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Law Alert

SCORE ONE FOR THE DEFENSE: APPLICATION OF THE AFFORDABLE CARE ACT TO REDUCE FUTURE DAMAGES

Affordable Care Act • May 2015

Lawyers who handle catastrophic injury cases have eagerly awaited the first rulings to address the impact, if any, of the Affordable Care Act (ACA) on claims for future damages. Before the ACA, it was uncertain whether injured individuals would have health insurance in the future. Consequently, in most jurisdictions, the collateral source rule has prevented defendants from arguing that a plaintiff's future damages should be reduced because he or she has health insurance. Plaintiffs' attorneys therefore have been permitted to present essentially unrebutted evidence projecting the cost of a plaintiff's medical expenses into the future. These projections, primarily in life care plans, are generally the single largest financial component of damage claims. Such plans often project massive expenses that can drive equally massive jury verdicts.

Since the roll-out of the ACA, along with its mandate that all Americans must obtain health insurance or face penalties, interested parties have anticipated rulings regarding what impact, if any, the ACA has on awards of future damages pursuant to life care plans. Those rulings have begun. In one recent case, *Jones v. MetroHealth*, Case No.757131, decided by Judge Ronald Suster in the Cuyahoga County Court of Common Pleas (Cleveland, Ohio), the court utilized the ACA to dramatically reduce an award of future damages.

In *Jones*, plaintiff presented a life care plan totaling $8 million. In response, defense experts in Elder Law, Life Care Planning and Nursing testified that the premiums for health insurance pursuant to the ACA are between $2,000 - $8,000 per year and that the maximum out-of-pocket expense is between $6,300 - $6,500 per year. Nonetheless, the jury returned a verdict of $14.5 million, most of which compensated plaintiff for future medical expenses. Relying on the ACA, along with provisions of Ohio law relating to damage caps and potential set-offs on past and future medical expenses, the court reduced the award by $11 million.

Based on her experience in *Jones*, the defendants' trial attorney, Leslie M. Jenny of Marshall Dennehey's Cleveland office, makes the following recommendations to counsel seeking to employ the ACA to reduce awards of future medical expenses:

- Get ahead of the curve by retaining experts and analyzing the details of plaintiff's life care plan;
- Consider retaining an Elder Law Attorney and/or insurance specialist who can assist in establishing the costs of health insurance, the benefits provided by alternate policies, and the maximum out-of-pocket expenditures;
- Retain a Life Care Planner who will carefully analyze plaintiff's life care plan to identify which elements/items are covered by the ACA;
- Consider retaining an expert to establish the cost of an annuity to fund your projection of future life care;
- Consider moving to bifurcate the trial into liability and damages because such a proceeding can obviate plaintiff's claims that evidence of ACA-mandated health insurance will taint the jury's liability determination and result in a tribunal more willing to entertain evidence on the ACA.

The trial court's ruling in *Jones* represents one stone on the path to acceptance of the ACA as a substantive limitation on awards for future medical expenses. **II**

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