



## GREATER TRANSPARENCY CAN EXPOSE ILLUSION OF MEDICAL RECEIVABLE FUNDING IN TORT LITIGATION

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Tort claims and litigation continue to represent a meaningful line item for members of the insurance, retail, manufacturing, energy, and pharmaceutical industries. The various causes of this phenomenon and the potential remedies are the subject of frequent scholarly articles, think-tank surveys, and investigative journalism. For example, in recent years, the impact of litigation financing on tort claims has captured headlines as well as the attention of industry leaders.<sup>1</sup> An emerging issue that has received far less attention is the rise and impact of medical receivable funding companies which purchase “medical receivables” from medical providers who render care to personal-injury plaintiffs.

In principle, medical receivable companies widen access to medical care for underinsured personal-injury plaintiffs who would be unable to afford such care without the assistance. Yet, some medical receivable funding companies are far from altruistic. Instead, these companies capitalize on tort claims’ damages awards and settlements by purchasing severely discounted receivables from the treating medical providers who would otherwise be compensated for the services rendered to plaintiffs at the conclusion of a claim or litigation. Medical receivable funders receive damages and settlement funds that derive not from what the funders paid to purchase the receivables, but rather from the full billed amount of the medical services—an amount that healthcare providers rarely receive.<sup>2</sup>

If left unchecked, these companies could fuel a significant increase in tort claims and litigation. COVID-19’s economic impact is expected to push more financially struggling plaintiffs toward healthcare providers backed by medical receivable funding companies. This LEGAL BACKGROUNDER discusses how medical receivable funding companies operate, their operations’ impact on the valuation of claims, and avenues that tortfeasors can pursue to mitigate their exposure.

### **Beware the Medical Receivable Funder: Background**

In a typical personal-injury case, an individual or entity’s negligence causes a plaintiff’s injuries. A plaintiff’s damages generally consist of economic compensatory damages, which cover medical expenses and other hard costs, non-economic compensatory damages, which cover items like pain and suffering or loss of consortium, and potentially punitive damages. Medical expenses typically represent the majority of a plaintiff’s economic damages. In most states, larger medical expenses lead to larger non-economic damages and form the basis for computing punitive damages. Simply put: increased medical expenses lead to increased damages awards.

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<sup>1</sup> *Now We Know Why Litigation Funders Make it ‘Harder and More Expensive to Settle Cases,’* U.S. Chamber Institute for Legal Reform, <https://www.instituteforlegalreform.com/resource/now-we-know-why-litigation-funders-make-it-harder-and-more-expensive-to-settle-cases> (Aug. 3, 2019); Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, WALL ST. J. (Mar. 21, 2018).

<sup>2</sup> *See, e.g.,* Ge Bai and Gerald F. Anderson, *Extreme Markup: The Fifty US Hospitals with the Highest Charge-to-Cost Ratios*, HEALTH AFFAIRS 34, No. 6 (June 2015).

The primary challenges for personal-injury plaintiffs and the cottage industry that benefits from tort litigation are the delay in payment and the risk of non-payment. Many months, and sometimes even years, may elapse between the triggering injury and any award of damages. For underinsured personal-injury plaintiffs who are unable to privately pay for their medical care, this delay can create an obstacle to accessing medical care in the first place. Similarly, medical providers who treat personal-injury plaintiffs under these circumstances face cash-flow challenges because of significantly delayed payment or, when a claim is unsuccessful, non-payment.

A vital element of medical receivable funding is letters of protection or LOPs. Plaintiffs use LOPs to assign their right to recover the cost of their medical care to the treating provider. In such an arrangement, the primary source of recovery for providers is the proceeds of the plaintiff's claim. Historically, LOPs provided access to medical care to underinsured personal-injury plaintiffs because a medical provider utilizing an LOP essentially agrees to provide services up front in exchange for delayed payment. Personal-injury claims do not always succeed. Thus, in agreeing to provide services pursuant to an LOP, a medical provider assumes the risk of potential non-payment as well. To offset this risk, LOP providers frequently charge their full rate for the services rather than the discounted rate associated with private or government-sponsored health insurance—and, at times, even artificially increase their rates.<sup>3</sup> The higher cost presented on a medical bill can in turn lead to larger payouts by tortfeasors and insurers, and ultimately a greater return for the provider.

LOPs remain a vital piece of the puzzle even when medical receivable funders are involved. When a medical receivable funding company purchases accounts receivable from a provider, the provider further assigns their right to collect from the proceeds of the claim that originates from the LOP. Effectively, the medical provider passes their assignment from the patient via the LOP to the medical receivable funding company. Medical receivable funders also typically contract with the individual plaintiff, much like a provider would through an LOP. In doing so, the medical receivable funder requires the plaintiff to personally guarantee the full amount of their medical expenses. Thus, if the plaintiff's claim fails, the plaintiff still owes the full amount of their medical bills to the medical receivable funder.

Although these transactions occur on a plaintiff-by-plaintiff basis, the terms of the arrangement between the medical receivable funder and the provider are generally established in advance. One common form involves an agreement by the provider to sell their receivables from the care of personal-injury plaintiffs at a dramatic discount. Medical receivable funders purchase receivables for as low as 20-40% of the medical bill's stated value. When the claim is resolved, the medical funding company receives the portion of the proceeds that are attributable to the *provider* with which the funding company contracted. Depending on the amount of damages awarded, a medical funder can profit exponentially more than the amount paid to purchase the receivable. If the claim fails, the funder, in turn, receives nothing. In such instances, these funders will at times seek to collect the full amount of the medical receivable from the plaintiff.

### **What's the Problem? Phantom Damages.**

A medical receivable funding company's involvement in litigation can lead to a spectrum of questionable and even unlawful behavior. These arrangements suffer from a profound lack of transparency. The healthcare provider and the funding company do not disclose the amount paid for the medical receivables to the plaintiff or the tortfeasor. Instead, the tortfeasor receives a medical bill for the provider's full charge either as part of a pre-suit claim or during litigation. The tortfeasor and ultimately the jury remain unaware of the significantly discounted amount the provider has already accepted as full compensation for the treatment, and instead are led to believe that the full amount of the bill remains due. The tortfeasor or the jury relies on the medical bill containing the full amount as an accurate and reasonable reflection of the provider's charges. As a result, the tortfeasor issues payment or a jury returns a verdict based on a medical bill for exponentially more than what the provider actually accepted as final payment. Thus the term "phantom damages." What critics of tort litigation historically decried as a windfall for plaintiffs in fact becomes a windfall for medical receivable funders.

<sup>3</sup> See Victor E. Schwartz and Cary Silverman, *Truth in Damages: Florida Juries Should Base Personal Injury Awards on Actual Costs of Treatment, Not Inflated Medical Bills*, <https://www.fljustice.org/files/124353479.pdf> (Feb. 2019).

The environment that permits the award of phantom damages also creates the following additional complications, which in turn further increase the risk of inflated damages.

**Medically Unnecessary Care.** First, the presence of a medical funder and the ease of access to guaranteed payment the funder provides can also lead to unnecessary medical treatment. Depending on the type of case, this could mean the patient receives additional diagnostic testing or excessive physical therapy, but it could also mean surgery that is not medically indicated solely to drive up the total amount of medical expenses. For example, certain pelvic-mesh class-action plaintiffs reported being lured into surgery to remove their pelvic-mesh implants, even when these procedures were later determined to be unnecessary. M. Goldstein and J. Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. TIMES (Apr. 14, 2018). Medically unnecessary services dovetail with the issue of phantom damages. By performing medically unnecessary services, providers increase their compensation from medical receivable funding companies while simultaneously expanding the pool of medical expenses, thereby increasing the likelihood of larger damages awards.

**Unlawful Patient Brokering.** Second, medical receivable funders are uniquely positioned to drive patient referrals to the providers from whom they purchase account receivables and thus facilitate the increase of medical expenses. Much like providers, medical receivable funders frequently have their own relationships with personal-injury lawyers from whom funders receive referrals of plaintiffs who need medical care. Medical receivable funders also routinely engage in their own marketing efforts including web and radio advertising and distributing brochures. Further, medical receivable funders often enter into arrangements under which providers agree to purchase receivables in advance at a discounted flat rate with an agreement to mutually refer patients. Ultimately, medical receivable funders refer patients to providers willing to accept payment at a severe discount, which in turn permits the funder to potentially recover a windfall in the eventual tort claim. In many states such an exponential return on investment may constitute an unlawful kickback in exchange for the patient referral.

**Diminished Recovery for Tort Victims.** Third, the award of phantom damages undercuts the American tort system's core tenet, under which the negligent tortfeasor makes the tort victim whole. Coupled with plaintiffs' lawyers who overwhelmingly provide legal services pursuant to a contingency-fee agreement, medical receivable funding companies further restrict the plaintiff's recovery when awarded damages do not exceed or do not sufficiently exceed the value of the hard costs. For example, an injured plaintiff incurs \$50,000 in injury-related medical expenses and, through a personal-injury lawyer working on a 30% contingency, submits a demand to the tortfeasor for \$75,000 inclusive of non-economic damages like pain and suffering. Rather than paying the full amount of the demand, the tortfeasor pays \$50,000. After subtracting the amount of the attorney's contingency fee, the remaining proceeds are less than the total amount of the plaintiff's medical expenses. Assuming the plaintiff contracted with a medical receivable funder to personally guarantee their medical expenses, as is often the case, the plaintiff conceivably exits their claim receiving essentially no reimbursement for their non-economic damages and runs the risk of liability if the medical receivable funder elects to sue the plaintiff, as sometimes occurs.

### **Increased Transparency Can Minimize Risks**

The rise of medical receivable funding companies, and the phantom damages they instigate, are expected to continue for the foreseeable future. The challenges posed by medical receivable funding in tort litigation cannot be solved by a "one size fits all" approach. An excellent place for tort defendants to start is by recognizing the risk medical receivable funders pose, assessing their own exposure, and then taking steps to mitigate against that risk internally, in litigation, and through collective action.

**Internal Risk Assessment and Education.** As a preliminary step, companies facing regular tort claims should consider and assess the extent of applicable insurance coverage for personal-injury claims. To do so, tortfeasors must educate their personnel at various levels to identify the extent medical receivable funders impact their business. Businesses' awareness of funders' propensity to increase the cost of personal-injury claims will assist decision making on insurance coverage.

**Claims Management.** Tortfeasors must seize opportunities to expose the involvement of a medical receivable funder at both the pre-suit and at the litigation stage. From a claims-administration perspective, enterprises subjected to tort litigation must educate and train personnel handling tort claims on the potential involvement of medical receivable funders. This awareness will allow tort defendants to more diligently defend claims. During the pre-suit phase, tort defendants should use this awareness to confirm whether the medical providers received payment for the services performed. To the extent this information is obtained, tort defendants should use it to better negotiate claims payments.

At the litigation stage, tort defendants should retain counsel committed to aggressively seeking to discover whether accounts receivable were sold both through written discovery and depositions aimed at relevant parties and non-parties. These tactics have succeeded, though such success may hinge on pursuing a motion to compel or defending a motion for protective order.<sup>4</sup> Simply put, a tortfeasor cannot obtain this information if its lawyers are not seeking it in discovery. Similarly, tort defendants should seek an *in limine* determination of the admissibility of the amount paid to purchase the medical receivable. Several recent court decisions allowed juries to consider this information.<sup>5</sup> Without knowledge of how much a medical receivable funder paid to purchase the receivable, juries are likely to focus on the stated amount of the service on the medical bill and award damages accordingly.

**Collective Action.** State laws that mandate disclosure of the sale of any medical receivable forming the basis of a tort claim and the amount paid to purchase it can also expand transparency. Traditional tort reform efforts have historically failed to address the root of the phantom-damages problem: the medical bill. Only recently have states considered legislation aimed at limiting damages commensurate with amounts paid to purchase receivables. For example, Wisconsin passed a law in 2017 that requires parties to disclose any agreement under which a non-attorney has a right to receive compensation contingent on the proceeds of the civil action. See Wis. Stat. § 804.01(2)(bg) (2017). Similarly, Iowa passed a law this year that prevents damages for past medical expenses from exceeding what healthcare professionals and hospitals were actually paid or may be owed for the treatment provided. See I.C.A. §§ 622.4; 668.14 (2020). In the past decade, Oklahoma and North Carolina enacted legislation that requires the amounts paid for medical expenses, rather than the amount billed, to be admissible at trial. See 12 OK Stat § 12-3009.1 (2014); N.C.G.S. § 8C-1, Rule 414 (2011). The plaintiffs' bar and medical receivable companies will certainly push back on any broader reform effort. Those forces were no doubt behind a 2019 Colorado bill that sought to bar discovery of the assignment of a healthcare lien from a provider to any other person or entity. See Colo. Senate Bill 19-217 (2019).

## Conclusion

Tort-litigation defendants must educate themselves and their attorneys on medical receivable funders and their impact, especially as plaintiffs' need for this type of alternative funding for medical care increases. Moreover, tortfeasors must manage the risk that medical receivable funders pose both internally and through litigation efforts. Finally, businesses impacted by medical receivable funders must continue to advocate for legislative reform to ensure transparency in tort claims and litigation.

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<sup>4</sup> See, e.g., *Prince v. Justus*, No. 2016CV31544, Or. on Mot. for Reconsideration, 16-23 (Colo. Dist. Ct., El Paso Cnty. Apr. 24, 2017) (rejecting Marrick's attempt to block disclosure of the amount paid to purchase medical receivables).

<sup>5</sup> See *ML Healthcare Services, LLC v. Publix Super Markets, Inc.*, 881 F.3d 1293, at 1301-03 (11th Cir. 2018) (affirming district court's admission of amounts paid by medical receivables funder to purchase receivables as evidence of potential bias of physician from whom the receivables were purchased); *Houston v. Publix Super Markets, Inc.*, No. 13-CV-206, 2015 WL 4581541 (N.D. Ga. Jul. 29, 2015) (admitting evidence of the purchase of the at-issue medical receivables to attack the credibility of causation opinions offered by the plaintiff's experts and to show the reasonableness of the services provided).