

THE AFFORDABLE CARE ACT

BY CASEY W. TYLER, ESQ., AND CHARLOTTE BUYS

THE COST OF MEDICAL MALPRACTICE IS STAGGERING.

In 2016 alone, physicians paid a reported \$21,790,000 resulting from medical malpractice claims.¹ This figure does not include payments made by hospitals, other health care facilities or non-physician health care providers. In recent years, the American health care system as a whole has faced massive changes under the controversial Patient Protection and Affordable Care Act (ACA). At the time of this writing, the ACA has remained largely intact, but is slowly being chipped away.²

The future of the American health care system remains a mystery to attorneys and health care providers alike.

However, this landscape provides ample opportunity for re-evaluating one of the most controversial doctrines in health law: the collateral source rule and its impact on calculation of damages in medical malpractice actions.

AND NEVADA'S COLLATERAL SOURCE RULE IN MEDICAL MALPRACTICE ACTIONS

History of the Collateral Source Rule

Nevada only adopted a per se collateral source rule in 1996, based on the assumption that the prejudicial value of collateral source payments outweighed its probative value, and due to the potential that such information may be misused by a jury.³ Since its adoption, the Nevada Legislature has carved out a notable exception to the collateral source rule's prohibition of third-party payments. NRS § 42.021 was enacted in 2004, providing that, in an action for professional negligence against a health care provider, the defendant may elect to introduce certain evidence typically barred by the collateral source rule including, most notably, insurance information. If such evidence is proffered by the defendant, the plaintiff may then elect to "introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits concerning which the defendant has introduced evidence." The constitutionality of this statutory exception to the collateral source rule has been challenged by the district court, but effectively remains "good law."⁴

The Collateral Source Rule Under the ACA

The enactment of the ACA in 2010 raised several questions about its influence on NRS § 42.021's collateral source rule exception. Particularly, the ACA required each individual to either maintain health insurance or pay a tax penalty. Each health plan had to have essential benefits that ensured coverage for ambulatory patient services; emergency services; hospitalizations; maternity and newborn care; mental health and substance use disorders; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services, as well as chronic disease management; and pediatric services.⁵ Furthermore, insurers could not rescind health coverage unless the insured acted fraudulently or made an intentional misrepresentation, were prohibited from imposing a lifetime or annual limit on coverage, could not discriminate based on whether the insured had a pre-existing condition and had to guarantee availability of coverage.

Based on the health insurance mandate and guaranteed comprehensive coverage under the ACA, many wondered if evidence of the ACA should be admitted to



show an anticipated insurance source under NRS § 42.021's exception to the collateral source rule. While it is difficult to know how different courts will approach this question, in some instances the Nevada district courts have denied related attempts. Such holdings have concluded that ACA matters are too irrelevant, unduly prejudicial and speculative. In support, courts have cited to concerns that a plaintiff may not be a current beneficiary of a plan created under the ACA; a plaintiff may decide to accept the tax penalty instead of enrolling in a health insurance plan; and that insurance plans, benefits under the ACA, the cost to the insured, out-of-pocket expenses, the availability of physicians to provide in-plan care and an individual's health care provider could all change over time.⁵

Such rationale may, however, be ripe for further challenge. For instance, a California appellate court held in the 2017 case *Cuevas v. Contra Costa County* that evidence of insurance benefits that might be available under the ACA could be admitted under California's collateral source exception, which was codified in the 1975 Medical Injury Compensation Reform Act (MICRA). These different outcomes are somewhat surprising as NRS § 42.021 mirrors California's statutory collateral source exception nearly word-for-word.⁶ Furthermore, this decision raises questions, given Nevada's history of deference to California in interpreting and enacting such adopted statutory language.

In *Cuevas*, the appellate court held that the uncertainty of the ACA did not

constitute proper grounds to exclude evidence of alternative life care plans that considered future benefits for which the plaintiff could be eligible under the ACA.⁷ Furthermore, the court analyzed MICRA's collateral source rule exception and found that its use of the language "amounts payable" encompasses future payment of benefits, and it does not limit admissible evidence to only the amounts already paid.⁸ This ruling strengthens the argument for the admission of life care plans that take into account future benefits under the ACA, which may reduce overall damages.

As further explained in *Cuevas*, the rationale behind the collateral source rule exception is to give jurors sufficient information to provide a remedy to a party that has been harmed by a tortfeasor, without providing a double recovery. Therefore, life care plans that consider state and federal benefits should be admitted in order to provide jurors with a comprehensive understanding of the benefits a plaintiff is entitled to receive, in order to reduce the potential for windfall judgments. The obvious counter to such an argument is that the ACA is undeniably on shaky ground. While polls show that Americans

overwhelmingly support certain measures of the act, which are likely to survive in one form or another, it is unclear what version will stand the test of time.⁹ Accordingly, when considering a 20-plus-year life care plan, what surety can there be that such benefits will be available and constitute double recovery? Faced with this uncertainty and the choice of over/under compensating a plaintiff, what choice Nevada courts will make remains difficult to ascertain. One thing is clear though, under the current status of the law, defense counsel would be remiss not to attempt introduction of life care plans when contemplating the ACA.

Proposed State Legislation on Health Care

As the fate of the ACA hangs in the balance, Nevada and several other states have proposed expanding Medicaid coverage; some have even pondered the creation of a state-wide, single-payer health care system. Assembly Bill 374 proposed expanding the Nevada Care Plan, Nevada's Medicaid plan, to cover all Nevadans. However, Governor Brian Sandoval vetoed the bill in June

continued on page 10

THE AFFORDABLE CARE ACT AND NEVADA'S COLLATERAL SOURCE RULE IN MEDICAL MALPRACTICE ACTIONS

2017. Additionally, a joint resolution was proposed to amend the Nevada Constitution; the proposed resolution would cap the cost of emergency care at a rate no greater than 150 percent of the agreed-upon amount accepted from a federal public insurer. Both houses passed the proposed legislation this session, but it will need to pass again in 2019 before Nevada's Constitution can be amended.

The possibility of state-wide, guaranteed Medicaid coverage raises the question of how the collateral source rule would be addressed in any subsequent medical malpractice claim. If states individually enact their own forms of guaranteed health coverage, then how would the computation of damages account for variance between states as people move or receive care in different parts of the country? Additionally, if a state guarantees its residents Medicaid coverage, there will be a widespread basis for subrogation claims by Medicaid.

It is estimated that \$1 billion per year was recovered by Medicaid, Medicare and all other insurers in the 2000s;

Medicaid and Medicare were responsible for 13.5 percent of opened subrogation files.¹⁰ However, under the make-whole doctrine, insurers can seek reimbursement for the money they paid only from amounts that exceed the insured's total loss. Therefore, the collateral source doctrine and a third-party payer's subrogation rights present contrasting doctrines. It stands to reason that the make-whole doctrine ensures the injured party is protected. If states expand their Medicaid programs, then subrogation claims can reasonably be expected to increase in order to offset the costs of a tax-funded health care system. Given these considerations, it behooves any practitioner dealing with the collateral source rule and NRS § 42.021 to closely monitor such actions on the state level and assess their impact on potential damages.

As changes are sweeping the nation's health care system, it is imperative for litigators and courts to keep abreast of changing legislation on both the national and state level. They should closely scrutinize such legislation's effect on medical malpractice tort reform and related statutory enactments, including collateral source considerations, as failure to adapt the rule under the changing circumstances could result in the destruction of the careful equilibrium that protects both plaintiffs and defendants. Finally, when it comes to interpreting and applying the ACA and its future variants, clear answers are unlikely to materialize anytime soon; in the meantime, however, the potential reduction in damages and avoidance of "double recovery" makes attempting introduction of such evidence well worth the effort. **NL**

Professional Liability Insurance Is **OUR BUSINESS.**

Don't Let It Be Your Problem.

→ We handle all your
Business Insurance Coverages:

- Professional Liability Insurance
- Errors & Omissions
- Employment Practices Liability Insurance
- Directors and Officers
- Workers Compensation
- Comprehensive General Liability Insurance
- Excess and Umbrella Liability



Contact us for your free, no obligation quote

Monica Plaxton Garin, Esq.
9900 Covington Cross Dr., Suite 120 ♦ Las Vegas, NV 89144
702.375.7448 ♦ 702.382.1512 fax

www.charlestoninsurancegroup.com

1. NPDB Research Statistics, National Practitioner Data Bank, <https://www.npdb.hrsa.gov/resources/npdbstats/npdbStatistics.jsp#ContentTop> (last visited Oct. 15, 2017).
2. At the time of this drafting, President Donald Trump has enacted an Executive Order that will facilitate the purchase of insurance across state lines and eliminate federal subsidies for health insurers. However, a negative impact on the core requirements of the ACA, for purposes of our analysis, has not been effectuated.
3. *Proctor v. Castelletti*, 112 Nev. 88, 90 (Nev. 1996).
4. *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 80, 358 P.3d 234, 237 (2015). (writ of mandamus challenging district court's order denying application of NRS § 42.021 denied, holding that appeal presents adequate opportunity to address the district court's decision in *Capanna v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, No. 66289, 2015 WL 9467499, at *1 (Nev. Dec. 21, 2015)).
5. *Dohl v. Sunrise Mountainview Hosp., Inc.*, 2015 WL 1953074 at 4 (Nev. Dist. Ct. Apr. 20, 2015).
6. CAL. CIV. CODE §3333.1(a) (2017). (§3333.1(b) has been preempted by federal law in regards to pursuit of subrogation,

but this does not affect MICRA's collateral source exception for purposes of our analysis). See *generally* *Goncalves By & Through Goncalves v. Rady Children's Hosp.* San Diego, 865 F.3d 1237, 1247 (9th Cir. 2017).

7. *Cuevas v. Contra Costa Cty.*, 11 Cal. App. 5th 163, 181, 217 Cal. Rptr. 3d 519, 530 (Ct. App. 2017), *reh'g denied* (May 23, 2017), *review denied* (July 26, 2017).
8. *Id.* at 174.
9. Kirzinger et al., *Kaiser Health Tracking Poll – June 2017: ACA, Replacement Plan, and Medicaid*, THE HENRY J. KAISER FOUND. (June 23, 2017), <https://www.kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-june-2017-aca-replacement-plan-and-medicaid/>.
10. Michael J. Brien, PhD & Constantijn W.A. Panis, PhD, *Trends and Practices in Healthcare Subrogation*, DELOITTE & ADVANCED ANALYTICS CONSULTING GROUP, Jan. 28, 2013, <https://www.dol.gov/sites/default/files/ebsa/researchers/analysis/health-and-welfare/deloitte-trends-and-practices-in-healthcare-subrogation.pdf>.



CASEY W. TYLER is a partner with the national firm Hall Prangle & Schoonveld, LLC. His practice focuses on the defense of professionals, with particular emphasis on medical malpractice claims, and business and industry-specific cases involving catastrophic injuries. He also practices in various areas of commercial litigation and contract dispute matters.



CHARLOTTE BUYS is a third-year law student at the William S. Boyd School of Law and a law clerk at Hall Prangle & Schoonveld, LLC. She serves as chair of Boyd's Student Health Law Society.



WE KNOW HOW TO MAKE AN IMPACT

THEY MAKE THE IMPACT POSSIBLE

PARTICIPATING FINANCIAL INSTITUTIONS

- American First National Bank
- Bank of America
- Bank of George
- Bank of Nevada
- Bank of the West
- BMO Harris Bank
- Citibank
- City National Bank
- East West Bank
- Financial Horizons Credit Union
- First Foundation Bank
- First Independent Bank of Nevada
- First Savings Bank
- First Security Bank of Nevada
- Heritage Bank
- JPMorgan Chase & Co.
- Kirkwood Bank of Nevada
- Meadows Bank
- Mutual of Omaha
- Nevada Bank & Trust
- Nevada State Bank
- Northern Trust Bank
- Plaza Bank
- Royal Business Bank
- Silver State Credit Union
- Town and Country Bank
- Umpqua Bank
- US Bank
- Valley Bank of Nevada (BNLV)
- Washington Federal
- Wells Fargo

EVERY DOLLAR

generated from IOLTA is donated by Nevada's participating financial institutions to the Nevada Bar Foundation.

\$2.5 MILLION

in IOLTA dollars is granted to qualified legal aid providers. Annually, that money provides

ACCESS TO JUSTICE

for **37,000 NEVADA HOUSEHOLDS** and for **38,000 LEGAL MATTERS** including:

9,500 DOMESTIC VIOLENCE cases

8,400 FAMILY LAW cases

6,400 HOUSING cases

1,400 CHILD ABUSE cases

LEARN MORE

about the work of the **Nevada Bar Foundation** and how you can give at: www.nevadabarfoundation.org