An insured plaintiff calls various experts to the witness stand who testify that he will need $5 million in future medical care. In reality, the plaintiff has health insurance and will pay, at most, a deductible and his premiums. Should the defendant still pay $5 million in damages? The Collateral Source Rule says he should.

The concept behind the Collateral Source Rule dates back to the 1800s with the proposition that a tortfeasor should not benefit from the “fortuitous existence of a collateral remedy.” Courts had to choose between granting a windfall to a defendant (who escapes liability to pay for some of the injuries he caused) or a plaintiff (who receives a double recovery). Courts chose to grant the windfall to plaintiffs, and the Collateral Source Rule was born.

The rule is still followed in many states in one form or another, but has been under attack. Many believe that the passage of the Patient Protection and Affordable Care Act (“ACA”) has changed the playing field and rendered the rationale that originally supported the rule outdated and meaningless.

The ACA has generated much political debate, with liberals in support and conservatives against. In a strange political irony, however, the survival of the ACA may be key to the death of the Collateral Source Rule, resulting in an unintended tort reform.

**IS THE RATIONALE BEHIND THE COLLATERAL SOURCE RULE OUTDATED?**

The overriding purpose of tort law is to make the plaintiff whole. Allowing an award to compensate a plaintiff for future medical expenses that he will never incur does far more than make him whole – it acts as motivation for “jackpot-lottery” litigation.

Still, the Collateral Source Rule was developed when health insurance was rare. Such windfalls and double recoveries occasionally occurred, but it was not the norm. This is no longer the case.

Statistics show that 85% of the U.S. population in 2012 had some form of health insurance, and many states have already begun to modify the Collateral Source Rule in one way or another.

With the passage of the ACA, which contains no subrogation provisions, the outdated rationale behind the rule is magnified. Today, the ACA requires that Americans purchase health insurance (the “Individual Mandate”) and it sets forth basic minimum coverage that must be afforded without regard to preexisting conditions (the “Guaranteed Issue”). No longer is health insurance “fortuitous” or “rare.” It is mandatory and coverage cannot be denied.

**WEAKENING OF THE COLLATERAL SOURCE RULE THROUGH STRENGTHENING OF THE ACA**

Some in favor of maintaining the status quo of the Collateral Source Rule argue that the ACA will face legal challenges and may not survive into the future. After all, even jurisdictions that allow for reduction of future medical expense awards usually require defendants to establish with some level of certainty that the plaintiff will continue to receive such collateral sources. If the future of the ACA is uncertain, so, too, one may argue, is the assumption that a plaintiff’s receipt of insurance will continue with any consistency.

On June 25, 2015, this position grew much less convincing. On that date, the Supreme Court decided the case of King v. Burwell, which involved a challenge to provisions of the ACA that granted federal tax credits to those who meet certain income criteria. King is a controversial decision which, some believe, is a statement by the Supreme Court that the ACA will survive at all costs.
THE “DEATH SPIRAL”

King centered around the fact that the ACA’s Individual Mandate does not apply to those who would need to spend more than 8% of their income to purchase coverage. Millions of Americans fall into this category and, if such people remain exempt from the Individual Mandate, they would likely elect not to purchase insurance until and unless they become sick. Because of the “Guaranteed Issue” as per the ACA, a plan cannot deny coverage based on a preexisting condition exclusion, and these people would obtain covered health care at that time. However, they would likely stop paying the premiums and drop their plan once they recover, only to return if they become sick again.

In this repeating cycle, the health insurers would be burdened by extensive costs without a consistent inflow of premiums. Costs would continue to increase and insurers would leave the market, resulting in a collapse of the healthcare system. This was described by the Supreme Court in King as a “death spiral.”

PREMIUM TAX CREDITS

to avoid this calamity, the ACA provides for tax credits to individuals whose household income falls between 100% and 400% of the federal poverty line. These tax credits are provided directly to the insurance carriers and applied to the insurance premiums, lowering the cost of insurance for these individuals to below 8% of their income. Such individuals are now subject to the Individual Mandate and are required to purchase a plan or be forced to pay an additional tax. In theory, the tax credits infuse the system with premiums necessary for the ACA to function.

“EXCHANGE ESTABLISHED BY THE STATE”

At the heart of the King case were two provisions that provide for these tax credits to be issued to those who purchase insurance through an “Exchange established by the State.” The problem is that states can elect not to establish an Exchange at all, and 34 states have chosen not to do so. In those states, qualified individuals must purchase insurance through a Federal Exchange, but there is no provision anywhere in the ACA that expressly provides for tax credits for those persons. A plain reading of the ACA, therefore, would prohibit the Federal Government from issuing credits to millions of Americans in the 34 states with federal Exchanges, potentially resulting in the feared “death spiral” to take place throughout most of the U.S.

In an already-controversial decision, the Court found the phrase “Exchange established by the State” ambiguous and, in a 6-3 decision, interpreted the otherwise plain language to refer to all Exchanges, State or Federal.

THE DECISION

In an already-controversial decision, the Court found the phrase “Exchange established by the State” ambiguous and, in a 6-3 decision, interpreted the otherwise plain language to refer to all Exchanges, State or Federal. This interpretation allows the federal government to issue tax credits to all qualified persons regardless of the Exchange from which they purchase insurance, providing an inflow of needed premiums.

CRITICISM

King demonstrates that the ACA has the backing of a controlling majority of the Supreme Court, and this majority might just refrain from doing anything contrary to the survival of the ACA. After all, King involved the third set of ACA provisions challenged at the Supreme Court level, and the ACA has survived every time. But this did not occur without controversy.

In a scathing dissent joined by Justices Thomas and Alito, Justice Scalia accused the majority of going far beyond mere interpretation and, instead, into the realm of rewriting legislation. He admonished that the law should be renamed “SCOTUScare” and lamented what he calls a “discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.” If this accusation is accurate, King is a judicial declaration that the ACA is not going anywhere for a long, long time, like it or not.

WHAT KING V. BURWELL MEANS FOR THE COLLATERAL SOURCE RULE

Viewed in a vacuum, the King case only deals with the continued survival of the ACA, not the Collateral Source Rule. However, the rationale for the Collateral Source Rule is undermined by the existence of the ACA, raising the question of how the two can coexist. Thus, so long as the ACA is alive and kicking, the Collateral Source Rule will become more and more susceptible to attack.

CONCLUSION

King v. Burwell is a statement that the ACA might just survive whatever challenges are thrown its way. However, the continued survival of the ACA could lead to an ironic and unintended tort reform by weakening, or even eliminating, the Collateral Source Rule and the double recovery windfalls it so frequently provides to plaintiffs in personal injury litigation.

4 Joshua Gongold-Hofman and Victor A. Matheson, Life-care Awards in the Age of the Affordable Care Act, College of the Holy Cross Department of Economics Faculty Research series, Paper No. 1406 (2014).
10 Thomas Geroulo, Esq., of the law firm of Weber Gallagher Simpson Stapleton Fires & Newby, LLP, has acted as a consulting attorney in numerous cases where the ACA has been implicated. He and his firm have been a great source of information.