



STOCKMAN • O'CONNOR

**TESTIMONY OF ERIC STOCKMAN AND SANDY ROUSSAS SUBMITTED TO
THE JUDICIARY COMMITTEE ON FEBRUARY 20, 2020 RE HB 5053: An Act
Concerning The Reduction Of Economic Damages In A Personal Injury Or Wrongful
Death Action For Collateral Source Payments Made On Behalf Of A Claimant.**

On behalf of Stockman O'Connor, we thank the Committee for the opportunity to submit testimony in support of HB 5053, An Act Concerning The Reduction Of Economic Damages In A Personal Injury Or Wrongful Death Action For Collateral Source Payments Made On Behalf Of A Claimant. This bill seeks to redress an irregularity created by the Supreme Court's decision in Marciano v. Jiminez, 324 Conn. 70 (2016), which precluded a reduction in damages when any right of subrogation exists for a collateral source. By way of background, we are partners at Stockman O'Connor, PLLC and we have devoted our entire careers to the defense of healthcare providers in medical malpractice and wrongful death actions. Since Marciano's release, we have seen the impact it has had on the resolution of cases and believe it has created an unsustainable situation.

Marciano involved a plaintiff that was injured in a car accident. At trial, the jury returned a verdict in favor of the plaintiff and awarded \$84,283.67 in economic damages and \$40,000 in noneconomic damages for a total verdict value of \$124,283.67. The defendants sought a collateral source reduction for the economic damages because the plaintiff had paid only \$1941.49 for his medical expenses. An employer-sponsored, self-funded ERISA healthcare plan covered the rest of the medical expenses. At a hearing on the request for a collateral source reduction, the court reviewed a copy of the health insurance plan, as well as an email from the employer's agent handling the claim stating that employer had an enforceable lien or subrogation rights upon the payment of any judgment. Another letter from the agent showed that the employer indicated that it would accept \$6,940.19 in satisfaction of its right of subrogation in the event of a settlement of the case for \$120,000. The defendant argued that the letter extinguished the right of subrogation and that the court should order a collateral source reduction of over \$60,000, which represented the difference between the total award of economic damages minus the amount the plaintiff contributed toward his medical expenses and insurance premiums and the amount the employer would accept in satisfaction of its subrogation rights. The trial court ordered a collateral source reduction of \$24,299, representing the difference between the costs to secure the collateral source benefits from the award of economic damages.

The Supreme Court's analysis largely focused on the language of the collateral source statute. It noted that the statute states that a trial court "shall reduce the amount of such award which represents economic damages . . . except that there shall be no reduction for . . . a collateral source for which a right of subrogation exists. . ." The Supreme Court concluded that in the phrase "a right of subrogation" the legislature chose to use the expansive term "a", which the Court has commonly interpreted to mean "any." The Court reasoned that if the legislature had intended for partial reductions, it would have said so in the statute. The Court ultimately was not swayed by the concern that this interpretation may lead to windfalls for plaintiffs, who will potentially recover for expenses that they never actually paid. The court reasoned that the collateral source statute is an "equitable balance" between preventing plaintiffs from obtaining double recovery and preventing defendants from benefitting from reduced judgments paid by collateral sources. The Court stated that in view of the history of the collateral source rule and the statute it "cannot conclude that the possibility of a windfall for a plaintiff is a bizarre result."

But in fact, it is a bizarre result. Marciano has empowered plaintiffs to claim and *potentially recover* as economic damages the total amount of medical bills for expenses charged, but not actually paid out. It becomes a form of punitive damages, which are as a rule are not recoverable in a medical malpractice action based on negligence. Indeed, in any medical malpractice trial, juries are already allowed to consider the amounts "charged" by a defendant—as opposed to the amounts actually paid—as economic damages; hence the need for a collateral source reduction hearing post-verdict. Trial lawyers from both the defense and plaintiff's bars understand that the size of a non-economic damages award by a Connecticut jury is often correlated to the amount of medical bills submitted for their consideration, e.g., a case with \$84,000 in medical bills is worth more in non-economic damages than a case with \$6,000. The fact that these unpaid charges are used as a measure of damages is already a boon to the plaintiff's bar. Allowing the unpaid charges to be recovered as an element of actual damages adds, as it were, insult to injury.

When this bill was introduced last year, opponents of the bill argued that Marciano acted as a deterrent to "careless wrongdoers." This is inaccurate. Deterrents for negligent conduct are embedded in our legal system. The first, obviously, is the specter of a finding of liability and a resulting award of compensatory damages. Second, in the medical malpractice context, when physicians settle a matter or are found to be liable by a jury for negligent conduct, a report to the National Practitioner Databank is made—a report that stays with them for their career. Third, the impact to physicians is further felt in the renewal of malpractice insurance or in applications for hospital privileges given the requirement the Databank requirements. In the context of a hospital system, money paid out in settlement or verdicts also impacts reinsurance and premiums. According to the Connecticut Medical Malpractice Report presented by the Connecticut Insurance Department on May 17, 2019, there were a total of 281 indemnity payments made totaling \$262,638,859 from all insurers in 2018. This is an increase of over \$80 million from just two years before where 287 indemnity payments

totaled \$181,802,181. Could this be the Marciano effect? We have certainly seen it in our practice, where the Marciano effect has created enormously inflated settlement demands and settlements that result in huge windfalls for plaintiffs because the unpaid charges are fair game at trial. Opponents of this bill would argue that there are too many variables to attribute the increase in the average payment from \$633,457 to \$934,658 in these two years, but the correlation cannot be ignored because, as we have seen, Marciano has had a direct impact on the value of the malpractice cases that we handle.

We thank the Committee for considering this important bill and for affording us the opportunity to present our comments in support of it.

Testimony
available for
public review in

Judiciary Committee
Room 2500