

## Federal Health Care Law May Reduce Or Eliminate Future Medical Expense Tort Damages

*Part One of a Two-Part Article*

By H. Thomas Watson

The mandatory health insurance requirement of the Patient Protection and Affordable Care Act of 2010 (PPAC) should significantly reduce the amount of tort damages recoverable for medical expenses. How?

First, under the doctrine of avoidable consequences, tort plaintiffs' damages should be limited to the lower "negotiated rates" for medical services that health care providers agree to accept from health care insurers, rather than the higher "billed rates" charged to uninsured patients for such services. Second, because the PPAC makes health insurance mandatory for everyone, it undermines the rationale historically used for application of the collateral source rule to medical expenses covered by insurance. As a result, defendants should seek to set off amounts paid by mandatory health insurance against any damages awarded for these same services.

### THE DOCTRINE OF AVOIDABLE CONSEQUENCES

Under the common law doctrine of avoidable consequences, "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 the tort." Restatement (Second) of Torts § 918(1) (1979). This doctrine precludes re-

covery of unreasonably excessive expenses incurred by a plaintiff in response to a tort. See *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 889-90 (Minn. 2010) (unreasonably excessive environmental cleanup costs are not recoverable); see also *Maere v. Churchill*, 452 N.E.2d 694, 699-700 (Ill. App. Ct. 1983) (plaintiffs' refusal to purchase title insurance policy available to them barred them from recovering damages that would have been covered by that policy).

The doctrine of avoidable consequences applies to require personal injury tort plaintiffs to take reasonable measures to minimize their damages. See 6 Witkin, Summary of California Law, Torts § 1624 at 1139 (10th ed. 2005) ("Personal injury cases furnish a familiar illustration. A plaintiff who fails or refuses to submit to necessary treatment by a doctor cannot recover for additional harm resulting from failing to do so."); *Withrow v. Becker*, 6 Cal. App. 2d 723, 729-30 (1935) (tort plaintiff could not recover pain and suffering damages resulting from hernia sustained in automobile accident for which plaintiff failed to seek medical treatment).

If this reasoning is applied to the recovery of medical expenses as damages, the doctrine of avoidable consequences should bar tort plaintiffs from recovering medical expense damages in excess of the lowest cost medical services reasonably available to treat the plaintiff's injury.

### APPLICATION OF THE DOCTRINE

A handful of cases have reached the conclusion that plaintiffs should recover only for the lowest cost medical services avail-

able in the context of past medical expense damages. See *Brzoska v. Olson*, 668 A.2d 1355, 1367 (Del. 1995) (evidence that free HIV testing was available presented a jury question of whether the plaintiff improperly failed to mitigate damages by incurring the expense of private HIV testing); see also *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 973-74 (5th Cir. 1969) (seaman's failure to accept free medical services available at a nearby Marine Hospital barred him from recovering the cost of private medical care); accord *Caulfield v. AC & D Marine, Inc.*, 633 F.2d 1129, 1133-35 (5th Cir. 1981). And a few cases have applied the doctrine of avoidable consequences to future medical expense damages. See *Hargrove v. Peterson*, 221 N.W.2d 875, 879 & n.4 (Wis. 1974) (tort plaintiffs have a duty to mitigate future medical expense damages); *Pattee v. Ga. Ports Auth.*, 512 F. Supp. 2d 1372, 1379-82 (S.D. Ga. 2007) (plaintiff's failure to purchase private health insurance following his termination evinces a failure to mitigate future medical expense damages).

In next month's issue, we will further explore the effects the Patient Protection and Affordable Care Act of 2010 could have on awards of medical expenses in medical malpractice cases.

H. Thomas Watson is a partner in the Encino, CA, firm Horvitz & Levy LLP.

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