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## The Affordable Care Act and Colorado's Collateral Source Rule

# THE AFFORDABLE CARE ACT AND COLORADO'S COLLATERAL SOURCE RULE

LAMAR F. JOST & MARISSA S. RONK<sup>†</sup>

The Patient Protection and Affordable Care Act (ACA or Act)<sup>1</sup> mandates near-universal healthcare coverage for Americans. Tax-paying individuals and entities largely fund the statutory system that permits near-universal healthcare coverage. Taxpayers, therefore, are not collateral to any insurance policy purchased on a federally mandated health exchange. As a result, an unresolved issue in Colorado (and around the country) is whether the ACA disaffirms the collateral source rule. This article examines that issue under Colorado law.

## I. THE AFFORDABLE CARE ACT

In 2010, President Obama signed the ACA into law.<sup>2</sup> Most of the key features of the ACA became effective on January 1, 2014.<sup>3</sup> The Act's purpose was to provide near-universal health coverage to Americans.<sup>4</sup> Since January 1, 2014, an estimated 16.9 million Americans purchased insurance on ACA-mandated health insurance exchanges.<sup>5</sup>

The ACA thus effectuated a "sea change" in American society.<sup>6</sup> That change did not come without challenges from various states, interest groups, and individuals.<sup>7</sup> The ACA, however, has withstood every major constitutional and statutory challenge. It is the law of the land, requiring legislators, judges, and lawyers to evaluate the effects of the

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1. Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended at scattered sections of 26 and 42 U.S.C.).

2. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES, Mar. 23, 2010, <http://www.nytimes.com/2010/03/24/health/policy/24health.html>.

3. DEP'T OF HEALTH & HUMAN SERVS., *Key Features of the ACA by Year*, <http://www.hhs.gov/healthcare/facts-and-features/key-features-of-aca-by-year/index.html>.

4. DEP'T OF HEALTH & HUMAN SERVS., *HHS Strategic Plan, Strategic Goal 1: Strengthen Healthcare*, <http://www.hhs.gov/about/strategic-plan/strategic-goal-1/index.html>.

5. Press Release, Rand Corporation, Health Coverage Grows Under Affordable Care Act (May 6, 2015), <http://www.rand.org/news/press/2015/05/06.html>.

6. See generally Ann S. Levin, *The Fate of the Collateral Source Rule After Healthcare Reform*, 60 UCLA L. REV. 736 (2013); Benjamin A. Geslison & Kevin T. Jacobs, *The Collateral Source Rule and Medical Expenses: Anticipated Effects of The Affordable Care Act and Recent State Case Law on Damages in Personal Injury Lawsuits*, 80 DEF. COUNS. J. 239, 239 (2013).

7. See, e.g., Geslison & Jacobs, *supra*, note 6, at 240 (discussing challenges to the ACA and concluding its "future . . . now appears secure").

ACA upon state law.<sup>8</sup> At least three major changes to state law have potentially arisen following the implementation of the ACA.

First, the ACA's individual mandate requires all individuals to purchase and provide proof of insurance.<sup>9</sup> The individual mandate requires that United States citizens and permanent legal residents maintain health insurance coverage through an employer, public health insurance, or an individual policy.<sup>10</sup> Individuals who fail to procure or maintain such insurance are subject to a penalty that the Internal Revenue Service imposes as a tax.<sup>11</sup> The United States Supreme Court upheld the ACA's individual mandate as a valid exercise of Congress's taxing powers.<sup>12</sup>

Second, to ensure universal healthcare is achieved, the ACA prohibits insurance companies from denying individuals health insurance based on preexisting conditions.<sup>13</sup> The ACA expressly addresses "essential health benefits" that must be covered for individuals who maintain insurance.<sup>14</sup> Essential health benefits include ambulatory patient services, emergency services, hospitalizations, maternity and newborn care, mental and behavioral health, substance abuse disorder services, prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventative and wellness services, chronic disease management, and pediatric services, including oral and vision care.<sup>15</sup>

The ACA limits the annual amounts of out-of-pocket medical expenses that can be incurred, excluding premiums.<sup>16</sup> As of 2015, the ACA limits the annual amounts of out-of-pocket medical expenses to \$6,600 per individual and \$13,200 per family.<sup>17</sup> Health insurers may not establish an annual or lifetime limit on the value of benefits they pay for any participant.<sup>18</sup>

Third, the ACA ensures participation in the insurance markets through a complex subsidy program for low-income individuals and for those who do not receive health insurance through the government or a family member's employer.<sup>19</sup> The Congressional Budget Office esti-

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8. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *King v. Burwell*, 135 S. Ct. 2480 (2015); Erin Christen Miller & Ryan J. Sullivan, *Looking Toward the Future, Begging for the Past: The ACA and Market-Rate Predictability for Future Damages*, 57 No. 4 DRI FOR DEF. 18 (2015) ("Despite more than 40 congressional attempts to undermine or repeal the bill, the ACA remains intact.").

9. 26 U.S.C. § 5000A (2012).

10. 26 U.S.C. § 5000A(a).

11. 26 U.S.C. § 5000A(b)(1).

12. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2600.

13. See 45 C.F.R. pts. 144, 146, 147 (2013).

14. 42 U.S.C. § 18022 (2012).

15. *Id.*

16. 42 U.S.C. §§ 18022(c)(1), 18071.

17. 42 U.S.C. § 18022(c)(1); 26 U.S.C. § 223(c)(2)(A)(ii) (2012).

18. 42 U.S.C. § 300gg-14 (2012).

19. See Joshua Congdon-Hohman & Victor Matheson, *Potential Effects of the Affordable Care Act on the Award of Life Care Expenses*, 24 J. FORENSIC ECON. 153 (2013).

mates that by 2021, 95% of nonelderly, legal residents will be insured under the ACA.<sup>20</sup>

## II. COLORADO TORT DAMAGES LAW

Plaintiffs have a legal obligation in civil cases to mitigate damages.<sup>21</sup> If a plaintiff does so, he or she can generally recover three types of damages: (1) economic damages, (2) noneconomic damages, and (3) punitive damages under limited circumstances.<sup>22</sup> Economic damages are awarded for past or future pecuniary losses the plaintiff suffered as a result of his or her injury, including reasonable and necessary medical expenses.<sup>23</sup> Noneconomic damages are awarded for non-pecuniary losses the plaintiff suffered as a result of the injury, such as pain and suffering.<sup>24</sup> Punitive damages are awarded to punish a tortfeasor who fraudulently, maliciously, or willfully and wantonly caused injury.<sup>25</sup>

In Colorado medical malpractice actions, the Healthcare Availability Act limits all damages recoverable against healthcare professionals and institutions to \$1,000,000.<sup>26</sup> Not more than \$300,000 of that award can represent non-economic damages.<sup>27</sup> A Colorado district (trial) court, however, can allow a jury to exceed the \$1,000,000 statutory cap if it determines that (1) economic damages would exceed the statutory cap and (2) application of the statutory cap would be unfair.<sup>28</sup>

## III. THE COLORADO COLLATERAL SOURCE RULE

“A collateral source is a person or company, wholly independent of an alleged tortfeasor, that compensates an injured party for that person’s injury.”<sup>29</sup> Colorado’s collateral source rule consists of two components: (1) a pre-verdict evidentiary component and (2) a post-verdict setoff rule.<sup>30</sup>

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20. *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010: Hearing Before the Subcomm. on Health, Comm. on Energy and Commerce*, 112th Cong. 8 (2011) (statement of Douglas W. Elmendorf, Director, Congressional Budget Office), available at <http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-healthcarelegislation.pdf>; see also Jeanne Sahadi, *Health reform's cost under scrutiny*, CNN MONEY, Mar. 13, 2012, <http://money.cnn.com/2012/03/12/news/economy/health-reform-costs>.

21. COLO. R. CIV. P. 8(c).

22. See *Wal-Mart Stores, Inc. v. Crossgrove*, 276 P.3d 562, 566 (Colo. 2012); COLO. REV. STAT. § 13-21-102; COLO. REV. STAT. § 13-21-102.5.

23. CJI-Civ. 6:1.

24. *Id.*; COLO. REV. STAT. § 13-21-102.5(2)(b).

25. COLO. REV. STAT. § 13-21-102(1)(a).

26. COLO. REV. STAT. § 13-64-302(1)(b).

27. *Id.*

28. *Id.*

29. *Smith v. Jeppesen*, 277 P.3d 224, 228 (Colo. 2012).

30. *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 280 P.3d 649, 654 (Colo. 2012).

Under the pre-verdict evidentiary rule, all evidence of benefits from a collateral source is inadmissible at trial.<sup>31</sup> The post-verdict setoff rule requires the trial court to reduce a successful plaintiff's verdict as a matter of law by the amount the plaintiff has been or will be wholly or partially indemnified or compensated by another person, corporation, insurance company, or fund in relation to the injury sustained.<sup>32</sup>

The statutory collateral source rule, however, contains a "contract" exception.<sup>33</sup> The contract exception provides that benefits paid to a plaintiff as a result of a contract—such as a contract of insurance—will not reduce the verdict.<sup>34</sup> The contract exception thus swallows the post-verdict setoff rule, essentially restoring the common-law collateral source rule in Colorado.

Colorado courts developed the common-law collateral source rule in order to ensure that a tortfeasor could not be relieved of the consequences of its wrong through a plaintiff's prudence and foresight in obtaining insurance.<sup>35</sup> The same rationale is used to justify the contract exception to the statutory collateral source rule.<sup>36</sup> Even though the rule may result in a plaintiff recovering for the same injury twice, the rule was justified on the ground that the windfall should inure to the benefit of the plaintiff, who had the foresight to purchase insurance, thereby generally encouraging the public to purchase insurance.<sup>37</sup>

#### IV. THE ACA'S EFFECT ON TORT DAMAGES

The ACA changes the legal landscape for litigating damages because it undermines the purpose of the collateral source rule.<sup>38</sup> Litigants have advanced three arguments in favor of the admission of benefits provided pursuant to an ACA insurance policy.

##### *A. Purchase and Maintenance of Insurance.*

A primary policy justification for the collateral source rule (and "contract exception" in Colorado) is that the collateral source rule en-

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31. See *Wal-Mart Stores, Inc. v. Cosgrove*, 276 P.3d 562, 564 & n.3; see also COLO. REV. STAT. § 10-1-135(10)(a).

32. See COLO. REV. STAT. § 13-21-111.6.

33. See *Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080, 1084 (Colo. 2010).

34. COLO. REV. STAT. § 12-21-111.6.

35. *Riss & Co. v. Anderson*, 114 P.2d 278, 281 (Colo. 1941).

36. *Colo. Permanente, P.C. v. Evans*, 926 P.2d 1218, 1233 (Colo. 1996) (en banc) (explaining the purpose of the contract exception is to "ensure that a defendant does not receive a windfall by avoiding payment of damages because the plaintiff had the foresight to purchase insurance, or enter into a contract that compensates the plaintiff for injury caused by the defendant").

37. *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1074-75 (Colo. 1992).

38. See generally *Miller & Sullivan*, *supra*, note 8; *Levin*, *supra*, note 6; *Geslison & Jacobs*, *supra*, note 6; *Congon-Hohman & Matheson*, *supra*, note 19, at 153; *Rebecca Levenson, Allocating the Costs of Harm to Whom They Are Due: Modifying the Collateral Source Rule after Health Care Reform*, 160 U. PA. L. REV. 921 (2012).

courages the purchase and maintenance of insurance.<sup>39</sup> The ACA, however, eliminates this rationale in support of the collateral source rule.<sup>40</sup> The purchase of insurance is no longer left to individual judgment.<sup>41</sup> Rather, the federal government made a decision for all U.S. citizens and legal permanent residents (with limited exceptions): individuals must maintain or purchase insurance.<sup>42</sup>

### *B. Windfall of Benefits*

Second, courts have recognized that the collateral source rule permits a “double recovery”—insurance benefits plus a monetary tort award for the same injury.<sup>43</sup> Although double recovery of the same injury is generally not permissible,<sup>44</sup> courts have traditionally permitted double recovery in the collateral source context because “if the plaintiff was himself responsible for the benefit, as by maintaining his own insurance . . . the law allows him to keep it for himself.”<sup>45</sup> The fact that nearly every individual is now required to purchase or maintain insurance stands in contrast to this line of reasoning;<sup>46</sup> no longer is the benefit a matter of an individual’s “prudence and foresight,”<sup>47</sup> but rather it is a matter of government mandate.

### *C. Right of Subrogation*

Third, and finally, a classically given justification for the collateral source rule was that the right of subrogation prevented a plaintiff from receiving double recovery. The ACA, however, does not provide insurers with a right of subrogation (unlike Medicare and Medicaid and under ERISA). Because there is no similar provision in the ACA, it “does not

39. See, e.g., *Ellsworth v. Schelbrock*, 611 N.W.2d 764, 767 (Wis. 2000) (holding “[t]he tortfeasor who is responsible for causing injury is not relieved of his or her obligation to the victim simply because the victim had the foresight to arrange, or good fortune to receive, benefits from a collateral source for injuries and expenses”).

40. See Levin, *supra*, note 6, at 768 (finding that “[t]he individual mandate eliminates the need for the collateral source rule to incentivize the purchase of insurance”).

41. 26 U.S.C. § 5000A(a) (2012) (“An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.”).

42. *Id.*

43. See *Wal-Mart Stores, Inc. v. Cosgrove*, 276 P.3d 562, 565 (Colo. 2012).

44. See, e.g., *Levy v. Am. Family Mut. Ins. Co.*, 293 P.3d 40, 45 (Colo. App. 2011) (noting that no public policy is served by allowing double recovery).

45. Restatement (Second) of Torts § 920A, cmt. b (1979).

46. 26 U.S.C. § 5000A(a) (2012) (“An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.”).

47. See *Riss & Co. v. Anderson*, 108 Colo. 78, 84 (1941) (holding “a tortfeasor may not plead his victim’s prudence and foresight [in purchasing insurance] to relieve him from the consequences of his own wrong”).

appear that private, non-employer-based insurers on the exchanges are entitled to the same reimbursement.”<sup>48</sup>

#### V. ADMISSIBILITY OF COLLATERAL SOURCE EVIDENCE POST-ACA

No published case law exists in Colorado on the admissibility of collateral source evidence after the ACA’s effective date. To date, it appears that at least five states have addressed the intersection of the ACA and the collateral source rule.<sup>49</sup> The results are mixed, and depend on the particular state’s formulation of the collateral source rule.<sup>50</sup> Colorado courts and legislators, therefore, can write on a clean slate when addressing the intersection of the ACA and collateral source rule.

To begin, insurance maintained under the ACA is not wholly independent of a tortfeasor if the tortfeasor is a taxpayer. Unlike private insurance schemes, insurance policies purchased or maintained post-ACA are inexorably linked to the tax code.<sup>51</sup> The individual mandate is only constitutional because it operates as a tax.<sup>52</sup> The ACA is funded by taxpayers, including civil defendants, through a universal cost-sharing pool operated by the federal government to provide health insurance while lowering health insurance premiums.<sup>53</sup> Because insurance is now univer-

48. Victor A. Matheson, Jon Karraker, & Joshua Congdon-Hohman, *Medical Damages: Settlements and Awards Under the Affordable Care Act*, 57 No. 8 DRI FOR DEF. 38 (2015) (“[T]he right of subrogation is not granted to insurers under the ACA.”).

49. See generally *Deeds v. Univ. of Penn. Med. Ctr.*, 110 A.3d 1009 (Pa. Super. Ct. 2015) (defendant’s comments suggesting coverage were in “patent violation of the collateral source rule” despite the ACA); *Donaldson v. Advantage Health Physicians, PC*, No. 11-091810-NH (Kent Cnty. Cir. Ct. Mich. 2015) (Buth, J.) (denying the defendants’ motion in limine, concluding the “medical care and therapies [that] would be provided by insurance through the ACA can be discussed/argued at trial”); *First Bankers Trust Co. v. Memorial Med. Ctr.*, No. 11L184 (Ill. 7th Cir., Sangamon Cnty. 2015) (Kelley, J.) (granting in part the plaintiff’s motion in limine, concluding the defendants could produce evidence of the ACA only as to its effect on actual reasonable costs of medical services, but could not refer to the ACA’s effect on out-of-pocket costs payable by the plaintiff or available insurance coverage); *Jones v. Metrohealth Med. Ctr.*, No. CV11757131 (Ct. of Common Pleas, Cuyahoga Cnty., Ohio) (Suster, J.) (using the plaintiff’s premium under the ACA in calculating future economic damages); *Christy v. Humility of Mary Health Partners*, No. 2013CV01598 (Ct. of Common Pleas, Trumbull Cnty., Ohio) (Logan, J.) (concluding any reference to a collateral source would be improper but also noting it could not “restrict reference to the Affordable Care Act as it is the law of the land” and noting it could not prohibit the defendants from “presenting their own damage assessments for future care”); *Halsne v. Avera Health*, No. 12-cv-2409 (SRN/JJG), 2014 WL 1153504 (D. Minn. Mar. 21, 2014) (denying the defendant’s motion for partial summary judgment to limit the plaintiff’s future medical expenses damages to the projected payments of premiums and deductibles under the ACA); *Vasquez-Sierra v. Hennepin Faculty Assocs.*, No. 27-cv-12-1611, 2012 WL 7150829 (Minn. Dist. Ct. Dec. 14, 2012) (observing that “[u]ntil the Minnesota legislature passes new legislation regarding collateral sources in light of the Affordable Care Act, this court will not rewrite long-standing law regarding collateral sources”).

50. See cases cited *supra* note 49.

51. See, e.g., 26 U.S.C. §§ 4375–77.

52. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012).

53. See *id.* at 2585 (finding that “[b]y requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.”).



sally available and no longer wholly independent of any taxpaying defendant, the collateral source rule would seemingly no longer apply.

Even assuming the ACA evidence is wholly independent of civil defendants, ACA evidence is nevertheless relevant to essential elements of plaintiffs' prima facie obligations, witness credibility, and defendants' affirmative mitigation defenses.

#### *A. Plaintiffs' Damages Claims*

The ACA permits the trier of fact to determine the actual out-of-pocket expenses for a plaintiff's alleged future medical expenses. In Colorado, "[a] jury's discretion in awarding damages is limited by the parameters of what the law will allow."<sup>54</sup> Relevant evidence is, of course, evidence that has a tendency to prove or disprove a fact of consequence to a pending action.<sup>55</sup> The ACA's individual mandate, requiring the purchase of insurance for "essential health benefits," with a limit on out-of-pocket expenses has the tendency to prove or disprove the amount of future damages—a fact of consequence to the action, as it can affect the verdict potential by millions of dollars.<sup>56</sup>

#### *B. Credibility of Damages Experts*

ACA limits on out-of-pocket expenses are also relevant to the credibility of expert witnesses. The credibility of a witness is always a fact of consequence to the action.<sup>57</sup> Moreover, "[a]n award of future medical expenses must be based upon substantial evidence that establishes the reasonable probability that such expenses will necessarily be incurred."<sup>58</sup> The ACA limits out-of-pocket expenses for future medical expenses without regard to preexisting conditions.<sup>59</sup> A psychiatrist, life care planner, or economist who does not take these federally mandated limitations into consideration in formulating a life care plan or calculating the cost

54. *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 510 (Colo. App. 2009).

55. COLO. R. EVID. 401.

56. For example, in the course of personal injury litigation, a plaintiff produces a life care plan outlining the medical care, equipment, and medication the plaintiff will need for the duration of his or her life expectancy. The plaintiff's economist calculates the present value of all future care needs, totaling a minimum of \$13,000,000. However, the defendant's economist finds that nearly all of the alleged future medical costs are defined as "essential health benefits" under the ACA, and calculates the present value of all future care needs by adding the maximum cost of out-of-pocket expenses plus premiums under the ACA. The defendant's economist therefore calculates that the cost for all the plaintiff's requested future medical care is \$402,000. Thus, the difference in the amount of tort calculations when taking the ACA into account in such a case would be \$12,598,000.

57. *See* COLO. R. EVID. 611 (credibility of the witness is always relevant on cross-examination).

58. *Wallbank v. Rothenberg*, 74 P.3d 413, 419 (Colo. App. 2003) (internal quotations and citations omitted).

59. *See* 42 U.S.C. § 18091(2)(1) ("This requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.").

of a plan will likely be unable to establish that such costs will be necessarily incurred.<sup>60</sup>

### *C. Defendants' Mitigation Defenses*

Finally, ACA evidence should be admissible for the purpose of proving that a plaintiff failed to mitigate damages. A plaintiff in a tort action has a duty to take such steps as are reasonable under the circumstances to mitigate damages sustained.<sup>61</sup> The Restatement provides that one injured by the tort of another “is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of a tort.”<sup>62</sup> The purchase of insurance to cover essential health benefits (even after the injury), as federal law requires, is a reasonable expenditure to avoid incurring future medical expenses.<sup>63</sup>

In sum, the policy justifications that previously permitted a plaintiff's double recovery in the context of the collateral source rule do not exist in the post-ACA era. Courts and legislators must squarely address the societal and legal changes that exist in America's universal health system.

## VI. CONCLUSION

The ACA has injected a host of arguments, strategy, time, and expense into litigating future tort damage awards. Vigorous argument will continue from both plaintiff and defense lawyers because, in each case, millions of dollars may be at issue. As seen in the few states that have tried to address the collateral source rule in the post-ACA world, the legal landscape surrounding the law and health insurance is far from clear. What *is* clear, however, is that the policy justifications underlying the collateral source rule no longer exist.

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60. See *Smith v. Jeppesen*, 277 P.3d 224, 226 (Colo. 2012) (proper medical expenses damages should be the necessary and reasonable value of the medical services rendered).

61. *Banning v. Prester*, 317 P.3d 1284, 1287–88 (Colo. App. 2012).

62. RESTATEMENT (SECOND) OF TORTS § 918.

63. See, e.g., *Parking Mgmt. Inc. v. Jacobsen*, 257 A.2d 479, 481 (D.C. 1969).