument**

The bill might not have a direct cost to State or local government but there are potential economic consequences. When health care providers are held fully accountable for their negligence, then medical bills paid by employer-sponsored health insurance, Medicare, Medicaid, and units of government are repaid from the proceeds of the recovery. This system safeguards public resources. On the other hand, these entities have limited opportunity to recover their losses when negligent physicians and hospitals are not held accountable. By contributing to a recent decline in the number of medical malpractice actions filed, the bill will increase the burden on taxpayers.

Legislative Analyst: Suzanne Lowe

**FISCAL IMPACT**

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Ryan Bergan