IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

Weber Gallagher Attorneys Paula A. Koczan and Thomas Geroulo report on the uncertainty of future medical damages defenses surrounding the results of the election and the threat of repeal to the Patient Protection and Affordable Care Act.

President-Elect Trump, the Affordable Care Act and Future Medical Damages Defenses

ABOUT THE AUTHORS

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Thomas Geroulo provides defense in general liability matters for healthcare providers, retailers, construction and commercial transportation companies, property managers and in cases of serious automobile accidents. He has crafted a portion of his practice to assist in nationwide coordination with local counsel, carriers, third party administrators and self insureds, on the applicability of the Affordable Care Act to claims of future medical damages in all types and disciplines of catastrophic loss matters across the country. He can be reached at tgeroulo@wglaw.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:

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A. Commentary on the Affordable Care Act Itself

For the last few years, the applicability of the Affordable Care Act (ACA) inside the courtroom and how it affects the estimate of long-term medical costs has been a hot button topic across the country. In opposing the entry of health insurance into evidence, the plaintiffs' bar and many judges have framed the ACA-based insurance as speculative due to the constant political threats of repeal. In rulings, Courts have held that the threat of repeal from the House of Representatives was a worthwhile reason to consider rejection of evidence.

Despite this there had been marked success in states including California, Michigan, Illinois, Ohio and New York on the use of the ACA inside the courtroom to offset future medical damages. The fundamental premise had been that with the mandate of health insurance and the guaranteed coverage of pre-existing conditions, future medical costs and coverage could be reasonably ascertained and provided as a compensable form of damages if liability were imposed thereby altering the use of billed medical rates as a barometer for awarding damages. The concepts and legal strategies surrounding these issues were additionally finding their way into mediations across the country and producing tangible results.

President-Elect Trump has most certainly called for the repeal and replacement of the ACA. His newly published website, www.greatagain.gov, makes repeal of the ACA a stated and primary goal of immediate action. Certainly, the Congress has voted on similar issues dozens of times over the last six years. As such, the arguments regarding the uncertainty of the ACA for the purposes of evaluating damages in a courtroom remain front and center. The key question and a bit of an unknown is: What happens next?

The answer, for the purposes of litigation only, likely starts with an evaluation of pre-existing condition coverage that was guaranteed by the ACA. There is little to no dispute that this is one of the most popular provisions of the legislation. The coverage of pre-existing conditions was a historic change to health insurance that most Americans embraced. Public polling has shown that the guaranteed issue (i.e. pre-existing condition coverage) tracked as high as 70 percent for all Americans and 69 percent of those registered as Republicans.[1] Tellingly, President-Elect Trump has repeatedly stated his intention to maintain guaranteed coverage for pre-existing conditions. A policy paper issued by House Speaker Paul Ryan earlier this year also provided an explicit intention to maintain this provision.[2] Furthermore, it is respectfully suggested that revocation of such a popular and critical provision to some of the most vulnerable in our population would be a sure-fire way to lose re-election. In Speaker Ryan's

[1] http://kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-march-2014/ (accessed November 11, 2016)

[2] https://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf

own words: "No American should ever be denied coverage or face a coverage exclusion on the basis of a pre-existing condition. Our plan ensures every American, healthy or sick, will have the comfort of knowing they can never be denied a plan from a health insurer."[3]

Now, we would be remiss for failing to acknowledge that in 2016, the House of Representatives and the U.S. Senate symbolically passed a repeal bill through the process of budget reconciliation which President Obama vetoed. The reconciliation process in Congress is a parliamentary procedure designed to avoid the need for 60 senatorial votes utilized to override filibusters. It specifically requires that measures to be reconciled in this fashion must have financial expenditures tied to it in order to be effective. This set of technicalities reveals the major legislative hurdle that Congress and the President-Elect face: Guaranteed Issue (i.e. Pre-Existing Condition Coverage) cannot be repealed through budget reconciliation methods because it is not expressly tied to government expenditures. This means it requires 60 senatorial votes in order to override any attempt at filibustering. These are numbers that the Republican Party are not expected to realistically achieve.[4]

These premises point to a likely conclusion that retracting coverage for those with pre-existing conditions seems unworkable in the arenas of public perception, sincere individual and family needs and parliamentary procedure. We respectfully submit that it is the guaranteed issue provision, more than any other facet of healthcare reform efforts over the last 20 years, which should inform and upend how we evaluate future medical damages in the courtroom. Those that are catastrophically injured were previously completely un-insurable in the private sector without the guaranteed issue. Is there really a political appetite to cease this type of provision?

Of course, there are several other complicated and convoluted policy considerations regarding the repeal of the ACA. Focusing solely on the insurance exchanges (merely a segment of the legislation), what happens to the states who have truly succeeded in the marketplace such as California or Kentucky? What happens to the untold billions invested by hospitals, health insurers, networks and ancillary professionals who had to invest in making this system work to the best of their abilities? Without passing political judgment on the issue, anyone can recognize the inherent complications of repeal. These items are the tip of the iceberg regardless of political beliefs and sympathies that deserve real world answers.

With the election of Donald Trump as our next president, there is genuine uncertainty as to the specific policy details that will go into further healthcare reform. Quite simply, it has

[3] *Id.*

[4] http://healthaffairs.org/blog/2016/11/09/day-one-and-beyond-what-trumps-election-means-for-the-aca/ (accessed November 11, 2016)

not been an issue that has been refined beyond mere broad strokes of, "repeal and replace." For those in the litigation world, one key conclusion we feel comfortable drawing is that some system will be in place that covers pre-existing conditions. That remains the most profound change in health insurance in the private sector and thus informs the continued debate over healthcare pricing in the courtroom. As it pertains to the ACA-based health insurance exchanges specifically, there is likely a need to pause, wait and learn deeply about what comes next. That would be a rational choice at this juncture for lawyers and clients alike.

B. <u>What Can Happen in the Courtroom Right Now?</u>

The ACA and its insurance framework in the individual markets are but one strategy employed in the courtroom these days to drive more accuracy to medical damages. The rhetorical and evidentiary force of the ACA was (and just may remain) significant but not the only option. Separate and apart from the ACA was the long standing dialogue and litigation over the fundamental concept of paid versus billed medical rates. It is well established, without debate, that a billed medical rate rarely represents an accurate measure of medical costs to a given plaintiff. The Delaware Supreme Court, in *Stayton v. Del Health Corp*., 117 A.3d 521 (Del. 2015), provided the following commentary on this issue:

1) "The fact that the written off portion of *Stayton's* medical bills is thirteen times the amount paid gives us pause….It also reflects the way in which the realities of today's healthcare economy diverge from the traditional underpinnings of the collateral source rule."
2) "Discounting is the rule rather than exception in healthcare today. Only a small fraction of persons receiving medical services actually pay original amounts billed"
3) "The small share that do are typically uninsured and yet not without means…
4) "The collateral source rule does not apply to the amounts written off by [plaintiff's] healthcare providers."

California has repeatedly concluded that billed medical rates are no longer acceptable evidence on the issue of medical damages. In *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, the Court answered the question of whether the amount billed for past medical services can be considered in determining future economic or noneconomic damages. The answer is "no." *Corenbaum* held the full amount billed for a plaintiff's medical care is not relevant to the determination of damages for past or future medical expenses, and, therefore, is inadmissible. (*Id.* at p. 1319.) Thus, it is now well-established that the amount billed for past medical services is irrelevant and inadmissible to prove future damages, including medical care costs.

These types of rulings encompass the strategy of advocating for "reasonable value" of medical damages inside the courtroom. With or without the ACA, there is still a tremendous amount of evidence and knowledge that billed medical rates are largely a fiction. This is only reinforced by those states such as New Jersey, New York, Illinois and Florida which legislatively acknowledge post-verdict reductions predicated on traditional collateral sources. Those statutory frameworks, in our view, are tacit acknowledgment of reasonable value based concepts. Furthermore, defense friendly opinions on the issue of "reasonable value" have sprung from states such as Tennessee, Indiana and Oklahoma all within the last six months.

To achieve such rulings it requires continued use of focused damages experts to properly investigate medical billing, reimbursement rates, the inadequacies of life care plans and proper future projects with an eye towards achieving accuracy, and not windfalls, in the courtroom all without even having to mention the ACA.

In addition, the ACA and the threat of repeal have absolutely no impact on the presence, use and sincere consideration of damages based concepts such as Special Needs Trusts and Liability Medicare Set Asides. These are also critical concepts for damages defenses that fortify the ability to undermine billed medical rates as competent evidence.

C. Conclusion

With the election of President-Elect Trump, there is genuine uncertainty as to the specific policy details that will go into further healthcare reform. Quite simply, it has not been an issue that has been refined beyond mere broad strokes of, "repeal and replace." For those in the litigation world, one key conclusion we feel comfortable drawing is that some system will be in place that covers pre-existing conditions. That remains the most profound change in health insurance in the private sector and thus informs the continued debate over healthcare pricing in the courtroom.

We conclude with some rhetorical questions for your consideration:

1) Will anyone truly feel comfortable repealing the guaranteed issue threatening some of our most vulnerable citizens?
2) If the GOP alternative truly improves upon the ACA in terms of coverage and affordability, then won't these arguments be that much stronger?
3) What if the GOP delivers on its stated goal of providing more transparency to healthcare pricing? What does that say about reasonable value in the courtroom?

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