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FLORIDA'S HEALTHCARE CRISIS: USING BREACH OF OPEN-PRICE CONTRACTS AND THE FLORIDA CONSUMER COLLECTION PRACTICES ACT TO ADDRESS PRICE GOUGING

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INTRODUCTION

Imagine for a moment that you are an expectant mother who is going into labor.[1] After going through all of the pain associated with child birth, your doctor informs you of the horrifying fact that one of the three children you just gave birth to passed away having only experienced life for three brief minutes.[2] With the other two children still in the intensive care unit, you return home only to discover a medical bill addressed to the parent of your child that passed away.[3] At first, you are confused, and then, you become angry.[4] As it turns out, your child that passed away could not be added to your insurance due to the child's brief life span, and despite the fact that the child received no medical care, the hospital contends that your child's three-minute existence within the facility's walls came at a cost of $600 that you are personally responsible for.[5] The story described is what happened to Jennifer Gunter ("Jennifer"), and when these events transpired, Jennifer was employed as a doctor of obstetrics and gynecology ("OBGYN") at the hospital that sent her the bill.

Jennifer's story would probably lead most people to conclude that it is simply not fair to charge a person $600 for merely existing in a hospital for three minutes, but the story also sheds light on the illogical manner in which the cost of health care is calculated in the United States. The truth is the costs associated with the healthcare system in America have been crushing our country's economy for quite some time.[6] In 2013, for example, the amount of money spent on healthcare nationally in the United States was equivalent to each member of the population paying $9,255.[7] The effect of these costs on average Americans

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[1] Sarah Bregel, *Woman's Tweet About Hospital Bill Pinpoints A Lack Of Compassion In US Healthcare*, SCARY MOMMY (Sept. 29, 2019), https://www.scarymommy.com/tweet-deceased-baby-healthcare-hospital-bill/.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Steven I. Weissman, *Remedies for an Epidemic of Medical Provider Price Gouging*, FLA. B.J., Feb. 2016, at 22, 23.
[7] *Id.*

is evident from the fact that a majority of the bankruptcies in the United States are filed due to medical expenses.[8] In short, healthcare costs are bankrupting Americans with citizens in the United States spending 2.3 times more money on healthcare than on food and beverages in 2012.[9] Moreover, it has become clear that merely obtaining health insurance will not alleviate the overarching problem, since despite a 5.8% increase in private health insurance spending in 2018, out-of-pocket medical expenditures still rose 2.8% thereby accounting for 10% of all health care expenditures nationally in 2018.[10]

Though every state has been affected in some way by the national healthcare crisis, Florida, with respect to hospital-related costs specifically, has been faced with a unique challenge because, as of 2016, it was home to twenty of America's highest priced hospitals.[11] These hospitals have been reported to charge patients anywhere from 9.2 to 12.6 times more than the Medicare-allowable rates for medical services,[12] and this has resulted in patients being charged 920% to 1,260% more for healthcare services than what it actually costs to render the service.[13] Though large profit margins are not uncommon in certain sectors of the healthcare industry,[14] abnormal spikes in the cost of healthcare-related expenses will normally attract the attention of legislators.[15] Unfortunately, the pricing strategies of Florida's hospitals have either not been addressed or have been inadequately addressed by the Florida legislature, since as of September of 2019, Florida was ranked by John Hopkins University as being the seventh most expensive state for hospital care with patients being charged 5.8 times more than the Medicare-allowable rate for healthcare.[16]

Consequently, the next question that should be asked is, are patients legally obligated to pay these, some might call predatory, hospital bills? The short answer, based on Florida's caselaw, is that at least in cases where an individual has signed an admission contract obligating them to pay "all charges . . . in accordance with existing standard and current rates as set forth in regular schedules[,]" an individual is only required to pay the reasonable price for the healthcare received and is entitled to "question the reasonableness"

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[8] *Id.*
[9] *Id.*
[10] Centers for Medicare & Medicaid Servs., *NHE Fact Sheet*, CMS.GOV, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet (last modified Mar. 24, 2020).
[11] Weissman, *supra* note 6, at 24.
[12] *Id.*
[13] Patterson Clark & Katie Park, *The Top 50 Hospitals that Gouge Patients the Most*, WASHINGTON POST (June 8, 2015), https://www.washingtonpost.com/graphics/health/hospital-price-gouging/.
[14] U.S. GOV'T ACCOUNTABILITY OFF., DRUG INDUSTRY PROFITS, RESEARCH AND DEVELOPMENT, AND MERGER AND ACQUISITION DEALS 1 (2017).
[15] Jacqueline Howard, *On Rising Insulin Prices, Lawmaker Tells Pharma Execs: 'Your Days Are Numbered'*, CNN (last updated Apr. 10, 2019, 5:31 PM), https://www.cnn.com/2019/04/10/health/insulin-prices-congressional-hearing-bn/index.html.
[16] Peiqi Wang et al., *Hospital Prices in the United States: An Analysis of U.S. Cities and States*, JOHNS HOPKINS U., (2019) https://npr-brightspot.s3.amazonaws.com/legacy/sites/wusf/files/201910/hospital_prices_in_the_u.s._report.pdf.

of the price charged by the provider.[17] As one might imagine, whether or not a hospital has charged a patient a "reasonable" fee for services rendered is debatable and depends on a number of factors.[18]

Thus, although the healthcare crisis in the United States is a national problem and price gouging in the healthcare industry is but only one subset of that problem,[19] this article discusses how state courts from various jurisdictions evaluate the reasonableness of the fees charged by healthcare providers and proposes a potential solution to the price gouging problem in Florida and other states that have enacted legislation that is similar to the Florida Consumer Collection Practices Act ("FCCPA").

Part II of this note discusses the legal problem that inflated and unreasonable hospital bills pose for consumers as well as the potential solutions that have been proposed previously. Part III evaluates the various factors from other jurisdictions that have been adopted by Florida courts to determine whether the fees charged by medical providers pursuant to an open-price contract are reasonable. Part IV argues that although a litigant has more than one possible cause of action against a hospital charging unreasonable fees for care rendered on a walk-in or emergency basis,[20] the charging of unreasonable fees represents a violation of the FCCPA and that bringing a cause of action under the FCCPA in conjunction with other contract-based causes of action will give consumers effected by price gouging greater access to legal representation due to the FCCPA's attorney-fee provisions.

I. LEGAL AND ECONOMIC ISSUES

The secrecy surrounding how and what hospitals actually charge for their services is both an intentionally created aspect of a hospital's billing practices and the cause of the underlying threat that inflated hospital bills pose to the general public.[21] As an article published by the Florida Bar Journal and authored by Steven Weissman titled *Remedies for an Epidemic of Medical Provider Price Gouging* makes clear, "'[i]nsurers and hospitals include gag provisions, requiring the parties to maintain hospital pricing as a trade secret' thereby ensuring that the prices charged to different entities are 'cloaked in secrecy.'"[22] Each hospital maintains what is referred to as a "charge master" or "list price" for each of the services a hospital renders, but such "prices are billed only for the small minority of services performed when no insurance is involved[,]" with private insurance companies on

[17] Mercy Hosp., Inc. v. Carr, 297 So. 2d 598, 599 (Fla. Dist. Ct. App. 1974); *see also* Payne v. Humana Hosp. Orange Park, 661 So. 2d 1239, 1241 (Fla. Dist. Ct. App. 1995).
[18] Colomar v. Mercy Hosp., Inc., 461 F. Supp. 2d 1265, 1269 (S.D. Fla. 2006).
[19] *See generally* Weissman, *supra* note 6.
[20] David Stahl, *Article I. The Role of The Florida Courts in Protecting the Uninsured from Being Overcharged for Emergency Medical Services*, 33 NOVA L. REV. 269, 271 (2008); *see also* Weissman, *supra* note 6, at 27.
[21] Weissman, *supra* note 6, at 23-24.
[22] *Id.* at 23.

average paying 1.6 times the Medicare-allowable rate and the charge master prices being 9.2 to 12.6 times the Medicare-allowable rate.[23]

A. The Legal Conundrum Associated with Evaluating Claims

This wild variation poses a practical problem for legal practitioners who are tasked with evaluating the merits of a client's initial claim that they are being charged an unreasonable price, because as discussed *infra*, the factors used by Florida courts to evaluate the reasonableness of a hospital's fees—a market analysis of what the defendant and other similarly situated hospitals charge, the usual and customary rates the defendant hospital charges and receives, and the defendant hospital's internal cost structure—all center around the price that the defendant hospital and other similar hospitals actually charge individuals, government entities, and private insurers alike.[24] Thus, an attorney that is evaluating the reasonableness of a particular hospital bill would be left to essentially guess as to: (1) whether the hospital bill is indeed unreasonable, (2) if the bill is unreasonable, the extent to which it is unreasonable, and (3) whether such unreasonableness is to such a degree that engaging in litigation is financially sound for the client.

However, in 2017, Florida's Agency for Healthcare Administration, the state agency responsible for regulating and licensing medical providers that participate in the Medicaid program, launched a free online tool, the Florida Health Price Finder, that allows users to view the national, state, and, in some cases, county average price for a particular medical procedure.[25] While this tool may be helpful for attorneys evaluating the reasonableness of a particular hospital bill, it does not resolve the issue of a client being unable to finance the litigation needed to dispute a hospital's fees.

B. The Economic Status of Those Effected by Absorbent Hospital Bills

According to the United States Census Bureau, those that lack health insurance in the United States are disproportionately more likely to live in poverty, are considered low-income individuals, and have less than a high school level of education.[26] Similarly, a report published by the Legal Services Corporation ("LSC") indicated that 71% of low-income households experienced at least one legal problem in the civil context in 2016, 86% of the legal problems reported by low-income Americans received inadequate or no legal help, and low-income Americans would likely approach LCS with 1.7 million legal

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[23] *Id.* at 23-24.
[24] Colomar v. Mercy Hosp., Inc., 461 F. Supp. 2d 1265, 1270-73 (S.D. Fla. 2006).
[25] Christine Sexton, *Health Price Website Gets Little Public Attention*, WUSF PUBLIC MEDIA (Oct. 9, 2020, 11:08 AM), https://wusfnews.wusf.usf.edu/health-news-florida/2020-10-09/health-price-website-gets-little-public-attention.
[26] Edward Berchick, *Who Are the Uninsured*, U.S. CENSUS BUREAU (Sept. 12, 2018), https://www.census.gov/library/stories/2018/09/who-are-the-uninsured.html.

problems in 2017.[27] The report went on to indicate that of the problems posed to the LCS by low-income Americans, more than half of these problems would be addressed with little or no legal assistance due to a lack of resources.[28]

In other words, the same individuals who are likely to have no health insurance, and thus be charged for healthcare pursuant to the prices in a hospital's chargemaster, are also the same individuals who are likely to receive little or no legal help with their civil legal problems. Consequently, any solution that is likely to address the price gouging problem among Florida's hospitals needs to include a means of both allowing those affected by these pricing tactics to have access to legal representation with little or no upfront costs and a method for allowing attorneys who undertake representation of these individuals to collect a fee for their services.

C. Previously Proposed Solutions

Other authors have proposed a few different possible causes of action that could be utilized as a mechanism to combat predatory hospital pricing, including: fraud in the inducement, breach of an open-price contract, and violation of the Florida Deceptive and Unfair Trade Practices Act.

Fraud in the Inducement

Under Florida law, a plaintiff must prove four elements to prevail in a cause of action for fraud in the inducement: "(1) a misrepresentation of a material fact; (2) that [the] maker of the misrepresentation knew or should have known of the statement's falsities; (3) intent by the maker of the statement that the representation induce another to rely and act on it; and (4) resulting injury to the party acting in justifiable reliance on the representation."[29]

Steven Weissman ("Weissman"), author of the Florida Bar Journal article referenced previously, has argued that a typical hospital billing dispute might fit within these elements due to the nature of a hospital's billing procedures.[30] Specifically, by entering into a contract with a patient to pay "standard rates" for services rendered and billing a patient at the rate from the charge master, a hospital misrepresents a material fact by leading a patient to believe that the rates listed in the charge master are the "standard" rates, when in reality, the charge master rates are not "standard rates" at all given that only a fraction of the bills paid to a hospital are paid at the charge master price.[31] Weissman does not specifically address how such a case would fit into the second element,[32] but one

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[27] LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.
[28] *Id.*
[29] Palumbo v. Moore, 777 So. 2d 1177, 1179 (Fla. Dist. Ct. App. 2001).
[30] Weissman, *supra* note 6, at 27-28.
[31] Weissman, *supra* note 6, at 27.
[32] Weissman, *supra* note 6, at 28.

could imagine how the knowledge element could be satisfied based on the hospital billing tactics described *supra*.

A hospital would satisfy the third element when admitting a patient, because when a hospital offers a patient an admission contract representing that the patient will only be charged the "standard rates," i.e. the inducement, knowing that the standard rates are not standard at all, i.e. the representation, the patient, under the belief that he or she is being charged the standard rate, agrees to the admission or treatment, or acts on the inducement.[33] The fourth element would be satisfied after the patient is billed for the services at the charge master rates, because those rates are substantially higher than the actual "standard rates"—meaning those rates paid by the majority of customers, which are usually private and governmental health insurance entities.[34]

Breach of an Open-Price Contract

David Stahl ("Stahl"), author of the article titled *Article I. The Role of The Florida Courts in Protecting the Uninsured from Being Overcharged for Emergency Medical Services*, has proposed breach of an open-price contract as a possible legal option for patients that have fallen victim to hospital price gouging.[35] A plaintiff is required to prove two things in order to prevail in a cause of action for breach of an open-price contract in Florida: (1) that an open-price contract formed between the parties in which case a reasonable price is implied by law and (2) that the defendant breached the contract by charging an unreasonable price for the services rendered.[36]

Although proving that an open-price contract formed may be fairly straight forward in most cases, Florida courts have held that the determination of what constitutes a "reasonable" fee is a question of fact that should be answered by the fact finder.[37] Consequently, much of the litigation surrounding these claims and the opinions that have been rendered in connection with that litigation, have focused on the plaintiff's ability to survive the pre-trial stage of the judicial process.[38] To survive a Motion for Summary Judgement, a plaintiff must be able to convince a judge that there is sufficient evidence to support a finding that a genuine issue of material fact exists and that a reasonable jury could find that the prices charged by the hospital were unreasonable.[39] When evaluating the

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[33] *Id.*
[34] *Id.*
[35] Stahl, *supra* note 20, at 271.
[36] Colomar v. Mercy Hosp., Inc., 461 F. Supp. 2d 1265, 1268 (S.D. Fla. 2006); *see also* Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc., 8 So. 3d 1232, 1235 (Fla. Dist. Ct. App. 2009) (holding that evidence of unreasonableness was critical to claim breach of contract for a breach of implied covenant of good faith and fair dealing).
[37] State Farm Mut. Auto. Ins. Co. v. Sestile, 821 So. 2d 1244, 1246 (Fla. Dist. Ct. App. 2002).
[38] Herrera v. JFK Med. Ctr. Ltd. P'ship, 87 F. Supp. 3d 1299, 1302 (M.D. Fla. 2015), *rev'd*, 648 F. App'x 930 (11th Cir. 2016).
[39] *See* Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) ("Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.").

reasonableness of a hospital's charges, Florida courts have looked at three nonexclusive factors: "(1) an analysis of the relevant market for hospital services (including the rates charged by other similarly situated hospitals for similar services); (2) the usual and customary rate [the hospital] charges and receives for its hospital services; and (3) [the hospital's] internal cost structure."[40]

As stated *supra*, the fact that two of these factors—the usual and customary rates the hospital charges and receives for its services and the hospital's internal cost structure—are dependent on information that will, in most cases, have to be provided by a defendant hospital during the discovery process[41] could have a chilling effect on a litigant's ability to bring a cause of action for breach of an open-price contract due to the degree of uncertainty surrounding whether the fee assessed by the hospital was arguably unreasonable.

However, the problem with both of these arguments is that the majority of people who would have standing to bring these claims, mainly individuals without health insurance, often lack the necessary financial means to bring such a cause of action.[42] Thus, most litigants' only hope for carrying the litigation to fruition would be either to find an attorney who would accept their case pro bono or to find an attorney who would accept the case on a contingency-fee basis. As indicated *supra*, a low-income plaintiff seeking pro bono legal representation is unlikely to find an attorney to provide such representation,[43] nor is a low-income plaintiff likely to find a contract attorney who would accept the case on a contingency-fee basis.[44] As a result, the average plaintiff who could bring a cause of action against a hospital on a theory of breach of contract, fraud in the inducement, or both, would likely be unable to obtain legal representation due to a lack of financial resources.

Violation of the Florida Unfair and Deceptive Trade Practice Act

In recognizing that importance of potential litigants being able to have access to legal representation on a contingency-fee basis, Stahl, the author referenced *supra* who proposed breach of contract as a potential cause of action in hospital price gouging cases, theorized that victims of exorbitant hospital bills might also have a potential claim under the Florida Unfair and Deceptive Trade Practice Act ("FUDTPA").[45] One of the stated purposes of the FUDTPA is to "protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable,

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[40] *Giacalone*, 8 So. 3d at 1235 (quoting Colomar v. Mercy Hospital, Inc., 461 F.Supp.2d 1265, 1269 (S.D. Fla. 2006)).
[41] *Id.* at 1234-35.
[42] *See supra* section I.B.
[43] *Id.*
[44] Elihu Inselbuch, *Contingent Fees and Tort Reform: A Reassessment and Reality Check*, 64 LAW & CONTEMP. PROBS. 175, 176–77 (2001) ("Plaintiffs retain counsel on a contingent fee basis to pursue a wide variety of claims outside the arena of tort law, such as actions based on the violation of federal civil rights, antitrust, and securities statutes, and even garden variety collection cases. But the overwhelming number of contingent-fee retentions occur in tort cases . . . .").
[45] Stahl, *supra* note 20, at 280.

deceptive, or unfair acts or practices in the conduct of any trade or commerce."[46] The FUDTPA specifically outlaws, inter alia, "unfair or deceptive acts or practices in the conduct of any trade or commerce."[47] However, the FUDTPA contains no definition of what type of conduct qualifies as "unfair acts."[48] Consequently, the Florida Supreme Court brought clarity to the term in *PNR, Inc. v. Beacon Property Management, Inc.* by defining an unfair practice as one that "offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[49] Moreover, the Court clarified that although the exact language of the FUDTPA outlaws "unfair acts," a cause of action can arise from a single unfair or deceptive act.[50]

With these principles in mind, Stahl argues that a patient with a cause of action for breach of an open-price contract may also have a claim against the offending hospital for violating the FUDTPA.[51] Stahl points out that bringing a claim for violation of the FUDTPA in conjunction with a claim for breach of an open-price contract would be beneficial, especially for uninsured patients, because "the statute permits the court to award attorney's fees to the prevailing party."[52] In essence, Stahl alludes to the same point that is made in this article, which is that uninsured patients will normally not be capable of financing their own litigation and thus, it is necessary to tie the patient's underlying claim to a statutory cause of action that permits the patient's attorney to take the case on a contingency-fee basis.[53] Moreover, Stahl argues in support of his position that the ability of a patient's lawyer to collect attorney's fees from a hospital charging unreasonable rates is important because "without the recovery of attorney's fees, many claims against emergency service providers would be 'negative-value suits' where the cost of attorney's fees exceeds the total expected recovery from the claim."[54]

However, the underlying problem with bringing a claim under the FUDTPA in conjunction with a cause of action for fraud in the inducement or breach of an open-price contract is that the FUDTPA provides that "the *prevailing party* . . . may receive his or her reasonable attorney's fees and costs from the nonprevailing party."[55] So, given that the FUDTPA's attorney's fee provision only allows the prevailing party to collect attorney's fees and costs, bringing a claim under the FUDTPA is not without risk to the patient, and Stahl points out as much in the context of a breach of an open-price contract case.[56]

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[46] Fla. Stat. § 501.202(2) (2020).
[47] Fla. Stat. § 501.204(1) (2020).
[48] Fla. Stat. § 501.203 (2020).
[49] PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003) (internal quotation marks omitted).
[50] *Id.*
[51] Stahl, *supra* note 20, at 280.
[52] *Id.* at 281.
[53] *Id.* at 281-82.
[54] *Id.* at 282.
[55] Fla. Stat. § 501.2105(1) (2020) (emphasis added).
[56] Stahl, *supra* note 20, at 282-83.

II. DETERMINING WHETHER A HOSPITAL'S FEES ARE UNREASONABLE

A survey of the case law on the topic of hospital price gouging in the context of breach of an open-price contract, and other statutory claims arising from it such as violations of the FUDTPA, shows that one of the main factors at issue in these cases is whether the rates being charged by hospitals are "reasonable."[57] In *Colomar v. Mercy Hospital, Inc.*, Barbra Colomar ("Colomar") went to the hospital because she was experiencing shortness of breath.[58] Colomar did not have private health insurance and did not qualify for any type of public assistance programs.[59] Prior to being admitted, she signed an "Authorization and Guarantee" form under which she agreed to pay any hospital bills that were not covered by insurance or other means, but the contract did not specify the services that Colomar would receive nor did it indicate the amount she would be obligated to pay for them.[60] The treatment rendered to Colomar by the hospital consisted of steroids, oxygen, and respiratory therapy, and Colomar's stay at the hospital lasted a total of twenty-six hours.[61]

Colomar later received a bill from the hospital for $12,863 and eventually filed a class action lawsuit against the hospital on behalf of all uninsured patients at Mercy Hospital, alleging breach of contract and two counts of violating the FUDTPA.[62] In her First Amended Complaint ("FAC"), Colomar alleged that "the bill she received from Mercy was inflated and unfair when compared to the rates charged to, and accepted from, patients with insurance or patients covered by Medicaid or Medicare."[63] Colomar claimed that "differential pricing alone was sufficient to constitute a breach of contract because Florida law requires the amount of an open pricing contract to be reasonable."[64] Though the court agreed that Colomar was only obligated to pay a reasonable price for the services rendered by the hospital, it concluded that proof of differential pricing, by itself, was not sufficient to show that the prices charged by the hospital were unreasonable.[65] Accordingly, the court dismissed Colomar's FAC without prejudice but granted her leave to amend and allege additional facts that would establish unreasonableness.[66]

In her Second Amended Complaint ("SAC"), Colomar made a number of allegations that, inter alia, focused on the difference between the amount Colomar was charged for the services she received and the amount it actually cost the hospital to render the services to her and the difference, in terms of cost, between what uninsured patients

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[57] Colomar v. Mercy Hosp., Inc., 461 F. Supp. 2d 1265, 1268 (S.D. Fla. 2006); Urquhart v. Manatee Mem'l Hosp., No. 8:06-CV-1418-T-17EAJ, 2007 WL 781738, at *3 (M.D. Fla. Mar. 13, 2007); Day v. Sarasota Drs. Hosp., Inc., No. 8:19-CV-1522-VMC-TGW, 2021 WL 288969, at *5 (M.D. Fla. Jan. 28, 2021).
[58] *Colomar*, 461 F. Supp. 2d at 1267.
[59] *Id.*
[60] *Id.* at 1268.
[61] *Id.*
[62] *Id.* at 1267-68.
[63] *Id.* at 1268.
[64] *Id.*
[65] *Id.*
[66] *Id.*

were charged for the hospital's services and what public and private insurers were paying for the hospital's services.[67] In response to Colomar's SAC, the defendant filed a Motion to Dismiss for failure to state a claim.[68]

A. Market Analysis

As a starting point, the court determined that "no single factor can be used to determine the reasonableness of . . . [a] hospital['s] charges."[69] Rather, the court concluded, based on a thorough review of the case law in Florida and other states, that "several non-exclusive factors are relevant to the inquiry."[70] The court went on to indicate that "those factors include . . . : (1) an analysis of the relevant market for hospital services (including the rates charged by other similarly situated hospitals for similar services); (2) the usual and customary rate [the hospital] charges and receives for its . . . services; and (3) . . . [the hospital's] internal cost structure."[71]

In response to the defendant's argument that unreasonable prices could only be demonstrated by showing that a hospital's prices were grossly excessive as compared to the market rate for such services, the court determined that such a standard would be "far too restrictive a test of reasonableness."[72] However, the court specifically acknowledged that without question "what the market charges for similar services is one relevant measure of reasonableness." To support this conclusion, the court cited cases from not only Florida but also Tennessee, Indiana, and Illinois — all of which held in some fashion that, in the context of an open-price contract, a comparison of an allegedly unreasonable charge by a hospital or company for a particular service to the cost of obtaining the same service on the open market was relevant, and in some cases required, to determine the reasonableness of the charge at issue.[73]

In her SAC, Colomar alleged that the prices the defendant was charging for its services were in the top 13% of what all hospitals charged and that the defendant's "cost-to-charge ratio (a measurement of how much its charges exceed costs) is among the top 10% of all hospitals."[74] The court concluded that, at the pleading stage, these allegations were sufficient to show that the defendant's pricing structure was at the "extreme end of the range . . . " of what other hospitals were charging for similar services.[75] Thus, it is possible for the market analysis factor to weigh in favor of unreasonableness if the price charged for a service is at the upper or extreme end of what other hospitals are charging

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[67] *Id.*
[68] *Id.* at 1268-69.
[69] *Id.* at 1269.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 1270.
[73] *Id.*; *See also Bennett v. Behring*, 466 F.Supp. 689, 697–98 (S.D.Fla.1979); Victory Mem. Hosp. v. Rice, 493 N.E.2d 117, 120 (Ill. App. Ct. 1986); *Galloway v. Methodist Hosp., Inc.*, 658 N.E.2d 611, 614 (Ind. Ct. App. 1995); *Doe v. HCA Health Serv. of Tenn.*, 46 S.W.3d 191, 198 (Tenn. 2001).
[74] *Colomar*, 461 F. Supp. 2d at 1270.
[75] *Id.*

for the same service.[76] Moreover, this view has found support in the subsequent cases that have adopted the test articulated in *Colomar*.[77]

B. Differential Pricing

The second factor that the court looked at in *Colomar* was the defendant's differential pricing scheme, which the court defined as "the price charged for the same services to other patients within the same hospital."[78] The court pointed out the reasoning as to why this factor was significant in the analysis by indicating that "the prices charged to other patients, and the amounts received from them, within the same system often differ, and this difference may offer some insight into the value of the actual services provided."[79] The court ascertained this factor by looking at two cases, one from Florida, *Payne v. Humana Hospital*, and one from Pennsylvania, *Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc.*, which is particularly relevant.[80]

In *Temple University Hospital, Inc.* ("*Temple*"), the Pennsylvania Supreme Court articulated the appropriate method of calculating damages in a cause of action premised on a quasi-contract theory.[81] The court indicated that in such cases involving healthcare providers "the law implies a promise to pay a *reasonable fee* for a health provider's services."[82] The court indicated that when considering what constitutes a "reasonable fee," the amount that a hospital actually receives for its services is more important to the inquiry than its published rates, since the hospital will normally only receive full compensation based on its published rates in a small minority of the bills it processes.[83] This conclusion was based on the fact that there was evidence in *Temple* that the defendant hospital received less than its published rates 94% of the time, and thus, the court held that "those rates cannot be considered the value of the benefit conferred because that is not what people in the community ordinarily pay for medical services."[84]

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[76] *Id.*
[77] *See* Day v. Sarasota Doctors Hosp., Inc., No. 8:19-CV-1522-VMC-TGW, 2021 WL 288969, at *7 (M.D. Fla. Jan. 28, 2021) (holding that a reasonable jury could infer that a charge was unreasonable based on evidence that hospital was charging two to three times what other hospitals were charging for same service); Leslie v. Quest Diagnostics, Inc., No. CV171590ESMAH, 2019 WL 4668140, at *5 (D.N.J. Sept. 25, 2019) ("In sum, Plaintiffs allege that Quest's chargemaster prices are unreasonable, unfair, or excessive based on . . . payments received for these services by both Quest and other laboratory testing services. . . . As to these remaining claims based on a theory of excessive pricing, the [defendant's] motion to dismiss is DENIED.")
[78] *Colomar*, 461 F. Supp. 2d at 1271.
[79] *Id.* at 1272.
[80] *Id.* (Citing Payne v. Humana Hosp. Orange Park, 661 So. 2d 1239, 1242 (Fla. Dist. Ct. App. 1995); Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc., 832 A.2d 501, 510 (Pa. Super. Ct. 2003)).
[81] Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc., 832 A.2d 501, 507-08 (Pa. Super. Ct. 2003).
[82] *Id.* at 508 (emphasis added).
[83] *Id.*
[84] *Id.*

Accordingly, the court in *Colomar* adopted the reasoning in *Temple* and found that "the rates hospitals charge for services do not always accurately reflect the value of the services, especially when the hospital routinely accepts much less for them."[85] Moreover, the court pointed out that if a court were to simply focus on what the defendant hospital charged as compared to its competitors, a group of hospitals could grossly overcharge for their services, thereby creating false perception of value.[86] Since the plaintiff in *Colomar* had alleged that private and government insurance carriers paid significantly less than what she was being charged for the defendant hospital's services, the court determined that "[t]his allegation, if borne out during discovery, would be evidence in support of the conclusion that the charges imposed on Plaintiff are unreasonable."[87]

C. Internal Cost Structure

Lastly, the third factor that the court focused on was the defendant hospital's internal cost structure.[88] The court found support for this factor in cases from Illinois, Tennessee, and New York — all of which used a hospital's internal cost structure as a factor in determining the reasonableness of charges for services rendered. Even more importantly, the court pointed out that analyzing a hospital's internal cost structure is a practical gauge of reasonableness.[89] As the court put it, "[i]t makes sense to consider a hospital's internal costs in determining whether the hospital's charges are reasonable because such evidence might account for different prices that would not be fairly reflected in a simple comparison to other hospitals in the market."[90] In defining the contours of the cost-structure factor, the court noted that "if a hospital has additional, atypical internal costs compared to others in the market, then higher prices might still be reasonable even though those rates exceed the market price."[91] After considering the plaintiff's allegation that the defendant hospital had charged her six times what it actually cost the hospital to render the service, the court ultimately concluded that it could not "conclude as a matter of law that charging 600% above costs is reasonable."[92]

It is worth noting that the decision, analysis, and factors articulated in *Colomar* have been adopted, in part or completely, or cited with approval in various jurisdictions, at both the state and federal level, including Alaska, Florida, Texas, New Jersey, and South Carolina.[93] Thus, at the very least, it can be said that various courts are acknowledging that

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[85] *Colomar*, 461 F. Supp. 2d at 1272.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] Alaska Native Tribal Health Consortium v. Premera Blue Cross, No. 3:12-CV-0065-HRH, 2015 WL 12159388, at *3-5 (D. Alaska July 2, 2015); United States v. Berkeley Heartlab, Inc., No. 9:11-CV-1593-

in the context of hospital pricing, determining what constitutes a "reasonable price" for services rendered requires a more in-depth, case-by-case analysis than the average open-price or quasi-contract claim due to the uniqueness of hospitals' pricing schemes in general.

III. LINKING UNREASONABLE PRICING TO THE FCCPA

The link between a hospital charging unreasonable fees to uninsured or underinsured patients and a cause of action under the Florida Consumer Collection Practices Act ("FCCPA") is relatively straight forward in terms of legal theory. The FCCPA governs the debt collection activities of both third-party debt collection agencies and "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[94] The FCCPA was enacted to complement the federal version of the legislation, the Fair Debt Collection Practices Act ("FDCPA"), and the Florida legislature clearly intended for the FCCPA to provide Florida residents with more protection from aggressive debt collection practices than the protection afforded to them under the FDCPA.[95] There are a number of prohibited activities under the FCCPA that constitute a violation if it is proven that a defendant engaged in such activities, one of which is to "[c]laim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate . . . ."[96] Thus, in the context of hospital price gouging claims, the question becomes: could an attempt to collect an unreasonable fee from an uninsured patient be considered an attempt to collect an "illegitimate debt" under the FCCPA?

A. Attempting to Collect an Illegitimate Debt Under the FCCPA

A cause of action for violating the FCCPA's prohibition on collecting illegitimate debts has "three elements: an illegitimate debt, a threat or attempt to enforce that debt, and knowledge that the debt is illegitimate."[97] Generally, an illegitimate debt under the FCCPA can take one of two forms, either a debt that a debt collector is prohibited by law from collecting or a debt where a debt collector is attempting to collect more compensation than they are entitled to.[98] In the context of an unreasonably priced hospital bill, the bill at issue

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RMG, 2017 WL 2972143, at *5 (D.S.C. July 12, 2017); Leslie v. Quest Diagnostics, Inc., No. CV171590ESMAH, 2019 WL 4668140, at *5 (D.N.J. Sept. 25, 2019); Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc., 8 So. 3d 1232, 1235 (Fla. Dist. Ct. App. 2009); In re N. Cypress Med. Ctr. Operating Co., Ltd., 559 S.W.3d 128, 135 (Tex. 2018).

[94] Fla. Stat. § 559.55(7) (2020).

[95] Fla. Stat. § 559.552 (2020).

[96] Fla. Stat. § 559.72 (2020).

[97] Davis v. Sheridan Healthcare, Inc., 281 So. 3d 1259, 1264 (Fla. Dist. Ct. App. 2019), review granted sub nom. Lab. Corp. of Am. v. Davis, No. SC191923SC191936, 2020 WL 764156 (Fla. Feb. 17, 2020).

[98] Marchisio v. Carrington Mortg. Servs., LLC, 919 F.3d 1288, 1305-06, 1319 (11th Cir. 2019) (reversing grant of summary judgment in favor of defendant where plaintiff alleged FCCPA violation for attempting

could potentially fit into either category. For example, it is settled law in Florida that a patient who enters into an open-price contract with a hospital is only responsible for paying the hospital a "reasonable" fee for the services received.[99] So, when a hospital issues a bill that is unreasonably priced, the bill could be viewed as either the hospital attempting to collect more compensation than they are owed, since the patient does owe them a reasonable fee and nothing more, or a debt that they are prohibited by law from collecting any amount over what is reasonable.

In *Hewit v. Stern*, for example, a class of mortgagees that were in default brought suit alleging that the law firm representing the mortgagors committed multiple FCCPA violations by attempting to collect illegitimate debts.[100] Specifically, the plaintiff alleged that he had sent a letter to the defendant requesting the reinstatement amount for his mortgage, and in response, the defendant sent the plaintiff a letter with a list of charges that the defendant alleged were due and owing.[101] Within that list were charges for one future mortgage payment that had not yet accrued, attorney's fees that had not yet been earned, and flat fees for postage charges.[102] With respect to the attorney's fees and the future mortgage payment, the court found that attempting to collect these debts before they were due was a violation of the FCCPA under section 559.72(9) of the Florida Statutes.[103] Similarly, the court, citing to First District Court of Appeal's decision in *Robins v. McGrath*, found that the postage charges were office expenses, not costs, that could not be charged to an adverse party, and even if they could, the court held that the plaintiff would only be responsible for the actual cost of postage, not a standard flat fee.[104]

An unreasonable fee for services rendered by a hospital in the context of an open-price contract is analogous to *Hewitt* in many respects. Like the attorney's fees and mortgage payment that had not yet accrued in *Hewitt*, any amount charged by the hospital over and above what is reasonable could be viewed as either a debt that did not accrue or a fee that had not been earned. Moreover, though the law firm in *Hewitt* was prohibited from collecting postage charges against an adverse party as a matter of law, the court pointed out that even if they could recover postage, charging any amount over what was actually due, the actual cost of postage, would constitute an FCCPA violation as an attempt

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to collect mortgage debt after it had been discharged); Hewitt v. Stern, No. 502009CA036046XXXXXM, 2012 WL 8018580 (Fla. Cir. Ct. Sep. 27, 2012) (holding that attempting to collect more on mortgage than currently owed and attorney's fees that had not been earned is FCCPA violation); Pace v. Green Tree Servicing, LLC, No. 162014CC3939XXXXMA, 2014 WL 4999218, at *1 (Fla. Cir. Ct. Oct. 06, 2014) (holding plaintiff stated cause of action under FCCPA where mortgage servicer attempted to collect debt after discharge by bankruptcy court).

[99] Payne v. Humana Hosp. Orange Park, 661 So. 2d 1239, 1241 (Fla. Dist. Ct. App. 1995).

[100] Hewitt v. Stern, No. 502009CA036046XXXXXM, 2012 WL 8018580 (Fla. Cir. Ct. Sep. 27, 2012).

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* (Citing Robbins v. McGrath, 955 So. 2d 633 (Fla. Dist. Ct. App. 2007)).

to collect an illegitimate debt,[105] and it is this line of reasoning that goes to the heart of how an unreasonably priced hospital bill can constitute an FCCPA violation. Without question, a hospital is entitled to a reasonable fee for services rendered to an uninsured patient who enters into an open-price contract with it, or alternatively, where emergency services were rendered, and the hospital is seeking compensation under a quasi-contract theory. However, a hospital in such a situation is limited to only a reasonable fee, and any attempt to collect a fee that exceeds what is considered reasonable could clearly be viewed as a "threat or attempt" to collect an "illegitimate" debt, since an unreasonable fee by definition exceeds what the hospital is entitled to.

The last element of an FCCPA violation for attempting to collect an illegitimate debt, knowledge that the debt is illegitimate, requires that the plaintiff demonstrate that the defendant had "actual knowledge" that the debt was illegitimate.[106] The same knowledge requirement has been imposed on plaintiffs' attempting to prove that a debt collector violated section 559.72(18) of the Florida Statutes, which prohibits debt collectors from contacting a debtor directly if the debt collector "has knowledge of, or can readily ascertain, . . . [the defendant's] attorney's name and address."[107] To meet their burden under 559.72(18), some plaintiffs have sent an offending debt collector a letter to place them on notice that the debtor is represented, a tactic which has been successful in more than one case.[108] Thus, the requirement that the defendant have actual knowledge that the debt they are attempting to collect is not legitimate may be able to be satisfied by sending the defendant hospital a letter indicating that the alleged debt they are attempting to collect is unreasonable.[109]

B. Attorney's Fees Under the FCCPA Cause of Action

The biggest benefit to couching a breach of an open-price contract claim within an FCCPA claim is the manner in which attorney's fees are awarded under the FCCPA. Section 559.77 of the Florida Statutes provides, inter alia, that a defendant who is found liable under the FCCPA is liable for "court costs and reasonable attorney's fees incurred by the plaintiff . . ." and that "if the court finds that the [plaintiff's] suit fails to raise a justiciable issue of law or fact, the plaintiff is liable for court costs and reasonable attorney's fees incurred by the defendant."[110] However, the statute is silent as to whether

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[105] *Id.*; *See also* Daniel v. Select Portfolio Servicing, LLC, 159 F. Supp. 3d 1333, 1336 (S.D. Fla. 2016) (holding that plaintiff stated cause of action under FCCPA by alleging mortgage servicer charged more money in fees than what was permitted by law).
[106] Marchisio v. Carrington Mortg. Servs., LLC, 919 F.3d 1288, 1312 (11th Cir. 2019).
[107] Millstein v. Orlando Orthopedic Assocs., MD, P.A., No. COCE-17-002133 (52), 2017 WL 10260145, at *3 (Fla. Cir. Ct. Dec. 22, 2017) ("The FCCPA and Florida courts interpreting same, require only that the creditor have knowledge of the Plaintiffs representation with respect to debts.").
[108] *Id.*
[109] *Id.* (holding that defendant was placed on notice that plaintiff was represented by attorney under FCCPA after receiving a letter of representation with respect to debt); *accord* Corley v. Trustus Medical Transport, No. 2012-CC-361, 2014 WL 5040107, at *1 (Fla. Cir. Ct. July 31, 2014).
[110] FA

the plaintiff is liable for a prevailing defendant's attorney's fees if the plaintiff raised a justiciable issue and lost.[111]

Though not answering the question completely, Florida's Fifth District Court of Appeals answered a strikingly similar question in *Clayton v. Bryan*.[112] In *Clayton*, a plaintiff had brought a cause of action under both the FDCPA and the FCCPA that were eventually dismissed; the defendant sought to recover attorney's fees on the plaintiff's FCCPA claim pursuant to section 768.79 of the Florida Statutes, which provides, among other things, that if a defendant files an offer of judgement that is not accepted by the plaintiff within 30 days and the defendant is found to be either not liable at all or is liable for an amount that is at least twenty-five percent less than the offer, the plaintiff will be liable for the defendant's attorney's fees.[113]

The court held that since section 559.552 of the Florida Statutes instructs courts to apply the more protective provision(s) of either the FCCPA or the FDCPA in the event of an inconsistency between the two acts and since the FDCPA only allows a defendant to recover attorney's fees in the event that a suit was brought in bad faith and for the purpose of harassment whereas section 768.79 would allow a defendant who made a particular type of settlement offer in an FCCPA claim to recover attorney's fees if it applied, the FDCPA's provisions concerning a prevailing defendant's ability to recover attorney's fees preempted section 768.79.[114] Thus, though section 559.77 is silent as to whether the plaintiff is liable for a prevailing defendant's attorney's fees if the plaintiff raised a justiciable issue and lost, *Clayton* would seem to indicate that the FDCPA's provisions concerning a prevailing defendant's ability to recoup attorney's fees would be controlling in the event a defendant was given a pathway under a state statute outside of section 559.77 to recover attorney's fees.[115] Moreover, trial courts have had no problem using *Clayton* as a basis to deny defendants' attempts to invoke section 768.79 as grounds to recoup attorney's fees in FCCPA cases.[116] Consequently, this aspect of the FCCPA could make it a more superior vehicle under which to bring an unreasonable hospital billing claim than other alternatives such as FDUTPA.

IV. CONCLUSION

Hospitals charging uninsured patients exorbitant amounts for services rendered is clearly an ongoing problem that needs to be addressed and, given that many of the people

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[111] FLA. STAT. § 559.77 (2020).
[112] Clayton v. Bryan, 753 So. 2d 632, 634 (Fla. Dist. Ct. App. 2000).
[113] *Id.* at 634-35; FLA. STAT. ANN. § 768.79(1) (West 2020).
[114] *Seeid.* at 635.
[115] *Id.*
[116] *See* Hall v. Deutsche Bank Nat. Trust Co., No. 13-CC-13185, 2015 WL 13864809, at *2 (Fla. Cir. Ct. Aug. 26, 2015); Bartle v. Allied Interstate, LLC., No. 2017-CA-000043, 2017 WL 3208981, at *1 (Fla. Cir. Ct. July 18, 2017).

who are uninsured are also unable to afford legal representation, bringing an FCCPA claim along with a breach of an open-price contract action could be an effective way for lawyers to accept these claims on a contingency-fee basis and provide legal representation to those who need it most.