A MIDWESTERN LAW FIRM

MEDICOLEGAL MONITOR

A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

Fourth Quarter 2015

A Word From the Practice Group Chair

The Affordable Care Act has been controversial within the country and certainly within the medical profession. One aspect of the Act that should not generate any controversy within the medical profession is its potential impact on the recovery of future medical expenses in medical malpractice litigation. In this issue Mike Denning and Alyssa Freeman of our Rockford office explain how the legal effect of the ACA may ultimately substantially reduce the amounts of money damages awarded in the future by juries in medical malpractice cases. Future medical expense is a huge contributor to what many deem to be unreasonable verdicts. We must now take the fight to the appellate courts to confirm that the ACA has abrogated the collateral source rule. Wish us luck.

This issue also looks at Medicare liens and their effect on the ability to reasonably settle a medical malpractice claim. Medicare's efforts to recoup payments made to patients who have suffered iatrogenic injuries has greatly increased the cost and the degree of difficulty in achieving reasonable settlement in meritorious claims. Ann Barron of our Edwardsville office explains when Medicare liens present such problems and those types of claims where they don't.

As always, our trial lawyers have been busy defending medical professionals in Illinois courts. We are pleased to report that two members of our practice group, Cheri Stuart, R.N. and Renee Monfort, have been recognized for their outstanding results as medical defense attorneys.

We all would also like to wish you a very happy and a very healthy new year.

David R. Sinn
Chair, Professional Liability Practice Group
dsinn@heylroyster.com

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

By Michael Denning - *mdenning@heylroyster.com*
Alyssa Freeman - *afreeman@heylroyster.com*

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,

(continued on next page)

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.

Mike Denning defends physicians and long term care facilities. He is the chair of the firm's Long Term Care/Nursing Home Practice and he handles a myriad of issues for long term care facilities, including involuntary discharge proceedings, licensure issues, fraud and abuse claims, and litigation.

Alyssa Freeman is an associate the firm's Rockford office. During law school, she served as a judicial extern in the Second District Appellate Court and the Seventeenth Judicial Circuit. She also completed a legal externship with the Illinois Appellate Defender. She concentrates her practice in civil defense litigation, including medical malpractice litigation.

Payment of Medicare Liens After the Settlement of a Wrongful Death Action

By Ann Barron - *abarron@heylroyster.com*

You just settled a wrongful death action, must the decedent's Medicare lien be satisfied out of the proceeds? It depends on whether survival damages are claimed and on the damages recoverable under the applicable state's wrongful death statute. If the claim is one brought for survival damages or the wrongful death claim or statute allows for recovery of medical expenses, then the Medicare lien must be satisfied out of any settlement proceeds. *See Mathis v. Leavitt*, 554 F.3d 731 (8th Cir. 2008) (applying Missouri law). However, if the plaintiff's claim is one solely for the decedent's wrongful death without the right to recover medical expenses, as in Illinois, then the Medicare lien need not be satisfied out of the wrongful death proceeds. *See Hall v. United Security*, 2012 IL App (1st) 112158-U (unpublished decision applying Illinois law).

The Medicare program is administered by the Department of Health and Human Services and is designed to pay the medical expenses of certain individuals. If a third party is responsible for injuring a Medicare recipient, any payment by Medicare for the recipient's medical expenses is considered conditional and repayment to Medicare is required if the responsible party's liability insurer later makes a payment for those expenses. *See* 42 U.S.C. § 1395y(b)(2)(B). Medicare may seek reimbursement from any entity that receives such a payment. *Id.*

In *Hall*, the defendants filed a motion to include Medicare as a payee on the check settling a wrongful death action filed under Illinois law. The lawsuit did not include a claim under the Illinois Survival Act. The trial court denied the motion. On appeal, the defendants argued that the failure to include Medicare on the settlement draft left them vulnerable to a suit from the federal government for sums paid by Medicare for the decedent's medical care. The Appellate Court rejected the defendants' argument. Initially, the court acknowledged the distinction between a Survival Act claim and a Wrongful Death Act claim – finding that the Illinois Wrongful Death Act allows for recovery of damages suffered by only the next of kin while the Illinois Survival Act allows for recovery of damages sustained by the decedent up until his time of death. Stating that the plaintiff's complaint contained only claims for wrongful death, the court then explained that the recoverable damages were only those based on the pecuniary loss to the decedent's survivors. Since the claims at issue were not ones for pecuniary losses, damages and pain and suffering of the decedent, there were no claims to which the Medicare lien could attach. The court emphatically held that "Medicare liens do not apply to actions under the Wrongful Death Act." Thus, when a plaintiff files a complaint for damages solely for the decedent's wrongful death, the defendants are not required to include Medicare as a payee on the settlement draft. *See also Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010) (finding that under Florida law, there was a difference between a survival act claim and a wrongful death act claim and since the claim was one for wrongful death damages only, then the Medicare lien was not required to be satisfied out of the settlement proceeds).

The need to satisfy the Medicare lien out of the settlement proceeds will arise if a survival act claim is brought or if the wrongful death act at issue allows for recovery of the decedent's medical expenses. In *Mathis*, the Eighth Circuit considered the propriety of the Medicare lien on the settlement proceeds of a wrongful death claim filed under Missouri law. The Missouri wrongful death statute provides that a fact finder may award damages "for the death and loss" of the decedent as well as "such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued." The court found that the decedent's medical costs were damages that he could have sought had he survived. Since the plaintiffs claimed all damages available under the Missouri wrongful death act, the settlement necessarily resolved the claim for medical expenses. Accordingly, the

court held that Medicare had a right to reimbursement of the amounts it paid for the decedent's medical expenses.

Thus, when settling a wrongful death claim, the settling party must consider whether a claim has been brought for survival damages and whether the wrongful death act at issue allows for the recovery of medical costs by the decedent. If the answer to both of these considerations is no, then under the current state of Illinois law, the Medicare lien need not be satisfied out of the settlement funds resolving an Illinois wrongful death action.

Ann Barron concentrates her practice in civil litigation, including medical malpractice defense and nursing home litigation. Before joining Heyl Royster, Ann served as in-house counsel at Valero in San Antonio, TX, where she managed complex environmental, commercial, class action and tort litigation.

Stuart and Monfort Honored with Trial Lawyer Excellence Award

Cheri Stuart and Renee Monfort received a 2015 Jury Verdict Reporter Trial Lawyer Excellence Award for the Outstanding Defense Verdict in a Medical Malpractice Case on October 21.

The award was in recognition of a defense verdict that Stuart, as lead counsel, and Monfort obtained after a two-week medical malpractice trial in which the plaintiff asked the jury for $5 million. The case involved a 34-year-old patient with a history of lupus who died from septic shock while undergoing surgery for necrotizing fasciitis. Stuart and Monfort represented a surgeon who was accused of failing to appropriately communicate with the anesthesia team to ensure that additional lifesaving monitoring was provided during the surgery.

The award was presented by the Jury Verdict Reporter, a division of Law Bulletin Publishing Co. at the 6th Annual JVR Awards for Trial Lawyer Excellence at the Harold Washington Library in downtown Chicago.

Stuart defends professionals and healthcare entities in medical malpractice litigation, hospital liability and long term care facility cases, and in proceedings before the Illinois Department of Financial and Professional Regulation. Prior to becoming a lawyer, she served as a registered nurse, nurse case manager and nurse-paralegal. Monfort has twenty-five years of experience defending healthcare providers and other professionals in professional liability litigation. She also provides general counsel to health care professionals, multi-specialty clinics and hospitals on a wide range of administrative, policy and risk management matters, and represents clients before the Illinois Department of Financial and Professional Regulation and the Illinois Human Rights Commission.

For More Information

If you have questions about this newsletter, please contact:

David R. Sinn
Heyl, Royster, Voelker & Allen
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601-6199
Phone (309) 676-0400; Fax: (309) 676-3374
E-mail: dsinn@heylroyster.com

Please feel free to contact any of the following attorneys who concentrate their practice in the defense of physicians, dentists, nurses, and medical institutions:

Peoria, Illinois 61601
300 Hamilton Boulevard
PO Box 6199
Phone (309) 676-0400; Fax (309) 676-3374

David R. Sinn - dsinn@heylroyster.com
Nicholas J. Bertschy - nbertschy@heylroyster.com
Roger R. Clayton - rclayton@heylroyster.com
Mark D. Hansen - mhansen@heylroyster.com
Rex K. Linder - rlinder@heylroyster.com
J. Matthew Thompson - mthompson@heylroyster.com

Chicago, Illinois 60602
33 N. Dearborn Street
Seventh Floor
Phone (312) 853-8700

Andrew J. Roth - aroth@heylroyster.com
Maura Yusof - myusof@heylroyster.com

Edwardsville, Illinois 62025
105 West Vandalia Street
Suite 100, Mark Twain Plaza III
P.O. Box 467
Phone (618) 656-4646; Fax (618) 656-7940

Richard K. Hunsaker - rhunsaker@heylroyster.com
Ann C. Barron - abarron@heylroyster.com

Rockford, Illinois 61105
120 West State Street
PNC Bank Building, Second Floor
P.O. Box 1288
Phone (815) 963-4454; Fax (815) 963-0399

Douglas J. Pomatto - dpomatto@heylroyster.com
Jana L. Brady - jbrady@heylroyster.com
Michael J. Denning - mdenning@heylroyster.com
Scott G. Salemi - ssalemi@heylroyster.com

Springfield, Illinois 62791
3731 Wabash Avenue
P.O. Box 9678
Phone (217) 522-8822; Fax (217) 523-3902

Adrian E. Harless - aharless@heylroyster.com
John D. Hoelzer - jhoelzer@heylroyster.com
Theresa M. Powell - tpowell@heylroyster.com
J. Tyler Robinson - trobinson@heylroyster.com

Urbana, Illinois 61803
102 East Main Street
Suite 300
P.O. Box 129
Phone (217) 344-0060; Fax (217) 344-9295

Edward M. Wagner - ewagner@heylroyster.com
Renee L. Monfort - rmonfort@heylroyster.com
Cheri A. Stuart - cstuart@heylroyster.com
Daniel P. Wurl - dwurl@heylroyster.com
Jay E. Znaniecki - jznaniecki@heylroyster.com

HEYL ROYSTER

Below is a sampling of our practice groups highlighting a partner who practices in that area – For more information, please visit our website
www.heylroyster.com

Appellate Advocacy
Craig Unrath
cunrath@heylroyster.com

Arson, Fraud and First-Party Property Claims
Dave Perkins
dperkins@heylroyster.com

Business and Commercial Litigation
Tim Bertschy
tbertschy@heylroyster.com

Business and Corporate Organizations
Deb Stegall
dstegall@heylroyster.com

Civil Rights Litigation/Section 1983
Keith Fruehling
kfruehling@heylroyster.com

Class Actions/Mass Tort
Patrick Cloud
pcloud@heylroyster.com

Construction
Mark McClenathan
mmcclenathan@heylroyster.com

Employment & Labor
Brad Ingram
bingram@heylroyster.com

Governmental
John Redlingshafer
jredlingshafer@heylroyster.com

Insurance Coverage
Jana Brady
jbrady@heylroyster.com

Liquor Liability/Dramshop
Nick Bertschy
nbertschy@heylroyster.com

Long Term Care/Nursing Homes
Mike Denning
mdenning@heylroyster.com

Mediation Services/Alternative Dispute Resolution
Brad Ingram
bingram@heylroyster.com

Product Liability
Rex Linder
rlinder@heylroyster.com

Professional Liability
Renee Monfort
rmonfort@heylroyster.com

Railroad Litigation
Steve Heine
sheine@heylroyster.com

Toxic Torts & Asbestos
Lisa LaConte
llaconte@heylroyster.com

Trucking/Motor Carrier Litigation
Matt Hefflefinger
mhefflefinger@heylroyster.com

Workers' Compensation
Craig Young
cyoung@heylroyster.com

Scan this QR Code for more information about our practice groups and attorneys

Peoria
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601
309.676.0400

Chicago
33 N. Dearborn Street
Seventh Floor
Chicago, IL 60602
312.853.8700

Edwardsville
105 West Vandalia Street
Mark Twain Plaza III
Suite 100
PO Box 467
Edwardsville, IL 62025
618.656.4646

Rockford
120 West State Street
PNC Bank Building
2nd Floor
PO Box 1288
Rockford, IL 61105
815.963.4454

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822

Urbana
102 E. Main St.
Suite 300
PO Box 129
Urbana, IL 61803
217.344.0060