

**CLM 2016 Midwest Conference  
June 23, 2016 in Omaha NE**

**The Pros & Cons of an ACA Defense: Jurors' Views and an Insured's  
Perspective**

**I. Introduction**

While the law is still unsettled in many states regarding the Affordable Care Act (ACA), there is no doubt that life care plans based on the ACA are dramatically different than traditional life care plans and, if jurors accept these newer life care plans, damages may be greatly reduced in states allowing testimony on the ACA. However, do jurors accept arguments regarding the ACA? And if the law is so unsettled and the jurors may not accept ACA arguments, does it make sense from an insured's perspective to pay for the discovery and experts associated with the ACA?

This presentation will briefly examine the state of the law surrounding the ACA, the differences in life care plans with and without the ACA, and jurors' comments and reactions to the ACA using clips from mock trials and focus groups. In addition, a claims industry representative from a national insurance carrier will give her perspective on when it makes sense to pay for the costs associated with an ACA defense.

**II. Admissibility of ACA Evidence**

While the ACA may be a valuable tool in reducing damages, especially in catastrophic matters, the admissibility of ACA evidence varies widely from state to state and from jurisdiction to jurisdiction. The main arguments against the admissibility of the ACA are that the law is too speculative or that it is barred by the Collateral Source Rule. First, while some plaintiffs have argued that the law is too speculative to allow evidence on the issue, this argument seems to be waning given the fact the statute has been challenged several times and has repeatedly been upheld. (See, ie: Nat'l Federation of Independent Business v. Sebelius, 132 S.Ct. 2566 (June 28, 2012) and King v. Burwell, 135 S.Ct. 2480 (June 25, 2015)). In addition, none of the current presidential candidates propose abolishing the ACA. Instead, the Republican candidates argue the law should be repealed and replaced while the Democratic candidates propose fixing and/or expanding the reach of the ACA, further solidifying the ACA's future.

Accordingly, the more successful plaintiff argument currently appears to be the Collateral Source Rule and similar statutory modifications. The Collateral Source Rule prohibits the admission of evidence that the plaintiff received compensation from a third party source. States vary with respect to the application of the Collateral Source Rule. For example, some have abolished the rule in certain types of cases while others allow evidence of collateral sources in post-verdict proceedings. States with favorable rulings regarding the ACA include Ohio, California, Georgia and Hawaii. One state which has severely limited the use of the ACA is Florida. It remains to be seen which other states will follow the strict interpretation Florida has adopted. However, even within states, many cases are fact specific and may allow evidence in some situations and not in others. In addition, it does appear that more and more states are rejecting the hard and fast Collateral Source Rule and at least showing positive trends towards allowing ACA evidence.

## **II. Traditional Life Care Plans Versus ACA Life Care Plan**

All health care plans that qualify under the ACA have to meet minimum essential coverage requirements. At a minimum, each plan must cover ambulatory services, emergency room services, hospitalizations, maternity and newborn care, mental health and substance abuse, prescription medications, rehabilitation services and devices, lab services, preventative care and chronic disease management, and pediatric services. Individual health plans may cover additional services. There are also out of pocket maximums with each plan and pre-existing conditions must be covered. In addition, qualifying plans may not have life-time or annual limits on covered benefits. Things that may not be covered include dental or orthodontic treatment, modifications to the home, or cosmetic surgeries. In general, however, the ACA can greatly limit a plaintiff's life care plan as compared to a traditional life care plan.

### **Case Study-Mrs. Thrombosis**

Mrs. T was a 58-year old widow with two children who had recently undergone a hip replacement surgery at Chicago Hospital. The hip replacement surgery was in response to degeneration of the hip from osteoporosis. She underwent the surgery on Friday, Aug. 24<sup>th</sup>. She was transferred from Chicago Hospital to the Lincoln Assisted Care Facility two days after her surgery. Mrs. T resumed Coumadin therapy at that time to treat her atrial fibrillation. On the morning of Sat., September 1<sup>st</sup>, Mrs. T called for a nurse to assist her to use the bathroom. After waiting for about two minutes for the nurse to arrive, she decided to try and get to the restroom on her own. When she tried to get out of her bed, she fell to the floor and fractured her hip. She also lost two of her front teeth and she had a large gash on her face. The nurse who was assigned to Mrs. T heard the fall and responded immediately. Mrs. T's family was contacted and she was transferred to the emergency room at Chicago Hospital.

Mrs. T was coherent at the time of her admission to the ER of Chicago Hospital. She signed her consent form and was admitted to the hospital to undertake a surgical repair of her broken hip. She was admitted to the ICU and her care was initially handled by the resident on call, Dr. R. Dr. R was aware of her previous hip surgery and her Coumadin therapy. Dr. R stopped the administration of Coumadin and started Mrs. T on Lovenox to provide “bridge” coverage until the Coumadin wore off and the surgery could be undertaken. Dr. R also knew she had a history of atrial fibrillation, pulmonary hypertension, osteoporosis, was a smoker, was somewhat obese (5’4”, approximately 210 pounds, 36 BMI) and used alcohol on a regular basis. He noted some internal bleeding but delayed immediate surgery because of the risk of bleeding presented by Coumadin being in her system. Dr. R contacted the attending physician, Dr. F. who examined Mrs. T on Sunday, Sept. 2<sup>nd</sup>. Dr. F approved of Dr. R’s plan of care and scheduled the hip replacement for Tuesday Sept. 4<sup>th</sup>. The surgery could not be done sooner, according to the orthopedic surgeon, because the Coumadin would not be cleared from her system sufficiently until Tuesday.

On the morning of Monday, Sept. 4<sup>th</sup>, at 9:12 AM, Mrs. T suffered a severe stroke. Despite an immediate response from the nursing and medical staff, Mrs. T suffered significant brain injuries as a result of the stroke. She can no longer walk or speak but she retains cognitive function. She requires around the clock nursing care and assistance with all of her basic living needs. She lives in a two story home with steps leading up to the doorway. She has no walk-in shower and must step into the bathtub to bathe. Mrs. T has two children and is being cared for in the home of one of her children. The child who is caring for Mrs. T has filed a lawsuit on her behalf claiming the negligence of Chicago Hospital, Dr. R and Dr. F caused the stroke which led to Mrs. T’s current condition.

### **III. Jurors’ Views of the ACA**

#### **Jurors’ Acceptance of the ACA**

In nearly every surrogate jury deliberation, surrogate jurors have brought up the idea that insurance would cover some portion of a plaintiff’s medical costs. However, due to the current state of the law on insurance and the corresponding jury instructions prohibiting jurors from considering insurance when determining damages, the surrogate jurors follow the law and reject insurance as a means to lower damages. Therefore, ACA evidence on damages would seem to translate into powerful evidence for mitigating damages for the defense. Furthermore, the minimal evidence available seems to support this position across all venues.

## **Jurors Views of ACA Witnesses & Testimony**

As a general proposition, experts will not “win the day” with jurors. However, experts are necessary as unopposed experts leave the jurors no other choice but to accept the plaintiff expert’s testimony. With respect to the ACA, experts may include a legislative expert on the future of the ACA, an insurance industry expert who can clearly explain what is and is not covered under the ACA and/or an expert on the reasonableness of the bills to support the charges. What type of expert would be necessary in the Case Study above and which expert would the jurors view more favorably?

## **Contested Liability Versus Damages Only or Bifurcated Damages Matters**

One area where the use of ACA evidence is less clear is in contested liability matters. Traditionally, mock trials and focus groups have consistently demonstrated that jurors expect the defense to contest liability and to insist no damages be awarded. When the defendants act counter to this expectation, jurors view this as an admission of liability. Therefore, when the defense “sponsors” a damage award, this undercuts their liability argument, and often sets the “floor” for a discussion on damages. However, utilizing ACA evidence, while less clear than in damages only or bifurcated damages matters, does appear to have more promise than the traditional ways of presenting alternative damage awards.

## **IV. Claims Perspective on Costs of an ACA Defense**

### **Effective Use of the ACA**

Managing the plaintiff attorney’s expectations from the very beginning of a case is paramount to achieving your desired result; therefore, the Affordable Care Act should be woven into the discovery process. Planting the seeds of the Affordable Car Act early on will send the message that damages may be reduced due to this Act and could force the plaintiff’s attorney to reexamine the value of the case. Queries about the Affordable Care Act in interrogatories and depositions will set the stage. Retaining a life care planner and economist early on will provide you with a road map during discovery. In mediations and settlement conferences, use of the Affordable Care Act and its pertinent applications should be applied to leverage an agreeable resolution.

### **Risk Tolerance Versus Costs**

The Affordable Care Act is essentially untested. Some jurisdictions are clear about its implementation and others have ignored it completely. Is your carrier willing to test the boundaries? Know your audience! If your client/carrier is conservative and cost conscious, it is doubtful that they would take a trial court ruling up on appeal to make law. However, if your client/carrier prefers to blaze trails, bold use of the Affordable Care Act is the way to go. Know your jurisdiction! What are the chances of exercising the Affordable Care Act in your case and can you use it to your advantage? Work with your carrier to analyze the risk versus cost benefit analysis and proceed accordingly.