# To treat or not to treat

## *Pebley* and plaintiff's right to reasonable compensation for medical care outside of their insurance coverage

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Your client, who was rear-ended by a big rig on the freeway, required a three-level cervical fusion surgery and will require fusion surgery to his cervical and lumbar spine in the future. Defense counsel insinuates there is a conspiracy because your client sought treatment outside available insurance coverage. Defense counsel, dismissing the fact that your client was injured by their client, instead plans to "expose" your client, the medical treaters on liens, and your "ulterior motives." They plan to argue that your client failed to mitigate damages by choosing unreasonably expensive treatment and that your client should only be reimbursed for what their insurance coverage would have paid.

The Court of Appeal squarely addressed this issue in *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266 (*Pebley*). It held that a plaintiff who obtains medical services outside of his insurance coverage should be treated as uninsured and that a plaintiff does not have a duty to "mitigate his damages" by treating within his coverage. (*Id.* at pp. 1276-1277.)

Despite *Pebley*'s clear holding, defense counsel often continue to employ the same discredited tactics, seeking to diminish the recovery of plaintiffs who choose to obtain medical treatment outside of their insurance coverage. As explained below, a thorough understanding of *Pebley*'s scope and limitations should foreclose these unfair tactics.

### *Howell* and its progeny

"Before 1988 a plaintiff, relying on the collateral source rule, could recover the full amount of a health provider's charges despite the fact that an insurer or governmental agency had prenegotiated a discounted rate for the services and the plaintiff was not liable for the full amount." (*Moore v. Mercer* (2016) 4 Cal.App.5th 424, 437, citation omitted.) As we know, the Supreme Court in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 566 held that a plaintiff with medical insurance cannot recover more than the amount paid for their medical treatment. *Howell* further concluded that "[W]here the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Ibid.*) Instead, the amount that the insurer has accepted as full payment, by a prenegotiated discounted rate, is relevant and admissible to prove medical expenses. (*Ibid.*) Ultimately, "the measure of medical damages is the lesser of (1) the amount paid or incurred and (2) the reasonable value of the medical services provided. (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1330 (*Bermudez*).)

In *Howell*'s wake, questions arose as to the admissibility of medical bills for uninsured plaintiffs. *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1295-1296 held that evidence of the full amount billed is admissible to assess the value of past medical services if the plaintiff is uninsured and remained liable for the full amount billed. *Ochoa v. Dorado* (2014) 288 Cal.App.4th 120, 139 disagreed, concluding that "evidence of unpaid medical bills cannot support an award of damages for past medical expenses." *Bermudez* rejected this reasoning and held that in cases involving uninsured plaintiffs, medical bills are relevant and admissible to prove the amount incurred and the reasonable value of medical services provided. (*Bermudez*, *supra*, 237 Cal.App.4th at pp. 1329, 1335, 1337.)

### *Pebley*

The *Pebley* court rejected the defense's claim that an insured plaintiff has a duty to "mitigate his damages" by treating within his insurance coverage. (*Pebley*, *supra*, 22 Cal.App.5th at pp. 1276-1277.) *Pebley* explained that there are many reasons an injured plaintiff may elect to treat outside his or her insurance plan. (*Id.* at p. 1277.) These include the fact that a plaintiff may suddenly need "complex, extensive care that an HMO is not structured to provide." (*Ibid.*, citation omitted.) As *Pebley* recognized, a plaintiff has "the right to seek the best care available and the incentive to do so." (*Ibid.*) Moreover, a "plaintiff also may wish to choose a physician or surgeon who specializes in treating the specific type of injury involved, but who does not accept the plaintiff's insurance or any other type of insurance." (*Ibid.*) Finally, *Pebley* recognized that "health-care providers that bill through insurance, rather than on lien basis, may be less willing to participate in the litigation process." (*Ibid.*)

*Pebley* also concluded that the trial court did not abuse its discretion under Evidence Code section 352 in excluding evidence of the plaintiff's insured status. (*Pebley*, *supra*, 22 Cal.App.5th at p. 1278.) *Pebley* reiterated that the plaintiff had a right to treat outside his plan and that "[e]vidence of his insurance would have confused the issues or misled and prejudiced the jury." (*Ibid.*) Nonetheless, *Pebley* recognized that the amount billed for past medical services was insufficient, by itself, to establish the reasonable value of the services and expert testimony was necessary. (*Ibid.*) The plaintiff carried his burden in this respect by introducing qualified expert testimony that the bills represent the reasonable and customary costs for the services in the Southern California community. (*Id.* at pp. 1278-1280.) Finally, *Pebley* concluded that the trial court properly permitted the parties to engage in a battle of the experts on the reasonable value of the medical costs and that it did not abuse its discretion in

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excluding cumulative defense expert testimony in this respect. (*Id.* at p. 1280.)

### Conclusion

While *Pebley* is an important case for the plaintiff's bar, we continue to see defense counsel who act like it doesn't exist, raising variations of the same discredited arguments that *Pebley* roundly rejected. Defense counsel may claim that *Pebley* has little precedential value because it only held that the trial court did not abuse its discretion in excluding evidence of the plaintiff's insurance. This is spurious.

*Pebley* in fact reiterated that the plaintiff is "entitled to recover the lesser of (1) the amount incurred or paid for medical services, and (2) the reasonable value of the services rendered." (*Pebley*, *supra*, 22 Cal.App.5th at p. 1276, citation omitted.) "The fact that Pebley chose to pay for those services out of pocket, rather than use his insurance, is irrelevant so long as these two requirements are met." (*Ibid.*) If plaintiff's counsel has introduced qualified expert testimony that the amounts billed are reasonable, *Pebley* forecloses any defense argument that evidence of the plaintiff's insurance is admissible. The key for plaintiff's counsel is, therefore, introducing competent expert testimony on the reasonable cost of the services rendered.

We have also seen defense counsel argue that plaintiffs may be cross-examined on their insured status, as if that would somehow impeach their credibility. It doesn't. As *Pebley* recognized: "A tortfeasor cannot force a plaintiff to use his or her insurance to obtain medical treatment for injuries caused by the tortfeasor." (*Pebley*, *supra*, 22 Cal.App.5th at p. 1277.) Indeed, plaintiffs have the right to seek the best medical care and their choice to seek medical care providers who will be willing to participate in litigation is one that *Pebley* expressly confirms is legitimate. Therefore, evidence of their insurance has no bearing on their credibility.

### Takeaway

Counsel should file motions in limine seeking to exclude any evidence of the plaintiff's insured status when they have chosen to treat outside their coverage. In sum, *Pebley* provides a powerful sword and shield for plaintiffs who choose to exercise their right to treat outside of their insurance coverage.

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