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A due diligence directive

Appeals court: Duty of plaintiffs' lawyers to find all medical bills

By: Traci R. Gentilozzi in News Stories March 16, 2015

Before finalizing a personal-injury settlement, attorneys must make sure they track down all the crucial information — especially the medical bills, the Michigan Court of Appeals has advised in a published decision.

And if there is any uncertainty about whether all the medical bills are in hand, it is the plaintiff's lawyer's responsibility to insist on the right kind of settlement, the appeals court said in *Clark v. Progressive Ins. Co., et al.* (MiLW No. 07-88093, 10 pages).

The plaintiff in *Clark* settled all her no-fault claims for $78,000. A few days later, she learned of a $28,000 medical bill. She then wanted to have the settlement set aside, claiming she would not have settled had she known about the bill. She also asserted that defense counsel knew about the bill and should have told her about it.

"It is the obligation of plaintiff's attorney to ensure his client knows that a settlement, like the one at issue here, encompasses all claims," Judge Henry William Saad wrote, joined by Judges Donald S. Owens and Kirsten Frank Kelly. "If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of settlement."

If the court accepted the plaintiff's argument that defense counsel should have disclosed the bill, "then this case would stand for the novel theory that opposing counsel has a duty to do what is in fact, law, and professional obligation, the duty of plaintiff's lawyer," Saad said.

Novi private practitioner David E. Christensen, who represents the plaintiff in *Clark*, said the decision "sanctions fraud by insurers against their own insured."

Under *Clark*, "the standard of practice will now have to be that every attorney in every PIP case will have to subpoena the bills from each adjuster on each case every month to be sure they are getting the entire picture," Christensen said. "Anything short of this will be malpractice."

Farmington Hills attorney Steven M. Gursten, who represents no-fault plaintiffs, said that *Clark* is unsettling because it forces plaintiffs' lawyers to "play detective."

"This decision is deeply flawed," he said. "Judge Saad makes it sound like it is easy to find all the medical bills. It's not that simple. Finding bills is often a game of 'Where's Waldo.' This ruling basically makes us become detectives and spend hours looking for information that we cannot charge for."

Clark also has an important professional responsibility lesson, said Lake Orion lawyer Kenneth M. Mogill, who chairs the State Bar of Michigan's Professionalism and Ethics Committee.

"The opinion is certainly a heads-up for lawyers on any side of litigation when it comes to their preparation of the case," said Mogill. "Lawyers for both sides have a responsibility to clients to be up on all the facts and understand the implications of what they are agreeing to."

Uncontemplated charge

Christensen explained that, when someone has a surgical procedure, they are often surprised by the different entities that bill for the surgery. "There are always anesthesiologists, laboratories, facility charges, and so forth that are never contemplated by the patient," he said.

In *Clark*, the facility where the plaintiff had surgery charged for the use of its operating room, Christensen noted. "No ordinary person would have contemplated this charge," he said.

"The facility did not send her a bill, but instead properly billed Progressive," Christensen said. "They were negotiating with Progressive and were unaware that the patient was in a lawsuit with Progressive. The adjuster knew it and knew that that case was about to settle."

According to Christensen, the *Clark* ruling "blesses insurance companies that hide the truth with the full intent of deceiving their customers and costing their customers money."

Gursten, who is with Michigan Auto Law, said the *Clark* decision does not reflect "real life."

"What bothers me," Gursten noted, "is that you can have an attorney who did everything right and exercised due diligence, but they couldn't track down all the medical bills. Sometimes bills show up a year later and come from numerous providers because hospitals outsource services."

He also pointed out that defense counsel has no obligation to disclose any medical bills.

"It's difficult because almost every other state allows lawyers to hire professionals who are savvy and can track down this kind of information," he said. "But in Michigan, we have an ethics opinion that says we cannot do that."

Garan Lucow Miller PC represents the insurance company in *Clark*. A firm representative said it could not comment on the decision without first getting approval from its client, which it was unable to do before MiLW's deadline.

A defense perspective

Detroit lawyer Adam B. Kutinsky, of Kitch Drutchas Wagner Valitutti & Sherbrook, emphasized that once a settlement is signed, it is an enforceable contract that usually cannot be revised because of "buyer's regret."

"This is why the release should specify the effective date of the settlement and release, the specific benefits incorporated if not 'any and all' benefits, whether the release includes future benefits, and all other necessary terms of the settlement," he said.

Clark illustrates the need for other protective clauses, Kutinsky said, like stating that the plaintiff was represented by counsel and knowingly and willingly signed the settlement agreement after consultation.

Troy private practitioner Ronald M. Sangster said the *Clark* panel is cautioning plaintiffs' lawyers that they must know their clients' files inside and out.

"Plaintiffs' attorneys will now have to exercise more due diligence to find out the extent of the medical bills and other expenses," he said. "And if you don't have all the information at hand to make an informed decision, then structure a different type of settlement."

And if the settlement is global, like in *Clark*, "make sure your client fully understands that if something pops up down the road for an expense prior to the date of settlement, it's going to be their responsibility to pay," Sangster said.

More limited settlements?

Practitioners said there will likely be more limited settlements because of *Clark*.

"As the court states, if the plaintiff does not want to include all of her provider bills, she needs to disclose that to the carrier and specify what bills are included and limit the settlement in that fashion," Kutinsky said. "That is the nature of a settlement, or contract, negotiation."

Sangster said it is always in an insurer's interest to obtain a global settlement. "But this case is going to force defense lawyers and plaintiffs' counsel to specifically state the scope of the settlement," he said. "If plaintiffs' attorneys do their job and know what the exposure is, they can make an informed decision regarding any settlement offers."

According to the *Clark* panel, there were "many other ways plaintiff or her lawyer could have settled her claim besides a universal settlement that wiped the slate clean of any claims incurred prior to the date of settlement."

For example, the panel said the plaintiff could have demanded the settlement include a specific list of benefits incurred to date, rather than all benefits. It also said the plaintiff could have conditioned the settlement by specifying that if any charges incurred before the settlement date were discovered afterward, then the settlement could be reopened to address the new charge.

However, "I've been doing this for 20 years and I cannot imagine an insurance company letting a settlement be reopened," Gursten stated. "It's unrealistic."

Malpractice possibility

According to Mogill, the *Clark* panel made a general statement about the division of responsibility between plaintiff's counsel and defense counsel in civil litigation — and that general statement is consistent with the Michigan Rules of Professional Conduct.

"If lawyers are not familiar enough with the relevant law and the specific facts, then they run a risk of entering into an agreement that doesn't protect their client's interest," said Mogill, of Mogill Posner & Cohen.

Sangster said he believes the plaintiff in *Clark* might have a malpractice claim. "Assuming that trial counsel was operating on a one-third contingency fee on a $78,000 settlement, that is almost the amount of the medical bill," he said. "The plaintiff's lawyer should probably forego the attorney's fee in the case."

Gursten would not say whether there could be a malpractice claim in *Clark*. However, he did say that lawyers who represent no-fault plaintiffs are becoming more susceptible to malpractice suits.

"It is really easy to miss something," Gursten said. "A medical bill can turn up even a year later. You can't just dabble in this area of the law anymore."

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Lawyers Weekly No. 07-88093

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- Civil Procedure – No duty to advise opponent of relevant settlement information