FUTURE MEDICALS AND THE AFFORDABLE CARE ACT

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Future Medicals and the ACA

Future Medicals Under the ACA
Basics

• **Goals**
  • Cover the Uninsured
  • Lower the nation’s cost of healthcare

• **Main Provisions**
  • Coverage mandatory or individual pays penalty
  • Eligibility guaranteed – no pre-existing condition exclusion
  • Individuals with Medicare, Medicaid etc. need not apply
Future Medicals and the ACA

Future Medicals Under the ACA
No Pre-Existing Condition Exclusion

• Historically, insurer could deny coverage based on pre-existing condition.
• Now, under the ACA, it cannot.
• 42 U.S.C. § 300gg.
• What does this mean in the Medical Liability context?

Future Medicals and the ACA

Future Medicals Under the ACA
No Pre-Existing Condition Exclusion

• Now, under ACA, claimant has the ability to obtain coverage under an ACA for future accident-related care.
Future Medicals Under the ACA
No Pre-Existing Condition Exclusion

• How can you make sure claimant actually seeks and/or obtains that coverage?
• Under what fact patterns is this even possible?
• What may be covered? What is not?

Future Medicals Under the ACA
Mitigating Damages

• 2016 Out of Pocket Maximums
  • Individual = $6,850
  • Family = $13,700
  • Excluding premiums
• Can you use this as proof that future medical damages should be capped at that amount?
• In certain cases, this may be a good argument.
Future Medicals Under the ACA
Mitigating Damages

Simplicity on the near side of complexity
- No exclusions for pre-existing conditions, and
- Everyone must enroll, so
- The only people who would be charged retail rates by medical providers are those who are breaking the law, and
- Courts do not reward scofflaws.

Future Medicals and the ACA

Future Medicals Under the ACA
Mitigating Damages

- Plaintiff rebuttals
  - Law does not require insurance coverage; it merely imposes a tax penalty if coverage does not exist
  - ACA may be repealed if Republican elected President
- What about collateral source rule?
  - This is where the battles will be fought.
**Future Medicals Under the ACA**

**Mitigating Damages**

*Collateral source rule*

The doctrine that if an injured party receives compensation for the injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay. – Insurance proceeds are the most common collateral source. – Also termed *collateral-benefit rule*.

*BLACK’S LAW DICTIONARY*, 319 (10th ed. 2009).

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**Future Medicals Under the ACA**

**Mitigating Damages**

- Health care providers and insurers negotiate rates
- Rates paid by Medicare and private insurers alike are lower based on volume and purchasing power
- Neither provider nor carrier contracts for a net loss
- Subscribers are not a party to those negotiations but still enjoy the benefits
Retail rates are often 250% higher than rates negotiated by private insurers.
Medicare rates can be 1/13th retail rates.
Retail rates are charged to uninsured patients, usually with no expectation of recovery.
Population of uninsured patients is declining.
Logically, the only people to be charged retail rates since the ACA are scofflaws with no $$$. 

Future Medicals Under the ACA
Mitigating Damages

- Plaintiffs’ burden to prove:
  1. that the value claimed for medical services is reasonable, and
  2. that the need for medical services was proximately caused by the defendant(s).
Simplicity on the far side of complexity

- Defense life care plans should eliminate questionable line items
- Attack rates being charged (generic meds)
- Include columns for services that may be covered by Medicare and, if available, pvt insurers in the locale and at what rates
- Include what Plaintiff may actually pay if enrolled and covered under the ACA

The key to getting around the collateral source rule is “reasonableness”

- Attack reasonableness of the rates suggested by the Plaintiff’s life care planner by moving to introduce evidence of actual costs
- The purpose of a tort judgment is to make victims whole if negligence and causation are found by the trier of fact
Attacking the Collateral Source Rule’s Rationales with the ACA—Part 1

- **Deterrence** - The argument that damages should be calculated at Retail Rates to deter negligence is no longer reasonable. This will result in unfairly high damage awards.

- **Unjust Enrichment** - All parties are now likely participants in insurance under the ACA. Unjustly excessive awards at Retail Rates is thus not Unjust Enrichment of the defendant; it merely represents payment of his fair share.

Attacking the Collateral Source Rule’s Rationales with the ACA—Part 2

**Eliminating the Need for Incentive** —

There is no need to incent individuals to buy health insurance, by rewarding tort claimants with excessive awards at Retail Rates, with the mandate in place. Conversely, those who opt-out and choose to pay the penalty should not be rewarded with a Retail Rate reward.
Attacking the Collateral Source Rule’s Rationales with the ACA—Part 3

Restoring the Plaintiff/Avoiding Overcompensation—

With the ACA Mandate:

The Plaintiff can be ‘made whole” without a Retail Rate Award
Life Care plans which assume ACA coverage and include uncovered benefits provide full recovery
In some cases this is 60% less.*

*Victor Matheson, and Karraker, J “Settlements and Awards for Damages Under the Affordable Care Act” DRI 3/2/2013

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Future Medicals Under the ACA

Mitigating Damages

- Halsne v. Avera Health, 2014 U.S. Dist. LEXIS 37363 (D. Minn. 2014) (rejected argument that future medicals limited to ACA costs)
- Cowden v. BNSF Railway, 2013 U.S. Dist. LEXIS 155486 (E.D. Missouri 2013) (where issue arose at trial, deft must show ACA is not collateral source)
Future Medicals Under the ACA
Mitigating Damages

- **Brewington v. U.S.**, 2015 U.S. Dist. LEXIS 97720 (C.D. Cal. 2015) (Calif. med mal law allows evidence of insurance that may cover future meds)

Future Medicals Under the ACA
Mitigating Damages

- **Bozeman v. State of Louisiana**, 2003-C-1016 (La. July 10, 2004), 879 So.2d 692 (Under the “benefit of the bargain” Medicaid recipient was not entitled to recover the amount of the amount of the “write off” [difference between the Retail Rate and the Negotiated Rate] as payment in full). No payment was made to obtain Medicaid benefits.
WHAT TO EXPECT IN THE FUTURE?

- Defense Life Care Plans will include the ACA discount in the calculation of benefits
- Defense interests will refuse to settle without the discounted ACA calculation/deductibles
- Patient’s Compensation Funds will pay future medicals at ACA discounted rates
- The defense bar/claims side will challenge the Collateral Source Rule whenever possible (California, New York, Louisiana are targets)
- LEGISLATION IS NEEDED—To modernize the Collateral Source Rule

Conclusion—Use the ACA

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