An Overview of the Affordable Care Act's Potential to Mitigate Future Damage Claims

12/23/15

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One of the fundamental elements of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001, (ACA) signed into law in 2010 is the individual mandate, which generally requires individuals to obtain health insurance or, in the alternative, pay a penalty for failing to do so. The law, and specifically the individual mandate, has been upheld by the United States Supreme Court and is fully integrated into both the state and federal health care landscape. The ACA provides an interesting opportunity for defendants in personal injury cases to challenge a plaintiff's attempt to seek extensive awards for future medical treatment by proving that by complying with the ACA and the well-established duty to mitigate damages, the plaintiff will never be liable for paying those extensive future medical bills. However, Illinois's long standing collateral source rule seemingly lies at odds with this approach, suggesting perhaps that the collateral source rule itself has been negated by the ACA.

The ACA eliminates the purpose and reasoning of the collateral source rule.

Substantively, the collateral source rule prohibits the reduction of damages to which a plaintiff is entitled in a tort case by third-party payments received, or to be received in the case of future damages, by the plaintiff. *Arthur v. Catour*, 216 Ill. 2d 72, 78 (2005). As an evidentiary rule, it bars a defendant from admitting evidence of the existence of insurance or other third-party payments which a defendant could use to show the actual cost to the plaintiff of medical treatment or, alternatively, as an affirmative defense that plaintiff did not fulfill his or her duty to mitigate damages. *Arthur v. Catour*, 216 Ill. 2d at 79. The collateral source rule was developed at a time when individuals rarely had insurance. John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1479 (1966).

The main justifications provided for the collateral source rule's implementation were that it: (1) does not punish prudent plaintiffs that purchase insurance; (2) prevents defendants from being unjustly enriched as a result of their negligence if the harmed individual had insurance; and (3) avoids prejudice to plaintiffs because juries can look unfavorably on plaintiffs suing for costs already paid by a collateral source. Illinois reaffirmed these justifications as recently as 2008 in *Wills v. Foster*, 229 Ill. 2d 393, 418 (2008). However, the Illinois Supreme Court issued its *Wills* opinion prior to the enactment of the ACA. Arguably, the ACA defeats each of these policy concerns.

Overturning the collateral source rule will not punish prudent plaintiffs as the ACA legally requires all individuals to have insurance and guarantees access to it.

First, the collateral source rule is no longer needed to guarantee that insured, or "prudent" plaintiffs, are not punished as the ACA's individual mandate requires that every individual obtain some form of minimum essential healthcare coverage. 26 U.S.C. §5000A(a). The only exceptions are religious exemptions, individuals not lawfully present in the United States, and incarcerated individuals. The ACA also provides for a guaranteed issue provision that prohibits denial of coverage based on preexisting health conditions. 42 U.S.C. § 300gg-1, 3, 4(a).

Not only does the ACA provide for a guaranteed mandate that all individuals will qualify for insurance, but it stabilizes the cost of insurance across all individuals. It does this by prohibiting the use of pre-existing health conditions in determining an individual's premium cost. The only factors that may be considered in a premium's cost is: (1) individual's age; (2) group or individual plan; (3) geographic location; and (4) tobacco use. 42 U.S.C. § 300gg. This is a critical point when considering future medical damages. Before the ACA, most severely injured tort plaintiffs could argue that they might be required to pay the billed amounts of future medical care and services out of their own pockets. *Arthur*, 216 Ill.

2d at 81. Prior to the passage of the ACA, there was no guarantee that the patient/plaintiff could obtain insurance or that the costs would not exceed certain maximum coverage amounts, or that insurers, upon receipt of medical bills related to a serious injury, would not simply deny coverage, thus leaving the patient/plaintiff personally liable. *Id.* Even if an individual with a pre-existing condition could qualify for insurance, the higher premium charged might have made it impossible for that person to afford coverage. These scenarios increased the likelihood that plaintiffs would not be insured, therefore reinforcing the purpose of the collateral source rule. The ACA ensures that all plaintiffs will have insurance at a cost not impacted by pre-existing conditions or annual/lifetime limits on payments.

Thus, the ACA not only legally ***requires*** plaintiffs to obtain minimum essential coverage, but it also ***guarantees*** that plaintiffs will be able to obtain it, regardless of any pre-existing health conditions. In sum, this eliminates any policy concerns that prudent plaintiffs would be punished and unwise plaintiffs, without insurance, would wrongfully benefit. In today's landscape, nearly all plaintiffs will have insurance.

Overturning the collateral source rule will not leave some defendants unjustly enriched as the ACA determines the damages incurred by all plaintiffs.

Second, the collateral source rule is no longer needed to guarantee that some defendants will not be unjustly enriched because they had the "good fortune" of being sued by an insured plaintiff. Before the ACA, not every plaintiff was insured. This resulted, according to some courts, in certain defendants reaping a "windfall" compared to other defendants by pure chance. However, because of the ACA's individual mandate and guarantee, the possibility of any defendant reaping this so-called "windfall" has been all but eliminated. Now, nearly every plaintiff has or should have insurance; therefore, defendants would not be unjustly enriched by limiting their liability for medical expenses to only those amounts which are required to make plaintiff whole for his net losses (i.e., actual, out-of-pocket expenses, including insurance premiums).

Moreover, defendants would still be liable for the consequences of their actions as they are still liable for plaintiffs' insurance premiums and actual, out-of-pocket expenses not covered by insurance. Given that most everyone is required to be insured, in a post-ACA world the collateral source rule permits a double recovery to nearly every plaintiff. This result is contrary to the purpose of compensatory damages in tort law, since it overcompensates plaintiffs and unnecessarily punishes defendants.

Consequently, eliminating the collateral source rule would ensure that defendants pay for the actual, out-of-pocket expenses incurred by plaintiffs while preventing undue punishment to those defendants – all of which is consistent with public policy and statutory law regarding compensatory damages.

The collateral source rule is no longer needed to manage a jury's perceptions of a plaintiff.

The collateral source rule is no longer needed to screen the jury from any knowledge that the plaintiff has health insurance. Before the ACA, the existence of health insurance was kept from juries as courts reasoned that juries might look unfavorably on plaintiffs who were suing for bills that were already paid by a collateral source. Yet post-ACA, because of the aforementioned individual mandates and guarantees of insurance, most jurors will simply assume that plaintiffs have complied with the law and purchased insurance. Hence, the collateral source rule is no longer needed to prevent jury bias towards plaintiffs.

The ACA can be used as evidence of the actual, reasonable costs of a plaintiff's claimed damages.

Even without overturning Illinois's collateral source rule, the ACA may be a valuable evidentiary tool to rebut a plaintiff's claimed damages for medical expenses. In order to recover for medical expenses, a plaintiff must prove that he has paid or will become liable to pay a medical bill that was necessarily incurred, at a reasonable price, which was a result of the tortfeasor's negligence. *Arthur*, 216 Ill. 2d at 82. If a plaintiff is admitting an unpaid medical bill, he must also establish that the bill is the "usual and customary charge" for such service. *Tsai v. Kaniok*, 185 Ill. App. 3d 602 (3d Dist. 1989). A defendant is

entitled to introduce evidence that medical bills do not reflect a reasonable or customary charge. *Wills*, 229 Ill. 2d at 418.

The "reasonable value" of a medical bill has significantly changed with the implementation of the ACA. The pre-ACA market reality was that medical services were been billed at higher rates than the projected insurance reimbursement rate (much higher in the case of Medicare/Medicaid) for a number of valid reasons. Moreover, prior to the ACA the uninsured pool was much larger, so more individuals were (1) potentially paying these "full-price" medical bills, or (2) using these services and never paying for them, resulting in an increase in the cost of the services themselves. The ACA has significantly reduced the uninsured pool and, in turn, reduced the number of individuals paying "full-price" medical bills. As a result, unpaid medical bills that do not account for projected insurance reimbursement rates are no longer "reasonable" or "customary" in the post-ACA regime. Courts should allow a defendant to admit evidence concerning the ACA to establish how it has fundamentally impacted the "reasonable value" for medical services in Illinois.

The ACA can be used to impeach plaintiff's experts, especially Life Care Planners.

Along the same line, defendants should be able use the ACA to cross-examine plaintiffs' expert witnesses, including Life Care Planners, concerning the impact that the ACA will have on the customary and reasonable charge of future medical services.

Even if an unpaid bill is admitted at trial as evidence of the reasonable value of necessary future medical services or relied on by a witness, a defendant is permitted to challenge a plaintiff on cross-examination and to introduce his own evidence of reasonableness. *Id.*, 229 Ill. 2d at 416.

The Affordable Care Act guarantees insureds are covered for nearly every type of medical expense, including: (1) ambulatory or outpatient; (2) emergency; (3) hospitalization; (4) maternity/newborn; (5) mental health; (6) prescription drugs; (7) rehabilitative services/devices; (8) laboratory services; (9) preventative testing; and (10) pediatric. Therefore, a plaintiff's witness, such as a Life Care Planner that opines as to future medical expenses relying on unpaid medical bills is simply and obviously misrepresenting the expenses that will be incurred by the plaintiff. The unpaid medical bills will likely never be paid in full—not by the plaintiff and not by any third party. The only way to eliminate the prejudice resulting from that testimony is by allowing evidence regarding how the ACA will impact the true costs of medical care in the future.

Even in a more conservative court where the ACA is not admissible substantively, it might still be used by defense counsel to impeach plaintiff's witness by questioning if: (1) the witness is aware of the ACA; (2) the ACA is the law of the land; and (3) the ACA mandates everyone to have health insurance or pay a penalty.

Opposition to this approach.

Obviously, plaintiffs will seriously oppose these efforts due to the dramatic reduction it presents in the overall potential of plaintiffs' awards. Some expected arguments in opposition include:

The ACA could be defunded or repealed by future legislation, and plaintiffs who recovered the lesser amount of future medical care under this ACA analysis would have no recourse.

The ACA does not guarantee ***all*** individuals will have insurance as some may choose to pay a penalty in the future (although this could be resolved by the defendant/insurer offering to purchase the insurance policy).

Private insurers are permitted subrogation rights, if that respective provision is in the policy, for the payments they made that plaintiff subsequently recovered against a defendant. Hence, plaintiffs are not guaranteed to double recovery if collateral source rule remains.

As to medical malpractice cases in Illinois, the Code of Civil Procedure already adequately addresses risk of double recovery by providing for post-verdict reductions pursuant to 735 ILCS 5/2-1205 (although that statute does not impact the double recovery aspect of future damages claims).

A blueprint for seeking to overcome the constraints of the collateral source rule with respect to catastrophic future damages exceeds the scope of this overview. However, it should be understood that this strategy must be employed early in the case, initially by way of written discovery but ultimately through qualified experienced defense expert witnesses in the area of health insurance coverage, especially with respect to the ACA.

Overall, the Affordable Care Act has changed the landscape of future damages, especially when considering future medical expenses. It provides a significant opportunity for the defense to challenge the present inequities of the collateral source rule. This approach is being employed in many jurisdictions across the country as the relevance of collateral source rules in light of the ACA arguably evaporate. See *Brewington v. United States of America,* No. CV 13-07672, 2015 U.S. Dist. LEXIS 97720 (C.D. Cal. July 24, 2015) (holding that it is proper to take insurance benefits available under the ACA into consideration in calculating reasonable future life care plan needs). It remains to be seen how trial courts in Illinois will resolve the apparent conflict between the collateral source rule and the realities of the cost of future medical care under the ACA.