Abuse of Medical Billing in Tort Cases

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The Defense Bar has seen a significant increase in large jury verdicts over the last 2-3 years and this has been directly related to the pervasive use of LOPs by the Plaintiff's Bar in personal injury case

Why?

When Plaintiffs treat for their injuries they have various sources of potential payments for their medical bills:

1) Private Health Insurance
2) Medicare/Medicaid
3) Cash
4) Letter of Protection (LOP)

Letters of Protection have become the preferred form of payment by Plaintiff's lawyers when it comes to reimbursing MDs for medical treatment of their clients

How does an LOP work?

The Plaintiff signs an agreement with the MD that promises the MD will be paid for his or her services at the conclusion of the case and the Plaintiff does not have to pay anything for treatment on the front end. This is often done even when the Plaintiff has applicable health insurance.

Why would MDs agree to this arrangement?

1) No insurance mandated fee schedules to limit what an MD can charge.

2) The MD typically can get paid more by the Plaintiff than what the insurance company would pay for the procedure or treatment.

Letters of Protection have become the preferred form of payment by Plaintiff's lawyers when it comes to reimbursing MDs for treatment of their clients, CONT'D

Why would the Plaintiff and the Plaintiff's lawyer agree to this arrangement?

1) Since the medical bills are unpaid the Plaintiff is allowed to place before the jury the full amount of the inflated medical bills, instead of the reduced bills after payment by health insurance.
2) The higher medical bills lead typical juries to award larger Pain & Suffering awards, believing the Plaintiff must have suffered a significant injury if the medical bills are very high.
3) This leads to exorbitant per diem pleas to the jury asking for huge sums of money for Pain & Suffering.

2 CASE EXAMPLES

CASE EXAMPLE #1

- MVA low impact
- Two occupants that treated with the same providers
- All treatment under LOPs
- Bills almost identical
- Inflated the value of the claim

CASE #1 CONT'D

- Actual medical bills resulting from this accident for Plaintiff #1

Provider	Amount Billed	Amount Paid	Amount Written Off	Amount Owed
New Smyrna Imaging	$1,695.00	$804.82 (primary insurance)	$890.18 (contractual adjust)	-0-
Titusville Chiropractic & Injury Center	$10,096.88	$4,556.31 (PIP/ Direct General)	-0-	$5,540.57 (no LOP)
Wuesthoff Medical Center Rockledge	$3,820.86	$2,292.51 (PIP/Direct General)	$955.22 (PPO adjustment)	$573.13 (no LOP)
National Orthopedics and Neurosurgery	$1,575.00	-0-	-0-	$1,575.00 (LOP)
Coastline Imaging	$2,697.00	-0-	-0-	$2,680.00 (LOP)
MB Spine and Orthopedic Specialists of Central Florida	$36,329.00	-0-	-0-	$36,329.00 (LOP)
Total	**$56,213.74**	**$7,653.64**	**$1,845.40**	**$46,697.70**

CASE #1 CONT'D

- Actual medical bills resulting from this accident for Plaintiff #2

Provider	Amount Billed	Amount Paid	Amount Written Off	Amount Owed
New Smyrna Imaging	$1,695.00	$853.02 (primary insurance)	$628.72 (contractual adjust)	$213.26 (no LOP – no longer in business)
Titusville Chiropractic & Injury Center	$8,911.57	$5,013.30 (PIP/ Direct General) $1,321.49 (Plaintiff paid)	-0-	$2,576.78 (No LOP)
Wuesthoff Medical Center Rockledge	$2,835.89	$901.54 (Cash)	$1,934.35 (PPO adjustment)	-0-
National Orthopedics and Neurosurgery	$1,575.00	-0-	-0-	$1,575.00 (LOP)
Coastline Imaging	$2,790.00	-0-	-0-	$2,770.00 (no LOP)
MB Spine and Orthopedic Specialists of Central Florida	$32,598.00	-0-	-0-	$32,598.00 (LOP)
Total	**$50,405.46**	**$8,089.35**	**$2,563.07**	**$39,733.04**

CASE EXAMPLE #2

CASE EXAMPLE #2

- **Shopping in store when clothing rack fell striking left wrist**
- **Plaintiff underwent cervical fusion**
- **All treatment under LOPs.**
- **Bills extremely inflated**

Total Bills = $422,648.50 for just the Surgery Center and Surgeon (2 bills)

Based on the large amounts of unpaid medical bills the Plaintiffs then tell the jury that they will have intractable pain the rest of their lives.
They will then make outrageous Per Diem claims.

Below is a common example we are seeing:

- More bills and higher bills→ Higher amounts for P&S
- This leads to per diem arguments related to permanent intractable pain.

Per Diem Example:

EX: $10/hr. x 16 hrs./day = $160/day

Projected life span from life tables
30yrs → $1.7m
40yrs → $2.3m
50yrs → $2.9m
60yrs → $3.5m

Morgan & Morgan – 6 months of 2022 – 19 cases – Central and North Flo
* $86 million in verdicts

SUMMARY

Until there is some type of legislative reform regulating the use of LOPs in litigation this problem will only continue to worsen as both the MDs and the Plaintiff's lawyers work to inflate the medical bills that are being placed before juries in PI cases.

QUESTIONS?

Liability Considerations for Public Entities Associated with Contracted Labor and Services

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Liability Considerations for Public Entities Associated with Contracted Labor and Services

- Becoming more common practice to contract for labor and services which might previously been provided by directly employed County staff.

- Driving Factors:

  1) Cost (employment benefits, retirement, unions, insurance).

  2) Availability of expertise/labor.

  3) Avoidance of WC and Employment Practices Liability.

  4) Avoidance of third-party liability for BI and PD claims.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Important to understand that there are still significant (often heightened) liability exposures to a County, arising from contracted labor or contracted services relationships.

  1) Waiver of sovereign immunity protections.

  2) Non-delegable duties owed by County as landowner.

  3) Exposure by virtue of "Joint employer" status.

- Bottom line, contracting for services/temporary workers does not necessarily insulate the County from third-party liability- It is not a "get out of jail free" card!

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Sovereign Immunity:
- Represents the most important **tort liability protection** available to governmental entities in Florida.
- Doctrine which precludes lawsuits against governmental entities, in their entirety, for certain conduct-i.e., discretionary, planning level activities-design, legislative, police powers.
- Also, significantly limits the government's liability exposure for other conduct- i.e., operational level activities-maintaining property, operating motor vehicles- to the $200,000/$300,000 SI cap, absent passage of a claim bill by the Legislature.

Liability Considerations for Public Entities Associated with Contracted Labor and Services (CONT'D)

- Sovereign immunity protections can be waived- intentionally or by omission/oversight.

- Most common method of inadvertent waiver is by way of a contractual provision contained in a contract between the government and a private entity. Note:- Doctrine of sovereign immunity **does not apply** to claims for breach of contract.

- Common concerns with public/private sector contracts:

  1) Indemnity/Hold harmless provisions.

  2) Insurance coverage obligations/Additional insured status.

  3) Characterization of relationship between parties-i.e., Agency vs. Independent Contractor-might affect County's liability exposure.

  4) Note-description of relationship in contract is not determinative.

Liability Considerations for Public Entities Associated with Contracted Labor and Services (CONT'D)

- Indemnity/Hold Harmless contractual provisions:
- Indemnity- Obligation by Party One to reimburse Party Two for any losses which Party Two might incur, i.e. "make them whole" for a loss or judgment.
- Hold Harmless- One party will insulate the other for liability.
- Myriad of differently worded contractual indemnity provisions **BUT** the ones to avoid (like the plague!) are those which would require the County to indemnify a vendor/contactor, for the vendor/contractor's own negligence or conduct in performance of the contract/work.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- If County signs that type of agreement and, if a loss occurs, caused by negligence of the contractor, then County would be required to indemnify the contractor for that loss - Even if County was not actively at fault in any way!

- Real life example- American Home Assurance case- Railroad accident.

- Compounded by fact that private contractor, does not enjoy the benefit of sovereign immunity-therefore $200,000/$300,000 caps do not apply- County's liability limited only by the amount of the judgment against private contractor. Remember-no SI for breach of contract claims.

Liability Considerations for Public Entities Associated with Contracted Labor and Services (CONT'D)

- Guidelines:

1) Avoid entering in to indemnity agreements and certainly **never agree** to indemnify a private party for said private party's own negligence/conduct.

2) Florida law precludes one governmental entity from indemnifying another public entity for its own negligence § 768.28 (19), F.S.- **BUT**- no such prohibition exists for taking on responsibility for a private entity's negligence.

3) If you can get the contractor to indemnify the County for County's negligence-DO IT!- Better to receive that give- Golden Rule- One with the gold makes the rules!

Liability Considerations for Public Entities Associated with Contracted Labor and Services (CONT'D)

❖ Guidelines (cont'd):

4) If contractor insists on an indemnity provision, make sure that it is drafted so that each party will only indemnify the other to the extent the indemnitor is negligent **AND** make sure the County's indemnity obligation is expressly capped at SI limit (currently $200,000/$300,000). Language limiting indemnity obligation "…to the extent permitted by law…" is insufficient.

5) County's argument to contractor- party that exercises the most control over the activities governed by the contract is in the best position to enforce safety and loss control practices and should, therefore, generally be responsible for injuries or damages arising from those activities.

6) Have legal counsel carefully review all indemnity/hold harmless provisions.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Insurance obligations:

1) Beware of "hidden" contractual obligations to name the other party as an "additional insured" on the County's insurance policy/coverage agreement.

2) This is a standard risk transfer mechanism-but, because of status as a governmental entity, that can create coverage problems-result in a denial of coverage by County's carrier and resulting breach of contract claim against County. Result is that this could be an uninsured loss and represent a direct financial exposure to County.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Insurance obligations (cont'd):

3) Most governmental insurers limit the definition of any "additional insureds" to specific class of entity-usually other governmental entities only-or to "insured contracts" only- private parties often excluded from ever being an additional insured.

4) 4. Conversely, you definitely want the contractor to agree that it will list the County as an additional insured on their insurance policy.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Description of relationship between parties in contract- Agency or Independent Contractor
- Generally, a party is not responsible for the negligent acts of an independent contractor or vendor (goods or services).
- Conversely, a principal is generally vicariously liable for the acts of its agent. Further, these general rules are subject to numerous exceptions depending upon the specific factual circumstances.
- Often, contractor will want to be characterized as an "agent" of County, to take advantage of County's sovereign immunity protection.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Description in contract is not determinative of the outcome of the legal analysis.
- Court will look at whether the contract gives the County the "right" to control the details of the work, even if County never exercises that degree of control.
- Bear in mind, vicarious liability attaches to principal in an agency relationship- so if contractor deemed to be an "agent" is uninsured or insolvent, plaintiff can collect directly against County.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Other contractual provisions to consider:

1) Waiver of subrogation-precludes contractor's insurer from paying loss, then turning around & suing County.

2) Required insurance coverage/limits- Commercial General Liability (CGL); Automobile; Workers' Compensation; Professional Liability; Specialty risks (cyber, pollution, builder's risk, bonds, etc.)

3) Compliance with safety regulations/practices.

4) Public records.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Other contractual provisions to consider (cont'd):

5. E-verify.

6. Spoliation- Contractor agrees to promptly notify County and take all reasonable steps to preserve all physical evidence and information which may be relevant to the circumstances surrounding a potential claim arising out of performance of the contract.

7. Venue; applicable law; attorney's fees; termination.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Landowner-non-delegable duty of care owed to invitees on the premises.
- Duties:

1) Warn of hidden, dangerous conditions on the premises which are known or should be known to landowner and which are not readily discoverable by invitee, by use of reasonable care;

2) Maintain premises in reasonably safe condition.

3) These duties are separate and distinct- so, even if condition was "open & obvious" such that Claimant should have seen/avoided- County can still be held liable if evidence shows County was negligent in maintaining property which resulted in injury/incident.

Liability Considerations for Public Entities Associated with Contracted Labor and Services (CONT'D)

- Duties (cont'd):
- Landowner still owes those duties of care to an invitee, even if landowner delegates responsibility for property management or maintenance to a third party.
- Example- County contracts to have landscape company maintain sprinklers in median of highway.
- County may ultimately have a claim for indemnity or reimbursement against the contractor/vendor, but that does not preclude plaintiff from suing County directly, if injured on property.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Joint employer status:

- Both federal and state courts have developed several tests for determining when separate, but related entities should be aggregated for purposes of various employment and labor statutes- Title VII, FLSA, Whistleblower, WC.

  1) Where two ostensibly separate entities are "highly integrated with respect to ownership and operations"-known as "single employer" or "integrated enterprise" test. Not likely to apply to County.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Joint employer status (cont'd):

2) Where two entities contract with each other for the performance of some task, and one company retains sufficient control over the terms and conditions of employment of the other company's employees- known as the "joint employer" test. i.e. where County is supervising/directing the day to day activities of the contractor/temp. agency's employees.

3) Where an employer delegates sufficient control of some traditional rights over employees to a third party, we may treat the third party as an agent of the employer and aggregate the two- known as the "agency" test.

Liability Considerations for Public Entities Associated with Contracted Labor and Services
(CONT'D)

- Best practices:

1) Carefully vet contractors and deal only with reputable firms.

2) Check references-more importantly companies whom they have worked with over past two years, not listed as references.

3) Check records of safety violations through OSHA.

4) Check litigation records-include standard question on RFP-Has company been a party to any litigation in the past five (5) years?

5) Monitor compliance with contract terms

Liability Considerations for Public Entities Associated with Contracted Labor and Services (CONT'D)

- Best practices (cont'd):

6) Request and review actual insurance policy in addition to COI

7) Don't waive insurance obligations for "small" companies/projects- Size of contract does not equate to financial exposure.

8) Routinely (every 6 months) request confirmation of existing insurance coverage.

9) When considering insurance limits to require, remember that potential financial exposure to County does not correlate with size/dollar amount of the contract.

10) Seek legal review of all "contracts"- include proposals, invoice, service order, etc.- often contain contractual language on reverse page.

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