



MARYLAND DEFENSE COUNSEL, INC.

STATEMENT IN SUPPORT OF THE MARYLAND CIVIL JUSTICE PROJECT

Maryland Defense Counsel, Inc., urges support for its Maryland Civil Justice Project. The purpose of the bill is to ensure that there is adequate evidence in support of civil awards, and that those awards be valued according to sound and fair economic principles.

Properly Valuing Past and Future Medical Expenses in the age of Managed Care

Successful personal injury claimants can recover past and future medical expenses. The Civil Justice Project seeks to ensure that these damages are valued according to the actual cost of obtaining the care.

Historically, physicians bill for their services, and then the issue in civil cases is whether those bills are “fair reasonable”. “Fair and reasonable” in this context means that the services were necessary, and that the bill for those services is not excessive.

A revolution has occurred in this field, however, with care providers accepting less than the billed amount as full payment, pursuant to managed care arrangements. Similarly, care providers may accept Medicare or Medicaid reimbursement rates as full payment for patients qualifying for that benefit.

Plaintiffs currently claim the full “fair and reasonable” billed amount as their medical loss damages, without regard to the care providers accepting less than the billed amount as payment in full. The only meaningful value of these services is the one that is expected by the provider to be full payment when the bill is rendered. The Civil Justice Project intends to eliminate the excessive “compensation” of medical losses that is a historical accident of changing medical billing and collection processes.

In practice, the health care provider’s “standard rate” is like a car dealer’s “sticker price.” It is a non-market rate that virtually no consumer pays. Outside of the court system, therefore, no reasonable person argues that the cost of the care was anything other what the health care provider has agreed to accept as full payment.

The Civil Justice Project does not run afoul of the collateral source rule, because the actual cost of medical care will be compensated. The difference between the billed rate and the reimbursed rate is never going to be paid by anyone, including a collateral source, so changing the compensation rate to match economic reality presents no windfall to anyone.

As a final matter, it is typical in catastrophic birth injury obstetric cases that the substantial monies awarded for future care are put into a so-called special needs trust so that the child remains eligible for Medical Assistance even after the verdict. There is no justification for awarding future care dollars at billed rates when Medical Assistance will strike a better bargain for that care.

Eliminating the Post-Judgment Interest Windfall

Post-judgment interest in Maryland is set at a fixed 10% per year by statute, running from the date of the judgment. Section 11-107, Md. Cts. & Jud. Proc. Code Ann. For years, this rate has been well above current rates of return. Section 11-107 provides a windfall by, in effect, yielding an investment that substantially outperforms the market.

Maryland should adopt the federal practice, where the post-judgment interest rate is tied to prevailing rates of return. See 28 U.S.C. 1961. That rate in the recent past has been in the range of 1.5% to 2.5%, but, more importantly, reflects a market rate rather than an artificial rate. A market rate is equitable because it results in neither an excessive cost nor an inadequate return on the value of money pending the completion of the judicial process.

Updating the standard for admissibility of expert testimony

The opinions of expert witnesses play a central role in many civil cases, particularly high-value cases. The United States Supreme Court has adopted a rule for admitting expert testimony intended to determine whether the opinion has a sufficient basis. In effect, the test is whether experts within the field of inquiry would find that there is a sufficient basis for the opinion. If knowledgeable experts in a field consider an opinion to lack a sound factual basis or method, there is no reason that a jury composed of citizens should be able to find that the opinion is well-founded.

The Maryland decisions lack the singular, appropriate focus of the federal law concerning expert evidence. This leads to unpredictable verdicts and unfairness to all litigants. This is a matter of particular concern to businesses and others who have to conform their practices to legal requirements. It is virtually impossible to conform to a standard of “reasonable care” if an unfounded opinion about that standard subjects the defendant to unpredictable and unfair liability. There is nothing that is more likely to improve the administration of justice in Maryland to ensure that verdicts are rendered for the meritorious side.

The admissibility of expert testimony is governed by Rule 5-702 of the Maryland Rules, which provides that the court must determine “(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.” Md. Rule 5-702. Although Maryland Rule 5-702 is similar to its federal counterpart, it has not been interpreted consistently with the federal practice.

There is a well-developed body of jurisprudence interpreting Federal Rule 702, intended to verify that expert testimony meets minimum standards for competence and reliability. In particular, the Supreme Court's decisions in Daubert v. Merrill Dow Pharmaceutical, Inc., 113 S.Ct. 2786 (1993) and its progeny task the trial court with acting as "gatekeeper," ensuring that prior to the admission of expert testimony, the testimony "both rests on a reliable foundation and is relevant to the task at hand." Id. at 2790. The federal practice gives the jury a more reliable basis for its verdicts, and safeguards against "hired gun" experts call by any party, sides who base their opinions merely on their own say-so.

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