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Practical Defense Considerations: Building the Foundation to Apply the ACA to Reduce Future Damages

by Leslie M. Jenny, Esq.

Lawyers handling catastrophic injury cases have closely followed the emerging body of case law regarding 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 prevented defendants from arguing that a plaintiff's future damages should be reduced because he or she has health insurance. Plaintiffs' attorneys could therefore present essentially unrequited 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.

However, given the ACA's mandate that all Americans must obtain health insurance or face penalties, defense lawyers can and do oppose future damage claims by arguing that, because plaintiffs' future damages will be paid by federally-mandated insurance, they may not be compensated through jury verdicts. In a handful of cases decided in 2015, trial courts first addressed these efforts by defense counsel to utilize the ACA to reduce awards for future damages.

One of the first and most highly-publicized of those decisions was *Jones v. Metro Health*, Case No.757131, decided in May of 2015 by Judge Ronald Sister in the Cuyahoga County Court of Common Pleas (Cleveland, Ohio). In *Jones*, where the defendants were represented by this author, the 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 the 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.

In an important ruling handed down on July 7, 2016, the Court of Appeals of Ohio, Eighth Appellate District, affirmed the trial court's use of the ACA to substantially reduce the jury's award of future damages. In *Jones v. Metro Health*, Case No.102916 (July 7, 2016), the Court of Appeals squarely rejected the plaintiff's argument that, because the ACA (and Medicare and Medicaid) are "political targets" that might be abolished or changed in the future, they should not be used to reduce the jury's award of future damages. (Id., p. 29.) This is a key appellate ruling that should be cited by defense lawyers to promote and support the use of the ACA to limit future damages.

Relevance and Impact of the Collateral Source Rule

The Collateral Source Rule, or collateral source doctrine, is an American case law evidentiary rule that prohibits the admission of evidence that the plaintiff or victim has received compensation from some source other than the damages sought against the defendant. A discussion of the ACA in terms of future damage reduction requires a reevaluation of the rationale for the collateral source doctrine, applicable in many jurisdictions, barring evidence that would otherwise significantly reduce the cost of medical care in litigation. The individual mandate under the ACA requires that almost all Americans become insured. The law prohibits: (1) lifetime limits on coverage; (2) rescinding coverage except in cases of fraud; (3) pre-existing condition exclusions; and (4) premium variations except for those based on age, premium rating area, family composition and tobacco use.

Thus, the ACA takes away the "collateral source" argument that the individual should receive the benefit of what they have had to negotiate to receive. The

"benefits" of the ACA in this scenario are not negotiated and are available and/or required by all. Since nearly every American is required to obtain insurance pursuant to the ACA, a plaintiff in an injury action having medical coverage is no longer a "fortuitous" or "negotiated" event. One cannot avoid the reality that the collateral source rule came about at a time when healthcare coverage was rare, not the necessity the ACA has made it. Given the emerging nature of this discussion and the application of the ACA to reduce future damages in litigation, it is unclear how any particular jurisdiction will fall on the determination of whether the ACA qualifies as a "collateral source." Further, this rule of law is not uniform among the United States and close attention should be directed to the rule of law governing the case in question.

Raising the ACA Issue

There is no single answer as to when and/or how to raise the issue of the applicability of ACA to reduce future damages in a single matter. However, there are several opportunities that should be considered (this is not an exhaustive list):

- Pre-suit negotiations in a catastrophic loss claim
- Asserted as a potential "affirmative defense" in an Answer
- Presented in written discovery requests as requests for information pertaining to ACA coverage, benefits, etc.
- Outlined in a detailed presentation at mediation and/or arbitration
- Addressed at a pretrial conference informally with the court and counsel
- Identified in a request for an evidentiary hearing
- Presented as a Motion in Limine by the defense
- Presented as a Motion to Preclude by the plaintiff
- Listed in particularity in jury interrogatories

When and by what vehicle the ACA is raised in this setting may depend on the jurisdiction, the parties involved and the experience of counsel with the court and their opponents.

Building the Foundation

Effectively using the ACA to reduce future damages is a data-intensive endeavor. Typically, catastrophic injury cases do not immediately make their way to the courthouse. Generally, by the time these matters make it into suit there is a substantial history of medical care. Medical care results in medical expenses by way of detailed billing, payment and write-off information. Medical expenses relating to the claimed injury are essential in putting the initial brushstrokes on the picture establishing coverage, reimbursement rates, payment trends and out-of-pocket expenses.

In laying the groundwork to present this matter for the court's evaluation it is important to have a solid understanding of both the past, related medical expenses with the accompanying coverage and payment information as well as a detailed breakdown of the future medical expenses, typically detailed in a Life Care Plan. For example, such plans generally detail future expenses relating to a list of "medical" needs. Consideration should be given to breaking down coverages under the ACA in a corresponding fashion as is detailed below.

Cost of Future Care:*	Option I (Home Care)	After Set-Off	Option II (Facility Care)	After Set-Off
A) Medical Surveillance	$ .00	0.00	$ .00	0.00
B) Therapeutic Eval.	$ .00	0.00	$ .00	0.00
C) Counseling	$ .00	0.00	$ .00	0.00
D) Case Management	$ .00	0.00	$ .00	0.00
E) Case Management	$ .00	0.00	$ .00	0.00
F) Equipment/Supplies	$ .00	0.00	$ .00	0.00
G) Medications	$ .00	0.00	$ .00	0.00
H) Home Care	$ .00	0.00	$ .00	0.00
I) Home Care **	$ .00	**$.00	$ .00	0.00
J) Facility Care	$ .00	.00	$ .00	0.00
K) Transportation	$ .00	.00	$ .00	0.00
L) Spasticity Management	$ .00	.00	$ .00	0.00
M) One Time Cost: Housing	$ .00	.00	$ 00	0.00
Total Cost of Future Care	$ .00	**$ .00**	$ .00	**$ .00**

*Table represents reductions for current and/or available benefits pursuant to evidentiary hearing testimony of (insert experts).

**Cost of Future Home Care and/or Facility Care may need to be addressed separately by the cost of an annuity or provision of alternate coverages and/or benefits.

Conclusion

Building on the success of the *Jones* decision and expanding the application of the ACA to reduce future damages in other matters and additional jurisdictions presents an opportunity for rebutting astronomical life care plans that have characterized litigation for many years. Further success certainly appears jurisdictionally-dependent and will require hard word and detailed preparation by insurers and defense counsel alike. Understanding the provisions of the ACA is the first step, followed quickly by a good strategic plan to advance the issue. Close attention must be paid to the past medical history and past coverage and payments made. Retention of qualified, helpful and tested experts rounds out the initial preparatory steps to obtain traction on utilizing the ACA to the defense advantage.