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Calif. Court's ACA Benefits Ruling May Trim Med Mal Awards

By **Y. Peter Kang**

Law360, Los Angeles (May 2, 2017, 5:07 PM EDT) -- A California appeals court's recent holding that parties sued for medical malpractice can use projected Affordable Care Act benefits to challenge plaintiff estimates of future medical costs will "level the playing field" and reduce awards in cases where catastrophic injuries necessitate a lifetime of medical care, defense attorneys say.

Last week, a First Appellate District panel **overturned a jury's $9.6 million future medical expenses award** to a boy, Brian Cuevas, who suffered a brain injury at birth due to the negligence of a doctor employed by Contra Costa County. The panel said a new trial was warranted because the jury should have heard evidence about benefits available to him under the ACA that could offset his future medical costs.

The ruling was heralded by medical malpractice defense attorneys as a major victory in a long-running battle over whether the ACA could be factored into calculations regarding so-called life-care plans for medical malpractice victims.

"It made my day, to tell you the truth," Guy Gruppie, a Murchison & Cumming LLP partner and co-chair of the firm's emerging risks and specialty tort practice group, told Law360. "This war has been going on since Obamacare came into being."

Gruppie said the Cuevas decision was a "breath of reasonable fresh air" in the face of plaintiffs' attorneys' use of life-care plan experts who submit as evidence what he called "unreasonable and grossly inflated" expense projections that rarely reflect actual health care costs.

"The Court of Appeal here is leveling the playing field so that jurors can be better informed and know more facts when they decide if damages in the form of future medical expenses should be awarded," he said.

The ruling also ends plaintiffs' attorneys attempts to circumvent the California Supreme Court's 2011 ruling in Howell v. Hamilton Meats & Provisions, which held that a medical malpractice plaintiff can't recover the retail price of past medical expenses when the plaintiff's insurer pays a discounted rate under existing agreements with health care providers, according to Robert Olson, a Greines Martin Stein & Richland LLP partner representing the Association of Southern California Defense Counsel, which filed an amicus brief in support of Contra Costa County.

"The piece of unsettled law was whether the defense would be allowed to put on their own evidence as to what the likely future cost of medical services would be," Olson said. "In the past, plaintiffs have argued, sometimes with success, that only plaintiffs can put on evidence of what future medical costs are. This is an opinion that levels the playing field."

But the implications of the ruling go beyond mere evidentiary disputes, according to Linda Fermoyle Rice of medical malpractice plaintiffs' firm Rice & Bloomfield, who said an attack on future economic damages awards will further discourage plaintiffs' lawyers — already hampered by California's 1975 Medical Injury Compensation Reform Act, which caps noneconomic damages at $250,000 — from taking up cases on a contingency basis.

"From a larger perspective, this is just one more nail in the coffin of any med mal litigation," she said. "Over the years, we've struggled to help patients who are injured due to negligence of health care providers. As the MICRA cap has diminished in value, future economic damages are often the only way to justify helping someone who is hurt."

She said it just isn't economically feasible for a plaintiffs' attorney to take on a case and front $50,000 to $75,000 in legal expenses when the potential recovery is just $250,000, coupled with the fact that California law caps attorneys' fees on a sliding scale post-expenses.

Alston & Bird LLP's Brian Boone, an attorney for the California Chamber of Commerce and U.S. Chamber of Commerce who filed an amicus brief in support of the defense, said the ruling certainly could spark a decline in large medical malpractice awards.

"Generally speaking, if defendants in California can introduce evidence of contracted rates in talking about future medical damages, the likely tendency would be to decrease jury verdicts," he said.

Rice said she was also perplexed by the court's decision to factor in the ACA to calculate future medical costs given the law's uncertain future due to ongoing efforts by Congress and the Donald Trump administration to dismantle Obamacare.

"It doesn't make sense to me how we can project how the ACA can provide benefits to a child who needs care for the next 50 years when efforts are being made currently to dismantle the law," she said.

Personal injury attorney Barry P. Goldberg said the portion of the ruling regarding future ACA benefits essentially repeals California's collateral source rule, which bars using the compensation plaintiffs receive from third parties, or collateral sources, to reduce a personal injury award.

The appellate court ruled last week that future ACA benefits, like past insurance payments, are not subject to the collateral source rule because of an exception carved out under a MICRA provision.

"That was very dubious," he said. "In allowing discussion of the ACA at the trial court level, it completely abrogates the collateral source rule because the wink-wink, nod-nod message to the jury is, 'Don't award big damages because this person is going to get Obamacare insurance down the road.' It's a ruse to go around the collateral source rule."

In rejecting Cuevas' argument that the ACA is not certain to remain intact and therefore medical cost projections based on the health care law are speculative, the appellate court made a rare reference to the current political climate and said that despite recent attempts by Congress to repeal and replace it, the ACA "remains essentially intact."

"That seems like a pretty thin basis to reverse the discretion of the trial court to keep the information out," Goldberg said. "The practical effect is going to be devastating to med mal plaintiffs."

Justices Jim Humes, Sandra L. Margulies and Robert L. Dondero sat on the panel for the First Appellate District.

Cuevas is represented by William L. Veen and Elinor Leary of The Veen Firm PC and Alan Charles Dell'Ario.

Contra Costa County is represented by H. Thomas Watson, Karen M. Bray and Robert H. Wright of Horvitz & Levy LLP, and W. David Walker, Mauro Lilling Naparty and Richard J. Montes of Craddick Candland & Conti.

The case is Brian Cuevas et al. v. Contra Costa County, case numbers A143440 and A144041, in the Court of Appeal of the State of California, First Appellate District.

--Additional reporting by Daniel Siegal. Editing by Brian Baresch and Breda Lund.