UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE HIV ANTITRUST LITIGATION.

Case No. 19-cv-02573-EMC

ORDER GRANTING PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY AND EVIDENCE OF POTENTIAL MEDICARE PART D OFFSETS

Docket No. 1840

Currently pending before the Court is Plaintiffs' motion to exclude in which Plaintiffs seek to limit testimony from Defendants' damages expert Dr. Jena. Dr. Jena filed a supplemental report on May 11, /2023. This was in response to an updated report being provided by Plaintiffs' damages expert D. Frank. (The Court allowed an updated report which broke down damages by state. *See* Docket No. 1766-3 (Updated Frank Rpt.).) In his supplemental report, Dr. Jena opines, in relevant part, that

> Dr. Frank's updated damages calculations *still* fail to account for the portion of at-issue Medicare Part D prescriptions paid by the government to the EPP class [*i.e.*, the government payments should be counted as a set-off to the EPPs' damages]. Dr. Frank's failure to account for these payments is inconsistent with . . . the approach implemented by the two other indirect purchaser Plaintiffs' experts [the IHPPs and United), both of whom now account for government Medicare Part D payments . . . .

Docket No. 1850-3 (Ex. B) (Supp. Jena Rpt. ¶ 3) (emphasis added). Dr. Jena uses the word "still" because he made the same criticism with respect to Dr. Frank's original report. According to Plaintiffs, Dr. Jena should be barred from providing this testimony because, as a pure legal matter, Defendants should not be allowed to claim the government payments as a set-off.

Having considered the parties' briefs and accompanying submissions, the Court hereby **GRANTS** Plaintiffs' motion.

A. Prior Orders

As an initial matter, the Court take notes that it has previously issued opinions that relate to Medicare payments by the government: (1) its order on Defendants' *Daubert* motions (dated March 13, 2023), *see* Docket No. 1704 (order); and (2) its order on Defendants' motions in limine (dated March 19, 2023). *See* Docket No. 1716 (order). Of particular note is the latter order addressing Defendants' motions in limine. In the relevant underlying motion, Defendants argued, *inter alia*, that, "if Medicare paid for part of the drugs, then Plaintiffs cannot include that as part of their damages." Docket No. 1716 (Order at 7). In response, the Court stated that Defendants made a "fair argument" but "exclusion is not the proper remedy because the parties essentially dispute whether it is possible to allocate the Medicare payments to serve as a set-off. *See also In re Namenda Indirect Purchaser Antitrust Litig.*, No. 115CV6549CMRWL, 2022 WL 3362429, at *11-12 (S.D.N.Y. Aug. 15, 2022) (concluding that 'the measure of damages is the actual damage – the out-of-pocket cost – that is suffered by a [TPP] as a result of being overcharged for memantine,' but '[w]hether Dr. Vogt has calculated the measure correctly in light of the various government reimbursement programs presents a question of fact for the trier of fact – not a ruling of law for the court to make')." Docket No. 1716 (Order at 7).

In spite of the Court's prior orders, Plaintiffs have moved for relief because they are now making *pure legal arguments* as to why Medicare payments should not be able to be used as a set-off. Plaintiffs make two legal arguments: (1) as a legal matter, the Court should not use a Medicare payment as a set-off because that would interfere with the Medicare regulatory process; and (2) as a legal matter, the Medicare payments from the government should not be used as set-offs because most of the repealer states at issue follow the common law collateral source rule.

Defendants note that Plaintiffs are essentially moving for reconsideration here and complain that Plaintiffs are doing so on an untimely basis given that the Court's prior orders issued in mid-March. Although the Court is not without some sympathy for Defendants' timeliness argument, the Court nevertheless considers the motion – especially since Defendants

themselves have also been moving for reconsideration of prior Court rulings, and arguably on an untimely basis as well.

B. First Legal Argument: Reconciliation Process

To the extent Plaintiffs seek relief based on their first legal argument, the Court is not persuaded. As a preliminary matter, the Court notes that Plaintiffs made a similar argument at the time they opposed Defendants' motions in limine; specifically, they argued that the DIR process would be rendered *unnecessary* if government payments could be used as set-offs. Now, Plaintiffs present a slightly different argument – *i.e.*, that the DIR process would be *interfered* with, and therefore set-offs should not be permitted. The problem for Plaintiffs is that they have not articulated any legal basis that would give the Court authority to reject set-offs based on an interference theory.

Potentially, Plaintiffs were trying to make a preemption-type argument. *See, e.g.*, *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta*, 33 F.4th 1107, 1113-14 (9th Cir. 2022) (discussing different kinds of preemption, including conflict preemption which "arises when state law conflicts with a federal statute"); *Chae v. SLM Corp.*, 593 F.3d 936, 943 (9th Cir. 2010) (noting that "[a] state law, whether arising from statute or common law, is preempted if it creates an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"). But if that is the case, Plaintiffs did not sufficiently brief the issue. Plaintiffs did not, for example, cite any preemption case law. Plaintiffs did not take into account that courts are to be "cautious about conflict preemption . . . [w]hen we deal with an area in which states have traditionally acted," *i.e.*, "a state's historic police powers." *Id.* at 944. And there is room to argue that there would not be interference with the Reconciliation process if Medicare payments could be used as set-offs in this litigation because the Part D sponsors could still, during the Reconciliation process, tell the government what happened in this litigation – *e.g.*, that they settled or that they prevailed and thus their costs for the drugs were diminished. That the government could not then obtain recovery from the Part D sponsors amounts which were offset would not clearly preclude the government from seeking its portion reflecting overpayment from Gilead. At least Plaintiffs have not made any such showing which would appear to be a predicate to an

effective obstruction preemption claim.

C. Second Legal Argument: Collateral Source

Although the Court does not rule in Plaintiffs' favor on their first legal argument, it finds that their second legal argument has merit. To be sure, Plaintiffs initially raised this legal argument in their opposition to Defendants' motions in limine in conclusory terms. *See* Docket No. 1630-8 (Opp'n at 6-7). However, now that Plaintiffs have shed more light on their argument, the Court is persuaded.

The Court's ruling here turns on the following. First, as Plaintiffs point out, one major justification for the collateral source rule is that a tortfeasor should be held accountable for the wrong done and should not benefit from the fact that the victim later escapes some of the consequences of the harm. *See, e.g.*, *Collier v. Roth*, 434 S.W.2d 502, 507 (Mo. 1968); *Int'l Longshore & Warehouse Union v. ICTSI Or., Inc.*, No. 3:12-cv-1058-SI, 2019 U.S. Dist. LEXIS 8501, at *49 (D. Or. Jan. 17, 2019). Second, the collateral source rule comes from the common law, and most, if not all, states have adopted the approach that a state statute does not abrogate the common law unless it is clear that the legislature so intended. *See, e.g.*, *State v. Allen*, 513 P.3d 282, 310 (Ariz. 2022) ("Arizona adopts the common law unless it is 'repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state.' And 'if the common law is to be changed or abrogated by statute, the legislature must do so expressly or by necessary implication,' and '[a]bsent a clear manifestation of legislative intent to abrogate the common law, we interpret statutes with "every intendment in favor of consistency with the common law."'"); *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 88 (Iowa 2014) ("With respect to whether a statute abrogates common law, the test is somewhat similar. We have declared that absent express statutory language, a party seeking to demonstrate that a statute impliedly overrides common law must show that this result is 'imperatively required.'"); *Ed Dewitte Ins. Agency, Inc. v. Fin. Assocs. Midwest*, 427 P.3d 25, 30 (Kan. 2018) ("[W]e presume the Legislature acts with '"full knowledge and information about the statutory subject matter, prior and existing law, and the judicial decisions interpreting the prior and existing law and legislation."' Because of this preexisting knowledge, courts also presume legislatures do not

intend to alter or abrogate the common law unless a statute makes clear such an intention."). Here, even though many of the relevant state statutes refer to "actual damages" as the remedy for an injured plaintiff, that phrase in and of itself establish that a state legislature clearly intended to override the common law collateral source rule, particularly in light of the underlying policy that the tortfeasor not benefit as a result of the diligence of the victim.

The Court acknowledges that its ruling here does not entirely preclude Defendants from raising Medicare payments as a set-off. Plaintiffs concede that, although the majority of relevant states do follow the collateral source rule, some states do not, and others follow the rule in limited circumstances only. But Plaintiffs have pointed out – and Defendants do not dispute – that it is a decision *for the Court*, and not the jury, as to what should happen in these minority states. Accordingly, for purposes of the *jury trial*, Defendants shall not be permitted to raise Medicare payments as a set-off to Plaintiffs' damages. Should Plaintiffs prevail at trial, then there may need to be a limited bench trial on the issue of Medicare payments and set-off.

This order disposes of Docket No. 1849.

IT IS SO ORDERED.

Dated: May 23, 2023

EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California