THAT'S DISCOVERABLE! HOW MEDICAL FACTORING COMPANIES IMPACT YOUR CASE

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An emerging and dangerous trend in personal injury litigation is the use of medical factoring companies to artificially increase damages. Medical factoring companies (frequently called medical financing or medical lien companies, referred to herein as "MFC(s)") initially present an attractive option for plaintiff attorneys and their injured clients because they allow for medical treatment with no up-front costs. MFCs can contract with medical providers, injured plaintiffs, and plaintiff attorneys. MFCs typically require an injured plaintiff to sign a contract akin to a "Client Payment, Security, and Assignment Agreement," which allows the plaintiff to receive treatment from providers in the MFC's "network" in exchange for giving the MFC a lien for the entire amount billed to be paid by the plaintiff following a judgment or settlement of the personal injury claim.

A sampling of MFC websites includes the following advertisements:

- "Our team of experienced professionals not only connects attorneys and patients with our highly vetted network of medical providers but does so in a way that allows for a better overall case outcome." https://wshcgroup.com/ (last visited Sep. 5, 2023).
- "If you are currently facing an active personal injury case or denied workers' compensation claim, we can help provide you with: Chiropractic Care, Physical Therapy, Surgery Procedures, Diagnostic Imaging, Other Medical Care." https://omni-healthcare.com/plaintiff/ (last visited Sep. 5, 2023).
- "Medical providers are able to sell their existing lien receivables and convert them to cash. Omni Healthcare will buy the bill of active personal injury patients and absorb the risk, so the provider can focus on patient care." https://omni-healthcare.com/medical-providers/ (last visited Sep. 5, 2023).
- "With healthcare factoring, medical companies can continue to save lives without having to worry about limited cash flow." https://fundbox.com/resources/guides/medical-factoring/ (last visited Sep. 6, 2023).
- "You provide outstanding care. We make sure there's no outstanding risk." https://wshcgroup.com/ (last visited Sep. 5, 2023).

This arrangement incentivizes the MFC's network providers to issue highly inflated bills for services rendered because the MFC has purchased the provider's accounts receivable at a discounted rate. This

allows the provider to insure against future losses by selling its accounts receivable before the risk of recovery is presented.

Now, the MFC, as the assignee of all rights for the amounts billed, is entitled to repayment directly from the injured plaintiff. The MFC's profits, therefore, lie in the difference between what is billed and what is paid—the more the provider bills, the more money to be made. In *Huston v. United Parcel Serv., Inc.*, the MFC purchased $240,849.44 of the plaintiff's medical bills for the discounted rate of $81,589 but pursuant to the plaintiff's contract, the plaintiff remained liable to the MFC for the full amount billed regardless of whether the plaintiff was successful in litigation or not. In this example, the MFC made a profit of almost triple what it paid for the accounts receivable.

At first blush this lack of upfront costs is the attractive option for an injured plaintiff, but in practice, the results have ugly consequences. For the plaintiff, the use of MFCs leads to rushed and unnecessary medical treatment as in-network providers seek to exponentially increase their profits through inflated medical expenses before selling the accounts receivable to the MFC at a discounted rate. Additionally, even if the injured plaintiff is unsuccessful in litigation, the MFC still gets their pound of flesh by requiring the unsuccessful plaintiff to pay the MFC for the purchase of the accounts receivable. This is likely an amount far greater than the provider would have ultimately collected from the injured plaintiff.

Importantly, medical expenses not only make up the bulk of an injured plaintiff's economic damages, they also act as a grounding point for all non-economic damages. Plaintiffs frequently utilize the multiplier method to articulate a monetary figure of non-economic damages to request from the jury. Consequently, the higher the economic damages, the higher the overall recovery. The increased practice of utilizing MFCs is driving up the overall value of plaintiffs' personal injury claims, resulting in nuclear verdicts based on inflated medical expenses.

Courts are split as to the admissibility of the discounted rates paid by the MFC for the accounts receivable to rebut the reasonableness of plaintiffs' medical bills. However, practitioners should at minimum obtain this information through discovery to evaluate their case and identify experts needed to assess and rebut a plaintiff's inflated medical damages. MFCs and plaintiffs' attorneys generally advance two arguments to avoid disclosure: (1) collateral source rule; and (2) trade secret privilege.

The collateral source rule is nothing more than a red herring argument as most injured plaintiffs still remain fully liable to the MFC for the entire amount billed by the provider and therefore receive no benefit from the MFC, warranting the application of the collateral source rule. Courts have used this logic to both admit and exclude MFC agreements. One Colorado court held that despite not being a collateral source, the MFC agreement was inadmissible as more prejudicial than probative because plaintiff remained liable for the entire amount billed, therefore introduction of the discounted rate would confuse the jury. *Anchondo-Galaviz v. State Farm Mut. Auto. Ins. Co.,* 2021 WL 1087467 (D. Colo. Feb. 8, 2021). Whereas a Louisiana court, who likewise found MFC agreements were not evidence of collateral sources, conversely held the MFC agreements were admissible for a jury to determine damages if they concluded medical expenses were incurred in bad faith and could also be used to impeach the credibility of Plaintiff's healthcare providers. *Collins v. Benton*, 2021 WL 638116 (E.D. La. Feb. 17, 2021). *See also Shaw v. Shandong Yongsheng Rubber Co. Ltd.*, 2020 WL 1974762 (D. Colo. Apr. 24, 2020) (holding MFC liens are not subject to the collateral source rule and amounts billed versus amounts paid are relevant and proportional for discovery purposes).

Trade secret privilege presents the greater obstacle to overcome as, unlike the collateral source rule, it bears some merit. The factors required to establish a trade secret vary state by state, often with shifting burdens, thus requiring the requesting party to overcome the presumption of a trade secret privilege. This presents a challenge as the totality of information in MFC agreements is largely unknown. In New Mexico, an MFC's argument that "its only source of income [being] the margin between what it pays and what it recoups," was sufficiently compelling for the court to deny defendants' motion to compel on the basis of trade secret privilege. *Heaton v. Gonzales*, 2022 WL 772923, at *4 (D.N.M. Mar. 14, 2022). However, as demonstrated in *Huston*, the MFC stood to gain nearly triple what it paid for the plaintiff's accounts receivable. Without additional, and comparatively more invasive, discovery into the MFC's reported earnings, a defendant remains in the dark and unable to combat potentially baseless arguments regarding "sources of income." A Texas court has found that one solution is entering into a confidentiality agreement with the opposing party, which is sufficient to protect the MFC's interests in preserving trade secrets while providing the defendant with the relevant information. *Galaviz v. C.R. England Inc.*, 2012 WL 1313301 (W.D. Tex. Apr. 17, 2012). When dealing with the assertion of trade secret privilege, consideration of a reasonable confidentiality agreement (with a carve out for the sitting judge) should be the first step.

The authors have found the following three arguments to be the most successful for establishing the relevance of MFC agreements and obtaining the same in discovery. First, the discounted rates are impeachment evidence as to the reasonableness of plaintiff's medical bills. *Moore v. Mercer,* 447, 209 Cal. Rptr. 3d 101 (2016) (finding trial court erred in denying motion to compel MFC agreements as they "bear probative value" in determining the reasonable value of the services.). Second, the agreements may support the defense that treatment was provided/received in bad faith and therefore are likely to lead to the discovery of admissible evidence. *Collins v. Benton*, 2021 WL 638116 (E.D. La. Feb. 17, 2021). Third, secret agreements between MFCs and plaintiff attorneys frustrate the litigation and settlement process. *Bowling v. Brown*, 2021 WL 3666848 (W.D. La. Aug. 18, 2021) ("Keeping the amount of that reduction secret from the court and opposing parties frustrates the litigation process and casts an unnecessary cloud over the medical expenses for purposes of settlement. Production of the agreements and the amounts evens the playing field and facilitates resolution.").

The increased use of MFCs is driving up the cost of personal injury claims and cloaking litigation in secrecy. Transparency in amounts billed versus amounts paid by MFCs and later collected from injured plaintiffs is necessary to combat potentially dangerous overtreatment, avoid nuclear verdicts, and reach reasonable resolutions.

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