Emerging National Trends

Reducing Past and Future Medical Damages Through the Affordable Care Act

By Eileen L. Moss, Ann M. Songer, and Paul H. Mose

Although the courts currently are divided about the appropriate principles to apply in these areas, defense counsel have enjoyed some success by taking certain approaches.

March 23, 2016, marked six years since the enactment of the Patient Protection and Affordable Care Act (ACA). Over that six-year span, 20 million Americans have obtained health insurance. However, while the uninsured rate has steadily declined across the nation, there has been a steady increase in the number of courts addressing the ACA's effect on past and future medical damages. In 2015 alone, courts in 16 states considered new and developing arguments about the ACA's role in reducing an injured plaintiff's medical costs. While only 10 courts in 2015 ruled directly on the various arguments, those courts were evenly split on whether or not a defendant could admit evidence that a plaintiff's medical costs either were or would be reduced because of the ACA. The same trend has continued in 2016: courts in Texas and New Jersey issued conflicting rulings and thereby deepened the national divide.

This article provides a strategic blueprint for how defense counsel can leverage the ACA's cost-reducing effects when challenging a plaintiff's past and future medical damages. The article begins with background information about the key links between the ACA and modern medical costs. Next the article examines how courts have responded to legal arguments about the ACA's role in reducing past and future medical costs. The article then concludes with suggestions and strategies for using the ACA's cost-reducing effects



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to challenge inflated medical damages in tort cases.

The ACA's General Effect on Medical Expenses

While the ACA is filled with complex regulations, reforms, and restrictions, courts have focused on three provisions when evaluating past and future medical damages. These provisions are (1) the prohibition against denying coverage based on preexisting conditions, (2) the individual mandate to obtain insurance or pay a fine, and (3) the subsidies for insurance premiums and the various expenditure limits. Joshua Congdon-Hohman & Victor A. Matheson, *Potential Effects of the Affordable Care Act on the Award of Life Care Expenses* 8–9, College of the Holy Cross, Dep't of Economics Faculty Research Series Paper No. 12-01 (Sept. 2012). These provisions are separate but still have overlapping effects in reducing medical costs and expanding insurance programs.

The core obstacle for establishing that the ACA decreases a plaintiff's past medical expenses is the collateral source rule.

The prohibition against denying coverage due to preexisting conditions means that any individual should, theoretically, be able to purchase health insurance at the same price as any other demographically similar individual, regardless of preexisting medical conditions. Robin A. Cohen & Michael E. Martinez, *Health Insurance Coverage: Early Release of Estimates From the National Health Interview Survey, January–March 2015*, 1–6, Nat'l Health Interview Surv. Early Release Prog. (Sept. 1, 2015), http://www.cdc.gov/nchs/nhis/index.htm. So when an individual is injured and requires previously unnecessary present or future medical care, that individual can still apply for and receive a low-cost health insurance plan and pay no more than an uninjured individual.

Generally speaking, the individual mandate requires that a person provide proof of adequate insurance, either through an employer, public health insurance, or individual policy market. Failing to purchase health insurance between 2014 and 2016 will result in a fine of the greater of $695 a person, with a maximum of $2,085 per family, or 2.5 percent of a household's income. McKinsey & Co., *2015 OEP: Emerging Trends in the Individual Exchanges* (Sept. 2014), http://healthcare.mckinsey.com. After 2016, the fine will increase with the cost of living. This fine means that individuals who do not obtain insurance to guard against large medical expenses from a potential injury are now penalized whether or not such injury occurs. However, many individuals are exempted from the penalty if they cannot afford health insurance, which occurs if the lowest-cost plan option would exceed eight percent of the individual's income. *Id.*

Finally, the ACA's subsidies for insurance premiums and expense caps create predictable limits on most medical expenses. Individuals who do not receive health insurance through the government or from a spouse's employer, and whose income is between 133 percent and 400 percent of the poverty rate, may receive subsidies that limit the amount of income spent on premiums. *Id.* Further, the ACA establishes a maximum annual out-of-pocket premium that reflects an individual or household income level. Additional savings exist after an individual obtains insurance because final medical costs are typically discounted—sometimes by over 50 percent—to reflect a fee agreement between health-care providers and insurance companies.

While this is a very simplified summary of these three key ACA provisions, the bottom line is that the ACA expands insurance coverage, often penalizes the failure to obtain insurance, and imposes restrictions and various caps on health-care costs. As a result, the ACA can significantly affect an injured plaintiff's past and future medical costs.

Common Law Meets Modern Medicine in the Courts

For courts, the struggle lies in reconciling various common law doctrines with the modern health-care reality. For example, courts frequently focus on legal principles such as the collateral source rule and the requirement to mitigate damages when deciding whether to permit a defendant to introduce evidence about the ACA's effect in reducing health-care costs. In addition, courts apply different state statutes when examining damage issues, such as whether a defendant may admit evidence of the amount that an insurer actually paid for medical services instead of the higher amount that is initially billed before being discounted to an insurer's rates. To compound matters even further, courts distinguish between past medical damages and future medical costs, and accordingly, they apply legal doctrines and statutes differently based on this past-versus-future divide.

Nevertheless, an analysis of past and future damage calculations reveals common trends and arguments that are useful when attempting to introduce evidence of the ACA's cost-reducing effect. The following sections trace these key legal distinctions and trends by examining (1) developments involving past medical damages, (2) developments concerning future medical costs, and (3) overlapping issues for all discussions about the ACA and damage calculations.

Analysis of Reductions in Past Medical Damages

The core obstacle for establishing that the ACA decreases a plaintiff's past medical expenses is the collateral source rule. Generally speaking, the rule prohibits a party from introducing evidence that another party's loss was offset or reduced by a collateral source of payment. Restatement (Second) of Torts §920A (1979). The rule aims to reward parties for choosing to protect themselves from potential economic dangers by purchasing collateral protections, such as insurance policies, and prevent an alleged tortfeasor from benefiting from the other party's foresight. Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 McGeorge L. Rev. 965, 968 (2012). In addition, the collateral source rule is designed to shield against the potential prejudicial effect of jurors believing that an insurer already paid for any harm to a plaintiff. *Id.* The collateral source rule thus makes it difficult for a defendant

to introduce evidence about reduced medical bills under the various insurance reforms in the ACA.

However, courts are growing more receptive to arguments that combine the ACA's effect with state statutes permitting a party to show that the cost listed on a medical bill was more than what was actually paid for the service. For nearly a decade before the ACA came into existence, states began enacting tort reform statutes that permitted a defendant to show that alleged past medical damages were excessive because, if a plaintiff had health insurance, medical providers would apply significant discounts to the charges under a rate agreement with the insurer. Andrew S. Bolin, *Amounts Billed vs. Amounts Paid Limiting the Presentation of Past Medical Expenses by Plaintiffs at Trial*, 30 Trial Advoc. Q. 1, 24 (2011). In states with these evidentiary statutes, the parties typically must first obtain the court's permission to introduce evidence of the actual amount billed, and there are still prohibitions on informing the jury that the bills were discounted because the plaintiff had insurance.

Using these evidentiary statutes as stepping stones, some defendants have argued that health-care savings from the ACA are simply another type of discount that medical providers commonly apply. Specifically, limits on premiums and out-of-pocket costs, available subsidies, and expanded coverage for all Americans irrespective of preexisting conditions are essentially mandatory discounts available to all in today's healthcare system. *Jones v. MetroHealth Medical Center*, No. CV 11-75713 (Cuyahoga C'nty Ct. Com. Pl. Apr. 14, 2015) (Ohio). In addition, because the individual mandate penalizes the failure to obtain insurance, some defendants have successfully argued that the collateral source rule does not apply to evidence of the ACA's cost reductions because a plaintiff is no longer making a voluntary sacrifice to obtain insurance at his or her own expense. *See, e.g.*, *Stayton v. Delaware Health Corp. et al.*, 117 A.3d 521 (Del. 2015) (noting that the expense-reduction agreements are a benefit to the insurer instead of the insured). A plaintiff may actually save money by avoiding a larger tax penalty from failing to purchase insurance. As one Delaware court recently noted, the ACA and the "realities of today's healthcare economy diverge from the traditional underpinnings of the collateral source rule." *Id.*

Other defendants have argued that the collateral source rule does not apply if a plaintiff was injured but failed to obtain insurance beforehand. *Sprester v. Bartholow Rental Co.*, No. A-14-CV-00955-LY, 2016 WL 684933, at *2 (W.D. Tex. Feb. 18, 2016). Assuming that the ACA was in effect before a plaintiff's injury, the plaintiff would have failed to mitigate his or her damages by exercising reasonable care to obtain health insurance and thereby minimize later, avoidable medical costs. Under those circumstances, the collateral source rule would not apply because the plaintiff did not actually receive any collateral benefit from an insurer. Instead, the central argument is that the plaintiff could have received those benefits but failed to mitigate avoidable damages by purchasing health insurance. *Id.*

The discount and mitigation arguments above should provide inroads for future arguments and success by defense counsel in leveraging the ACA's cost-reducing effects to challenge the true amount of a plaintiff's past medical damages. Nevertheless, while some defendants have been successful against the collateral source rule, most courts are reluctant to allow defendants to introduce evidence regarding what a plaintiff did or could save on past medical bills by taking advantage of the ACA. Jesse Coleman & Christopher Conatser, *Health Reform, the Personal-Injury Lawyer's Friend,* The Nat'l L. J. (Online) (March 9, 2015) (archived content available from LexisNexis). For most courts, "insurance" is still a forbidden word—especially in front of juries. *Cowden v. BNSF Ry. Co.*, 980 F. Supp. 2d 1106, 1112 (E.D. Mo. 2013); *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 455, 5 N.E.3d 11, 21 (N.Y. 2013). Still, defense counsel should use any applicable evidentiary statute concerning discounted medical bills to introduce evidence of medical providers' write-offs, and if possible, to obtain a hearing and lay the foundation for the ACA-related arguments as a preliminary challenge to the collateral source rule's application in the case.

Analysis of Calculating Future Costs

Defendants have stronger arguments for introducing evidence about the ACA's effect on medical expenses when disputing a plaintiff's estimate of future damages. The core tension for issues involving future damages is the risk of a windfall gain for a plaintiff versus the risk of undercompensation due to some speculation about the ACA's future by a defendant.

Initially, most courts also consider the collateral source rule when deciding whether or not evidence of the ACA's effect is admissible for future cost-calculation purposes. The same arguments about mitigating damages applies in the future damages context because the ACA ensures that an injured plaintiff—no matter what injuries or health conditions—can obtain insurance and calculate future insurance costs based on the applicable premium limit and potential government subsidy. *Brewington v. U.S.*, 2015 WL 4511296, Case No. CV 13-07672-DMG (C.D. Cal. Jul. 24, 2015). Thus, a failure to obtain insurance would not justify an inflated damages award because a plaintiff is not free to pass avoidable losses onto the defendant. The spectrum for premium caps and eligibility for government subsidies is wide, but the ACA provides significant cost reductions for an injured plaintiff's future medical expenses.

Where defendants face resistance is in seeking to introduce evidence about how the ACA reduces a particular plaintiff's total future medical costs. Assuming that a plaintiff faces financial hardship, there is a predictable expense ceiling for insurance coverage based on the plaintiff's income level. The annual maximum out-of-pocket expense if often $6,600. However, in efforts to keep this evidence away from juries, plaintiffs have had some success in arguing that these types of calculations are confusing to juries and would prejudice the plaintiffs. *Patchett v. Lee*, No. 29A04-1501-CT-1, 2015 WL 7352582, at *10 (Ind. Ct. App. Nov. 19, 2015); *Joerg v. State Farm Mut. Auto. Ins. Co.*, No. SC13-1768, 2015 WL 5995754, at *6—7 (Fla. Oct. 15, 2015). Other plaintiffs have successfully argued that the evidence is speculative because it assumes that the ACA will not eventually be overturned after the next election and that the deductibles, co-pays, and other expenses instead will remain the same throughout a plaintiff's life. *See, e.g.*, *Dohl v. Sunrise Moun-*

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tainview Hosp., Inc., 2015 WL 1953074, at *2–4 (Nev. Dist. Ct. Apr. 20, 2015) (listing common arguments that plaintiffs' raise about the ACA's allegedly speculative chances for survival).

While those concerns may certainly have some merit, restricting evidence of the true cost of future medical services is equally, if not more, prejudicial to a defendant because a jury will only hear a plaintiff's side of the story. *See Berryhill v. Daly*, No. STCV1102180, 2015 WL 5144735 (Ga. State Ct. Chatham C'nty, May 15, 2015) (discussing risk of prejudice in excluding evidence about cost reductions under the ACA). Moreover, as an increasing number of defendants are successfully pointing out, it is much more reasonable to believe that the ACA is "likely to continue into the future," so not only will juries become increasingly familiar with the law's provisions, but the true speculation is excluding evidence of the ACA's cost-saving effects because of a belief that someday the law might go away. Congdon-Hohman & Matheson, *supra*, at 14–16. Any concerns about wild speculation from either side are better resolved through competing expert testimony so that both sides may present a complete analysis of their respective damage estimates. *See Jones v. MetroHealth Medical Center*, No. CV 11-75713 (Cuyahoga C'nty Ct. Com. Pl. Apr. 14, 2015) (Ohio) (permitting expert testimony from both parties about the true cost of the plaintiff's future medical costs).

It should be noted that even if specific evidence about the ACA's effect is kept from a jury, defense counsel should pursue other avenues to challenge a plaintiff's overinflated damages estimate. In several cases across the nation, courts have placed serious restrictions on a defendant's ability to discuss health insurance and savings effects on future medical expenses. Yet defense counsel have used the various evidentiary statutes to request a hearing to present evidence of discounts and cost reductions to a court. While only some of that evidence reached a jury, several courts were hesitant to uphold eight-digit awards for future medical costs after seeing substantial evidence of the lower, more-accurate cost of a plaintiff's future medical care. In some cases, the courts granted a defendant's post-trial motion to reduce a judgment to a more reasonable figure, and in other cases the courts informed a plaintiff's counsel before trial that any award for future damages would be subject to a reduction to account for savings from the ACA. *See Jones v. MetroHealth Medical Center*, No. CV 11-75713 (Cuyahoga C'nty Ct. Com. Pl. Apr. 14, 2015) (Ohio) (reducing $8,000,000 award to $2,951,291); *Peralta v. Quintero*, No. 12CV3864-FM, 2015 WL 362917, at *9–10 (S.D.N.Y. Jan. 26, 2015). These outcomes are not surprising because a plaintiff's future damage estimate may be 13 times higher than what the plaintiff or an insurer will actually pay for those services. *Delaware Health Corp. et al.*, 117 A.3d at 521. Therefore, while presenting ACA-related evidence to a jury is desirable, an increasing number of defendants are finding more success by educating the courts about the true cost of a plaintiff's medical damages and then winning motions to reduce an excessive verdict.

Three Overlapping Strategy Points

Defense counsel should be aware of three strategic considerations when raising ACA-related arguments as a challenge to a plaintiff's damage estimates.

First, defense counsel should strictly follow any court order to refrain from mentioning the existence or potential savings from insurance to a jury. Appellate courts have allowed little room for error if a comment about insurance slips out during a trial, and the risk of having a favorable verdict overturned when that happens is too great to ignore. *See, e.g., Deeds v. Univ. of Pa. Med. Ctr.*, 110 A.3d 1009, 1013 (Penn. Sup. Ct. 2015) (reversing defense verdict where defendant introduced evidence of the plaintiff's insurance coverage). However, some courts have permitted defense counsel to present insurance-related evidence when a plaintiff raises the issue first and thus waives the protection of the collateral source rule. *See, e.g., Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 545 (Mo. Ct. App. 2008) (permitting a defendant to introduce evidence about the plaintiff's insurance coverage after plaintiff claimed he could not afford to pay his medical bills).

Second, courts in most states have only issued, at most, a handful of opinions on the tension between medical damage estimates and the ACA's effect on medical expenses. There is plenty of room for creativity and shaping the law in this area. Thus far, defendants have succeeded by coming up with novel arguments and linking their arguments to related subjects and statutes, such as the evidentiary statutes discussed above. By digging into the particular state laws wherever a case is situated, there are bound to be other, unique legal concepts and statutes that can bolster an argument for introducing evidence of the ACA's cost-saving effects to a jury. Exploring those nuances go beyond the capabilities of this article, but this article does provide a blueprint for the type of arguments that have persuaded courts over the last few years.

Third, several practitioners have used the ACA's effect successfully in settlement discussions to reduce the value of various tort cases. Even when a court has refused to permit a defendant to introduce ACA-related evidence, defense counsel has persuaded opposing counsel to subtract the risk of remittitur from a settlement demand and to consider that jurors are becoming increasingly aware of the ACA's role in reducing medical expenses. Max Mitchell, *Can Affordable Care Act Ruling Help the Defense Bar?*, The Legal Intelligencer (July 2, 2015), http://www.thelegalintelligencer.com (archived content available from LexisNexis). As one practitioner noted, plaintiffs' counsel must be aware that more and more jurors will wonder why a plaintiff needs such a large award if the plaintiff can just get insurance through the ACA. *Id.* Those concerns will only become more prevalent as the ACA continues to exist, and defense counsel should consider the practical uses for those concerns in reaching favorable settlements of tort cases.

Conclusion

The intersection between medical damage estimates and the cost reductions for medical damages under the ACA is an area that will continue to develop over the next decade. While courts currently are divided about the appropriate principles to apply in this field, defense counsel have the opportunity to present creative arguments to shape the future course of this area of law. FD