

## RECENT FEDERAL CASE EXCLUDES INTRODUCTION OF DISCHARGED MEDICAL BILLS

Over the years, it has not been uncommon for plaintiffs to attempt to introduce medical bills that have been discharged in bankruptcy at trial. This issue came up again in the recent personal injury case of Payne v. Wyeth Pharmaceuticals, Inc. Slip Copy, 2008 WL 4890760 (E.D.Va.). In Payne, the plaintiff was injured in an auto accident and soon afterward filed for relief under Chapter 7 of the Bankruptcy Code. He listed his personal injury claim as an asset and most of his pre-petition medical bills as unsecured debts, and ultimately, obtained a discharge in bankruptcy. At trial, he sought to introduce his discharged medical debts as evidence of special damages and for his pain and suffering. The judge denied his request.

What is remarkable about this decision is that it addresses the issue of special damages, one that has been expressly avoided by the Virginia Supreme Courts. The majority of Circuit Courts in Virginia have held that bankrupted bills are inadmissible at trial to prove special damages. However, the Circuit Court for the City of Roanoke in Dodd v. Lang, 71 Va. Cir. 235 (Va. Cir. Ct. 2006) ruled contrary to the majority. In Dodd, the

court held that bankruptcy is not a "source", and ruled that the overall purpose of avoiding a windfall to the tortfeasor was served by allowing the discharged debts into evidence.

In 2004, the Virginia Supreme Court addressed whether or not discharged bills could be used to prove non-monetary or general damages such as pain suffering and inconvenience, but it declined to rule on the specific issue of allowing the bankrupted bills into evidence to prove financial loss or special damages. See Barkley v. Wallace, 267 Va. 369 (2004). Prior Supreme Court rulings such as Acuar v. Letourneau, 260 Va. 180 (2000) and Radvany v. Davis, 262 Va. 308 (2001), had expanded the scope of the collateral source rule in addressing similar issues with medical bills regarding special damages. The Court in Acuar allowed plaintiffs to introduce the full amount of medical bills (even though some of the charges were "written off" by insurers). The Acuar court ruled that even though the amount of the bill for which plaintiff was responsible was reduced, such reduction was the result of a private contract and constituted collateral source. In Radvany the court took the Acuar ruling one step farther and ruled that the reduced or written off amounts were not admissible to show a lack of reasonableness in the rates charged.

The Court's ruling in Payne addresses not only the plain meaning of "collateral source" for special damages, but it also addresses the relevance of the discharged debts

for non financial losses. The Court cites numerous examples in the development of the Collateral Source Rule where outside sources such as medical payments coverage, medical insurance, and gratuitous payments by family or employers were excluded from evidence, and the plaintiff was allowed to claim the underlying losses as special damages. Distinguishing bankruptcy from actual payments received from a third party, the court noted that in bankruptcy, there is no "payment or indemnity" to the plaintiff, or even a third party participation. Rather, a bankruptcy discharge results from an operation of law which renders the debts null as to the plaintiff. Under the present interpretation of the rule, the plaintiff, prior to the injury, has contracted or is entitled to the benefit provided by others or benefits from their gratuity. Including bankrupted bills in the rule may encourage bankruptcies, as the plaintiff can act post-injury to improve his situation, a result that is contrary to public policy.

The Payne court also ruled that allowing the introduction of the bills of the discharged debts is not relevant to the issue of pain, suffering, inconvenience, or other intangible damages. In so holding, it reasoned that the numerical values of the bills were not relevant under Federal Rule of Evidence 401, and to any extent that they were relevant, their "probative value is substantially outweighed by the danger of unfair



prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” As discussed above, the discharged debts cannot be used to prove special damages, and the confusion of the jury between the monetary and non-monetary damages would be exacerbated if the bills were allowed as evidence of the latter but not the former. The bills do not relate anything other than the cost of treatment, yielding no information about pain, inconvenience, or suffering. In fact, similar injuries could be treated differently with wildly different costs, and vastly different injuries and suffering could be evidenced by similar costs of treatment. The plaintiff’s and his doctor’s testimony is the proper evidence of pain

and suffering without confusing the issue of cost.

While Payne is decided under an analysis of the Federal Rules of Evidence, the law of evidence in Virginia is similar with respect to what is and is not relevant. The difference in application in the Virginia courts is in the actual admissibility of relevant evidence that is deemed to have a prejudicial effect. Virginia courts have applied a different standard than that of Federal Rule of Evidence 403, which states that relevant evidence should be excluded if the probative value is substantially outweighed by the prejudicial effect. The Virginia standard states that the relevant evidence should be admitted if its probative value exceeds its prejudicial effect. Comparing the two criteria, the federal rules have a higher burden for exclusion than the Virginia evidence

standards, yet the higher burden was met in this case.

With the Virginia Supreme Court allowing these bills as evidence of general damages, and the strong arguments and precedents of many Circuits disallowing their entry for special damages, a much stronger prejudice and confusion argument arises than was present in the Barkley case, and would seem to indicate that Virginia courts will be even more willing to exclude the medical bills as prejudicial, especially if the issue is brought before the Supreme Court for reconsideration.



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