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PERSPECTIVE

Future medical expenses thrown into an ACA flux

By Jeffrey Wolf

The issue of how much an injured person may recover for her future medical expenses has been thrown into question in the last few weeks. A California Court of Appeal decision recently injected politics and the country's health care debate into a routine personal injury trial. The court concluded that a defendant should be entitled to minimize the extent of an injured victim's future medical costs by pointing to future benefits that would be available to the victim under the Patient Protection and Affordable Care Act (the "ACA"). This decision came less than a month before the U.S. House of Representatives voted to pass the American Health Care Act, which would effectively eliminate the benefits of the ACA.

Let us look back for a moment to the state of the law at the beginning of 2017 with regard to future medical care needs in a bodily injury case. Typically, a plaintiff would need to prove her future care needs to a reasonable degree of medical certainty and then she would be compelled to demonstrate the reasonable cost of that care. Experts on both sides of the case might dispute the need for the care and the reasonable charges for that care.

In *Cuevas v. Contra Costa County*, 2017 DJDAR 4018 (April 27, 2017), the Court of Appeal decided that insurance issues and insurance discounted costs based upon negotiated rates could be evaluated when considering the plaintiff's future care needs. *Cuevas* was a medical malpractice case which involved a baby who suffered a brain injury at birth. The jury found that there was malpractice and awarded \$9.5 million for the present value of the baby's future care needs.

The defense in that case attempted to introduce evidence that the baby's future care costs would be much lower than the amount claimed in the life care plan for the baby. It pointed to negotiated discounts that might be obtained by health insurers under the ACA that would benefit the baby in



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Protesters demonstrate outside the Capitol in Washington after the House approved a bill that would repeal and replace major parts of the Affordable Care Act, May 4.

the future. The trial court rejected this argument and refused to allow evidence about discounts obtained under the ACA, recognizing that it was speculative to assume that the ACA would continue to exist in the future. The Court of Appeal reversed, deciding that the evidence should have been admitted.

The very foundation for the decision in *Cuevas* about the use of the ACA in a bodily injury case was shaken when the House approved the latest Republican health care bill. The decision in *Cuevas* hinged on the assumption that the ACA would be viable in the future and that it would not be repealed. The court simply noted that the 2016 presidential election did place the ACA's viability into question. But, the court stated that "as of the writing of this opinion the ACA remains essentially intact."

Before the ink even dried on the comment by the court about the viability of the ACA, the House Republicans took the first step toward repealing the ACA when, on May 4, they voted for the new health care bill. The bill eliminates the individual mandate, which requires people to purchase health insurance or face a tax penalty. It freezes the ACA Medicaid expansion. And it provides waivers to the states which will allow insurance companies to charge higher premiums to sick or injured people with pre-existing conditions. The bill allows insurance companies to return to the practice of placing lifetime caps on the amount of insurance benefits

available. It also allows insurers to issue policies that exclude essential health benefits.

It is clear that the passage of the House bill challenges the notion that the benefits of the ACA will be available to the Cuevas baby in his future. By inserting the issue of the health care debate and insurance benefits into this case, we are left with great uncertainty about whether this injured child will actually have the benefits of the ACA. If this bill passes the Senate, then this injured victim will likely receive an artificially smaller judgment based upon benefits under the ACA that disappear with the ACA's repeal. The baby, as he grows, will not have sufficient resources to pay for the care he requires.

This type of shift in focus toward insurance benefits when evaluating an injured person's future health care costs is fraught with problems. For example, does the evaluation change depending upon which party controls the White House or Congress? What happens if the ACA remains intact in some respects but not others? Does the result change if insurers are permitted to charge more based upon pre-existing conditions? Is the situation altered if the injured parties are entitled to health insurance but the policies are devoid of the essential health benefits?

Big business and the insurance industry are the clear winners in this shift of focus toward evaluating future damages based upon the politics of the ACA. One need look no further

than the identity and interests of advocates for the defense in *Cuevas* to recognize this fact. The US Chamber of Commerce and the Civil Justice Association of California filed amicus briefs in favor of the defense position. Both of these organizations are conglomerates comprised of big oil, drug and insurance companies.

Big business and big insurance win under the guidelines in *Cuevas* at the expense of individual victims who find their damage claims minimized based upon benefits of the ACA that may or may not exist in the future. The hypocrisy of the position taken by big business as reflected by the U.S. Chamber of Commerce in *Cuevas* should not be overlooked. While the Chamber of Commerce argued that the benefits of the ACA would continue to be viable for the baby in *Cuevas*, it backed the House bill to repeal the same benefits of the ACA.

Injury victims, who are likely to have their future damage claims minimized based upon uncertain future health insurance benefits, are the obvious losers under *Cuevas*. It places the burden on victims to pay for health insurance to mitigate the damages imposed by the harm created by the defendant. The answer, it seems, is found in the reaffirmation of the collateral source rule, the rule that precludes us from pointing to the benefits of health insurance when evaluating damages. Only then will we place the full cost of the harm on the party that caused the harm and eliminate the uncertainty of assessing damages based upon the ever-changing nature of health insurance in this Country.

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