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Southwest Chapter Fall Seminar

The Real Cost of the Affordable Care Act

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Agenda

8:00 am - 8:30 am

- Registration & Continental Breakfast

8:30 am - 9:30 am

- Opening Remarks & Keynote Address with Paul Greve

Speaker:

- Paul Greve from Willis Health Care Practice - KEYNOTE

9:30 am - 10:30 am

Session 1: How the ACA Impacts the Healthcare Industry

Speakers:

- Debora Verdier, *Manning & Kass, Ellrod, Ramirez, Trester, LLP* – ***MODERATOR***
- David Berg, *Redirect Health - PANELIST*
- Artie Eaves, *Sanders & Parks, PC- PANELIST*
- Jason Gard, *Crest Insurance - PANELIST*
- Paul Johnson, *Redirect Health - PANELIST*

11:00 am - 12:00 pm

Session 2: How the ACA Impacts the Insurance Industry

Speakers:

- Gary McAuliffe, *Scottsdale Insurance* – ***MODERATOR***
- Nancy Lamo, *Lockton Companies – PANELIST*
- Kathryn McCalla, *General Reinsurance - PANELIST*
- Frances O'Connell, *Markel Corp. - PANELIST*
- Mary Pryor, *The Cavanagh Law Firm - PANELIST*

Luncheon

12:30 pm - 12:45 pm

- PLUS Foundation Award

12:45 pm - 1:30 pm

- Luncheon Keynote Address

Speaker:

- Edward Hochuli, *Jones, Skelton & Hochuli - KEYNOTE*

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PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

THE ACA and REFORM: THE IMPACT ON MPL

PLUS SOUTHWEST CHAPTER

SEPTEMBER 2014

Paul Greve JD RPLU
Willis Health Care Practice
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PLUS REFORM: THE IMPACT ON MPL

Introduction and Overview

- The ACA: An Overview (As it Impacts MPL)
- Initial Thoughts on Reform
- Megatrends to Watch: The Impact on MPL
- The Future & Final Thoughts

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The ACA: An Overview

ACA: An Overview

- The ACA (enacted 3/23/10) is the "framework" for health care reform

- Purpose of reform
  - Increase the number of insured
  - Reduce health care costs
  - Focus on quality and better value
  - Pay for performance not volume

- 32 million people are expected to gain coverage

ACA: An Overview

ACA: The Good News

- Pre-existing conditions denials eliminated
- Coverage for young adults (to age 26)
- No more lifetime caps on coverage
- Expansion of public health & prevention
- More transparency by insurance companies
- More protections for health plan members
- Investing in primary health care (physicians/facilities)
- Paying for quality care
- Reducing hospital-acquired conditions

ACA: An Overview

2010

- No denial for pre-existing conditions in children under 19
- Cancellation of coverage for illness
- Lifetime caps
- Preventive care fully covered (for new group and individual health plans)
- Dependent coverage up to 26 years of age
- Medicare payments reduced to hospitals, home health, nursing homes, and hospices
- Tax relief and expanded loan repayment plans for primary health care providers

ACA: An Overview

2011

- Physician comparability website for quality
- Out- of- pocket costs for Medicare preventive services eliminated
- 10% Medicare bonus for primary care physicians and general surgeons (if in shortage areas) through 2015

ACA: An Overview

2012

- Medicare provides incentives for Accountable Care Organizations (ACOs) for physicians
- Hospital payment penalties for “readmissions”

ACA: An Overview

2013

- Some Medicaid payment (bundled) pilot programs begin for episodic care and hospitalizations

ACA: An Overview

2014

- Health insurance exchanges established
- Medicaid income eligibility expands to 133% of the federal poverty level
- Individual insurance mandate and penalties start (2015 now)
- No denial for pre-existing conditions (adults)

ACA: An Overview

2015

- Independent Payment Advisory Board created
- Medicare provider payment changes may be made to meet savings targets
- Doctors paid on value rather than volume
- Hospital payments for Safety Net hospitals start to be reduced

ACA: An Overview

ACOs: Accountable Care Organizations

- ACO refers to a legal entity composed of a group of providers that assume responsibility (are accountable) to manage and coordinate care for a defined group of patients in an effective (high quality) and efficient (low cost) manner.
- Encouraged by the ACA
- Promotes creation of networks and consolidation (negative?)
- Manage minimum 5,000 lives for 3 years

ACA: An Overview

ACOs

- **Goal: Better coordination of care**
- **Payment takes various forms but promotes savings**
- **Must hit quality benchmarks (penalties if not)**
- **Incentives to reduce hospital stays, ED visits, specialist visits and testing**
- **Mixed results to date but clearly some positive results**
- **Is this really the HMO concept warmed up?**

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INITIAL THOUGHTS ON REFORM

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PAYMENT REFORM

- **Our Health Care System Did Not Just Evolve Magically**
- **A Health Care System is Shaped by How You Pay For Services and What You Pay for (The Pursuit of Self-Interest)**
- **Health Care Activity is Shaped by Reimbursement: Follow the Money**
- **Health Care Activity and Provider Behavior Impact Medical Professional Liability**

Source: ***Thomas Campanella, Baldwin Wallace College***
Healthe Care Economist

PAYMENT REFORM

Health Care Delivery in 2014

- **Siloed**
- **Inappropriate Use of High Cost Technology**
- **Inappropriate End-of-Life Costly Efforts vs. Appropriate Hospice Services**
- **Excess Infrastructure and Technology (e.g. MRI, CT Scan)**
- **Lack of Focus on Primary Care, Preventive Services, Wellness, etc.**
- **Chronic Diseases That Are Not Addressed in a Coordinated and Sustained Manner**

Source: ***Thomas Campanella, Baldwin Wallace College Healthe Care Economist***

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HEALTH CARE REFORM AND HIGH COSTS: A FIX?

- **ACA Juices the Demand Side**
  - **32M More Patients?**
  - **Enhanced Expectations – Free Prevention**
  - **Subsidized Insurance Through Exchanges**

- **Relies on Silver Bullets on Supply Side for Fix**
  - **ACOs**
  - **Value-Based Payment**
  - **Bundled Payment: Episodes of Care**
  - **Global Payment**
  - **Capitation**
  - **Patient-Centered Medical Homes (PCMH)** ***Source: Larry Van Horn PhD, Vanderbilt***

EVIDENCE - PREVENTION

- **“The Evidence Suggests That For Most Preventive Services, Expanded Utilization Leads To Higher, Not Lower, Medical Spending Overall” – CBO Director Doug Elmendorf**

- **NEJM Review of Hundreds of Studies Suggests That 80% Increase Costs**

CBO Letter from Doug Elmendorf to Nathan Deal Aug. 9 2009.
Joshua T. Cohen, Peter J. Neumann, and Milton C. Weinstein, Does Preventive Care Save Money? Health Economics and the Presidential Candidates, New England Journal of Medicine, vol. 358, no. 7 (February 14, 2008), pp. 661-63.

THE END-GAME: A SINGLE PAYER?

Dr. Toby Cosgrove, CEO
Cleveland Clinic

"It's Going to Be a Faster Move Towards One Payer…. In 10 Years You're Going to Have 75% of the Health Care Costs Paid By the Federal Government."

WSJ Interview 12/19/12

REFORM

Thoughts to Keep in Mind Regarding Health Care Reform

- Reform would have occurred without the ACA
- Pressure to reduce health care costs: CMS, employers
- Clinical integration is the response to the need for reform and was beginning before the ACA: reconfigure for value-based payment
- Clinical integration is driving hospital M&A and buying of practices
- The ACO is truly a Medicare vehicle but is often used (incorrectly) to denote clinical integration. It can be a form of clinical integration

REFORM: KEY TRENDS 2014

- M&A Activity Still High: Hospitals Primarily
- More Contractual Networks Being Created
- Deceleration of the Purchase of Physician Practices
- Exception is Primary Care Groups/Physicians
- Reimbursement is Still Fee-for-Service Primarily
- Some Hospitals/Systems/Large Group Beginning to Take Financial Risk
- Financial Risk in 2014 is Mostly Capitation and Bundled Payments
- Increasing Use of Physician Extenders: NPs and PAs
- Increasing Move to Outpatient Care

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MEGATRENDS TO WATCH: THE IMPACT ON MPL

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REFORM: KEY MEGATRENDS
3-5 Years

- Payment Transformation: Volume-Based to Value-Based
- Hospitals Must Accept Financial Risk
- Focus on Wellness: Keep Patients Out of Acute Care
- Patient Care Will Be More Coordinated Than Ever
- Patients Will Be More Personally Accountable for Care
- The EMR is Crucial to Coordination/Collaboration/Communication
- Consolidation May Adversely Affect the Public's Attitudes to Hospitals
- Physicians are Critical for Organizational Success

MEGATRENDS TO WATCH: THE IMPACT ON MPL

- **Data is King**
  - **Quality Metrics/Value-Based Payment**
  - **IT/EMR Investment is Huge**
- **Physicians/Groups are Essential to Reform**
  - **Employment, JV, Contractual Alignments**
  - **Physician Risk Now Greatly Influences Hospital Risk**
  - **Physician Extenders More Essential**
- **Patient Care More Coordinated Than Ever**
- **Higher Patient Volumes?**
- **Network/Integration/ACO Exposures*: E&O,D&O, Cyber, Regulatory***
- **New Care Settings: Virtual Visits, Telemedicine, PCMHs, Retail**
- **Using Advanced Analytics: EBM, Skills, Tools = Cost and Care**
- **Patient Responsibilities and Expectations: Wild Cards?**

MEGATRENDS TO WATCH: THE IMPACT ON UNDERWRITING

- **Mergers & Acquisitions Accelerate**
  - Fewer Buyers for MPL: Hospitals, Physicians
  - More Buyers: Misc Facilities, Allieds, Aging Services, Health Plans/HMOs
  - Due Diligence on MPL Exposures: Loss Information; Risk Assessments
  - RM Assessment of Risks in Alignment: Acquisition, JVs, etc.

- **Clinical Integration and ACOs**
  - Cost of Creating (Medicare) ACO a Barrier
  - But Clinical Integration Will Occur = CIO
  - Vicarious Liability/Ostensible Agency Exposures Created
  - More Negligent Credentialing Claim Risk
  - Continuity of Care = Standard of Care
  - Coverages: E&O, D&O, Cyber, Regulatory, HPL, Financial Risk Insurance

MEGATRENDS TO WATCH: THE IMPACT ON MPL

- **Will Financial Incentives Distort Medical Necessity Decisions?**

- **When Can Utilization Be Safely Decreased?**

- **Follow the Money to Track Health Care Activity/Financial Risk**
  - Risk of Under-Treating: Use of Generics; Less Costly Medical Devices
  - Hiccups in the Transition from Fee-for-Service
  - Patient Hand-Offs to Other Providers and Transfers to Facilities, e.g. EM to Hospitalist, Hospitalist to PCP, etc.
  - Delegable and Non-Delegable Duties: Physician Extenders
  - Breaking Down Communication Barriers: Huge RM Challenge
  - Physician as Team Leader

MEGATRENDS TO WATCH: THE IMPACT ON MPL

Clinical Integration Takes Many Forms

- **JV/Contractual Alignments Must Be Disclosed to Carrier**
  - Indemnification Clauses Could Be Problematic
  - Contractual Liability Exclusions Are Problematic
  - Insureds Expect Coverage for These New Structures

- **Carriers Must Know the Organizational Structures/Entities**
  - Corporate Structure Charts
  - Patient Flow Charts
  - More Regular Updates by Insureds: Qtly, Semi-annually at Least

MEGATRENDS TO WATCH: THE IMPACT ON MPL

Physician Risk Now Greatly Impacts Hospital Risk

- Vertical Limits Affected
- Tail/IBNR Exposures as Individuals/Groups Integrate
- Retro Dates/Corporation Exposures
- Pressure to Accept All Individuals/Practices
- What is the Culture re Incorporating Practices?
- How Does the Hospital Risk Management Program Apply?
- Collaborative/Joint Defense Now Possible with Physician Carriers
- More Cooperation re QI and RM

MEGATRENDS TO WATCH: THE IMPACT ON MPL

Patient Care: More Coordinated Than Ever

- Plaintiffs Look for the Gaps/Weaknesses: Processes
- Plaintiffs May Argue The ACO/CIO is One Entity: VL and Ostensible Agency Exposure
- More Negligent Hiring/Credentialing Exposure: Networks
- JVs, Partnerships: SNFs,Dialysis, Hospice, Rehab, etc.
- More “You Dropped the Ball” Claims
- Defense Table More Crowded Than Ever
- Collaborative Defense Essential: Address Upfront
- No Finger-Pointing
- RM Strategic Focus on Both Patient Population and Individual Encounter

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EVALUATING THE RISK OF REFORM:

THE FUTURE & FINAL THOUGHTS

THE RISK OF REFORM: THE FUTURE

WHAT SHOULD THE CARRIER/BROKER EVALUATE?

- **Strategy/Review of New Provider Alignments/Networks**
- **Provider Financial Risk: The Impact on Patient Care**
- **Tracking of Payment Methodologies: Impact on Care**
- **Credentialing Alignment Partners: Facilities and Allied Medical Professionals**
- **Physician Employment and Alignments: JVs, Contracts, Partnerships**
- **New Models of Outpatient Care**
- **Physician Risk Exposures**
- **Contractual Liability Potential**

THE RISK OF REFORM: THE FUTURE

Reform/Clinical Integration May Also Reduce Risk

- One Goal is to Reduce Over-Utilization
- Focus on Preventive Care/Outpatient Care
- Better Coordination Among All Providers
- Telemedicine Improves Care (But Out-of-State/Region Exposures)
- Bedside Clinical Informatics Improve Care
- EMR's Goal is to Improve Care/Communication
- Patients Less Likely to Sue if Insurance Coverage Applies?
- Managing Patient Expectations May Reduce Risk in a Time of Transition

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THE RISK OF REFORM: THE FUTURE

Technology: Managing the Risk

- **Bedside Clinical Informatics**
- **Telemedicine: Complex Laws but Low Risk?**
- **Mobile Devices: Improve Care (May Increase Risk)**
- **“Watson”: Riding the Tsunami Wave of Medical Literature to Improve Patient Care**
- **Patient Simulation Labs**
- **EMRs Will Ultimately Improve Care**
- **GE PSO: Reducing Medical Errors Thru Maintaining a Large Database**

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THE RISK OF REFORM: FINAL THOUGHTS

- **The Health Care Industry is Undergoing Dramatic Change**
- **Underwriting its Risk Exposures Must Change as the Exposures Change**
- **Follow the Changes in Health Care Activity that are Driven by Reimbursement Changes**
- **Watch Hospital Financials Closely**
- **Know the Corporate Structures/Alignments and Their Risk Implications**
- **Understand the Implications of Physician and Physician Extender Risk in All Its Forms**

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THE RISK OF REFORM: FINAL THOUGHTS

- **Reform May Make MPL Cases Far More Complex**
- **Multiple Co-Defendants Due to Contractual Arrangements**
- **But Better Care Should Result Over Time Offsetting Risk**
- **The Greatest Risk: Frequency of Severity?**
- **Potential Loss of Public Good Will Towards the Local Hospital and Private Practice Physicians is a Concern**
- **The MPL Industry Has the Financial Strength to Manage Adversity**
- **There Are Still Many Factors in Our Favor in Defending These Cases Now and into the Future**

QUESTIONS?

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Break

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SESSION ONE

How the ACA Impacts The Healthcare Industry

Moderator

- Debora Verdier, *Manning & Kass*, *Ellrod*, *Ramirez*,

SESSION ONE PANELISTS

- Artie Eaves, *Sanders & Parks, PC*
- Jason Gard, *Crest Insurance*
- Paul Johnson, *Redirect Health*
- David Berg, *Redirect Health*
- *Trester LLP*

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Break

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SESSION TWO

How the ACA Impacts the Insurance Industry

Moderator

- Gary McAuliffe, *Scottsdale Insurance*

SESSION TWO PANELISTS

- Nancy Lamo, *Lockton Companies*
- Fran O'Connell, *Markel Insurance*
- Katie McCalla, *General Reinsurance*
- Mary Pryor, *The Cavanagh Law Firm*

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PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

Southwest Chapter Fall Seminar: The Real Cost of the ACA

Session 2—How the ACA Impacts the Insurance Industry

September 25, 2014

Nancy Lamo, RN/BSN, JD, CPHRM
AVP, Clinical Risk Consultant
Lockton Companies

Clinical Risk and the ACA

- My role
  - Clinical risk consultant
  - Clients: hospitals, senior services, ambulatory surgery centers, physician practices, clinics
  - How does the ACA affect health care risk managers?

Clinical Risk and the ACA

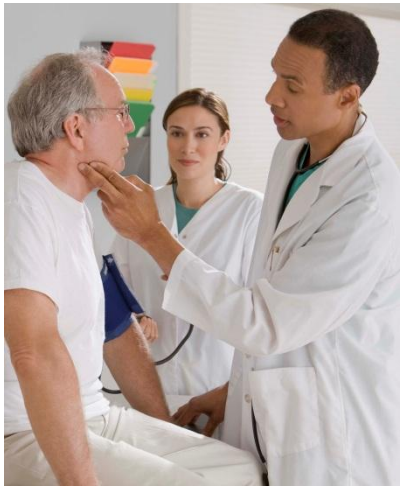
- The ACA:

Clinical Risk and the ACA

- Two sides to every coin!
- Three “coins” on my radar screen:
  - Expanded and affordable health care insurance
  - ACOs (accountable care organizations)
  - EHRs (electronic health records)

Clinical Risk and the ACA

- Expanded and affordable health care insurance
  - Better access to primary care
  - Reduce the use of emergency departments for non-emergency care
    - Average ED visit costs $580 more than doctor office visit



Clinical Risk and the ACA

- Expanded and affordable health care insurance
  - Surge of newly insured patients walking into EDs!
  - Kentucky:
    - Norton Hospital: +12%
    - Univ. of Louisville: +18%
    - Lexington, KY EDs: +7.5%
  - ACEP poll:
    - ~50% of ED physicians are seeing more patients

Clinical Risk and the ACA

- Expanded and affordable health care insurance
  - Why a surge of newly insured patients walking into EDs?
    - Shortage of primary care doctors
    - Some doctors won't accept Medicaid
    - Lower wage earners can't take time off from work during clinic hours
    - Long-term uninsured don't have regular doctors
    - Accustomed to seeking care at EDs

Clinical Risk and the ACA

- ACOs
  - Also ACO-like delivery models ("collaborative care"), more employed physicians
  - Purpose: provide integrated, streamlined and efficient care ➔ better outcomes, lower cost

Clinical Risk and the ACA

- ACOs, etc.
  - More employed physicians? More likely that hospital will be named in malpractice suit
    - Vicarious liability for employees
    - More likely to be sued for direct negligence
  - Is it *possible* to ↑ quality and ↓ costs?
    - Potential conflicts
    - Viable?
      - Sharp HealthCare the latest to drop out of Medicare's Pioneer ACO program
  - Potential new standards of care?

Clinical Risk and the ACA

- EHRs
  - Purpose: improve care, ↓ costs

Clinical Risk and the ACA

- EHRs
  - Design issues: complex, unwieldy, error prone
    - No process for reporting error prone software
  - 700+ vendors
  - Time consuming and painful to implement
  - Expensive
    - Savings not realized
  - Multiple EHR systems don't inter-connect
  - Privacy and security issues
  - *New* kinds of errors

Clinical Risk and the ACA

- Message:
  - Don’t leave it to chance: manage the risk instead of flipping the coin
  - This means:
    - Role of the healthcare risk manager is evolving
    - Must understand a broad array of risks

Clinical Risk and the ACA

- Bibliography
  - Advisen Ltd., “The Liability Impacts of Healthcare Reform”, March 2014
  - Herman, B., “Sharp HealthCare ACO Drops Out of Medicare’s Pioneer Program”, *Modern Healthcare*, www.modernhealthcare.com, Aug. 26, 2014.
  - Rowland, C., “Hazards Tied to Medical Records Rush”, The Boston Globe, www.bostonglobe.com, July 20, 2014.
  - Unger, L., “More Patients Flocking to ERs Under Obamacare”, The Courier-Journal, www.courier-journal.com, June 9, 2014.

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PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

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Session 2—How the ACA Impacts the Insurance Industry

September 25, 2014

Fran O'Connell- RN/BSN, MBA
Managing Director Medical Underwriting
Markel Corporation

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The Real Cost of the ACA

- My role
  - Product Line Leader-Medical Professional Liability
  - Clients: hospitals, senior services, ambulatory surgery centers, physician practices, clinics
  - How does the ACA affect Underwriting health care risks profitably?

Underwriting the ACO

- The ACA:

Underwriting the ACO

Identifying the Hazards

- Seen one ACO?

- You've Seen One ACO

PLUS Identifying the ACO Operations

- Professional Medical Services
- Health Benefit or Insurance Plans
- Claims Services
- Healthcare, behavioral health, pharmacy and other health related network/joint ventures
- Marketing and advertising activities
- Peer review/Provider Selection

PLUS Identifying ACO Associated Hazards

- Contracts
  - Indemnifications
  - Obligations
- EHR/EMR
  - Exist?
  - Compatible?
- Privacy/IT Security
- Financial Issues
  - Cost Sharing
  - Reimbursements
  - Joint Ventures

PLUS ACO Related Known Unknowns

- Change in Frequency?
- Change in Severity?
- Change in what constitutes Standard of Care?
- Change in processes and procedures?
  - Telehealth
  - Robotics
- Change in ACA Laws?
- Change in State Medical Malpractice Regulations?

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PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

QUESTIONS?

Thank You!

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PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

Southwest Chapter Fall Seminar: The Real Cost of the ACA

Session 2—How the ACA Impacts the Insurance Industry

September 25, 2014

Katie McCalla
Vice President, Healthcare Practice
North Central Regional Manager

Reinsurance and the ACA

My role

- Healthcare Underwriter and Line of Business Strategist
- Clients: Insurance Companies, Risk Retention Groups, Captives, other risk taking entities
- Question: How does the ACA affect reinsurance?

Reinsurance and the ACA

Reinsurance is normally used to address various concerns:

- Uncertainty with new(er) exposures
- Need for capacity
- Volatility across jurisdictions
- Lack of pricing or claim data

Reinsurance and the ACA

The ACA….

….continues to have a lot of unknowns for the reinsurance market.

Reinsurance and the ACA

Underwriting Concerns:

Will Quality of Care improve or decline?

- Expanded and affordable health care insurance creates more demand. Can the supply of physicians meet the demand of patients without reducing quality of care?
  - Demand for physicians is expected to outstrip supply through 2020 by a wide margin – close to 91,500 physicians or a 12% gap*
  - This gap creates an opportunity for more mid-level providers. How will increased use of Nurse Practitioners and Physician Assistants impact quality of care?

*Source: American Association of Medical Colleges, iii

Reinsurance and the ACA

Will Quality of Care improve or decline?

- Hospitals and delivery systems are paid more to reduce costs and deliver better outcomes. Is this achievable?
  - As reimbursements shrink, will physicians compensate by taking on more patients?
  - Delivery systems are becoming more integrated with Hospitals buying Physician groups. Will this provider consolidation create more efficiencies through a 'corporate management' or create a deeper pocket and less personalization for dissatisfied patients?

Reinsurance and the ACA

Will Quality of Care improve or decline?

- Healthcare costs are being (forcibly) driven down.
  - Increased out-patient and home health care usage to reduce costs in the system.
  - As consolidation continues, we expect more cost savings and innovation in delivery and payment models. Will more efficiency reduce claim frequency or the quality of care?
- Greater use of Electronic Health Records should reduce medical errors occurring today.
  - What are the 'new' hazards to be concerned about?
  - Is there a cost associated with data security and privacy claims? 44% of data breaches in 2013 were Medical/Health Organizations, up from 35% in 2012*

*Source: Identity Theft Resource Center, iii

Clinical Risk and the ACA

Claim Concerns:

How do these underwriting/risk changes impact claims?

- The Rand Institute for Civil Justice expects the ACA to impact many lines of commercial insurance.
  - Rand anticipates small decreases in AL, GL and WC claim costs due to the ACA reducing overall healthcare costs*.
  - Rand estimates a 2.8% increase in Medical Professional claims by 2016 due to the increased patient volumes*.

*Source: Rand, April 2014; www.rand.org/pubs/research.reports/rr493.html, iii

Clinical Risk and the ACA

How do these underwriting/risk changes impact claims?

- Reinsurance focuses on volatility or verticality of claims:
  - Will MPL claims frequency and severity be impacted by the broader coverage delivered by the ACA?
  - Will claim severity increase over time with the strain on providers?
  - Will the ACA lessen or mitigate impact of large verdicts through significant reduction in medical costs?
  - How will the change in patient mix, 5M new insureds (previously uninsured) already signed up, impact the data pool?*
  - Will the digitization of Electronic Health Records create a “Pandora's box” of information for plaintiff attorneys?

*Source: Centers for Medicare and Medicaid a/o 3/7/14

Reinsurance and the ACA

Pricing Concerns:

How do these underwriting/risk changes impact insurance/reinsurance pricing?

- The ACA impacts the underwriting and claims certainty associated with healthcare risks. To what degree is still unknown.
- Consequently, we are watching trends closely to see how the ACA will impact :
  - Medical inflation costs
  - Social inflation costs
  - Claims frequency and severity
  - Jurisdictional environments
  - And….
  - Ultimately the loss costs used to price Healthcare Risks.

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Reinsurance and the ACA

Thank you!

Katie McCalla
Vice President, Healthcare Practice
North Central Regional Manager

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PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

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September 25, 2014

POTENTIAL IMPLICATIONS OF THE ACA IN LITIGATION

Mary G. Pryor, Esq.
The Cavanagh Law Firm, P.A.
Phoenix, Arizona

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Potential Implications of the ACA in Litigation

- My Role
  - Representing physicians, hospitals, long-term care facilities, etc. for 19 years
  - Product liability litigation
  - All types of serious / complex injuries; wrongful death
  - Professional liability

- Issues for Discussion:
  - Potential Impact on “Collateral Source” Evidence
  - EMR’s & Electronic Discovery

The ACA & Collateral Source Evidence

- Collateral Source Rule
- Various rationales for the Rule
- ACA changes things

The ACA & Collateral Source Evidence

National Federation of Independent Business v. Sebelius (USSC 2012)

- Upheld key provisions of ACA as a tax measure
- Mandates health insurance coverage for most Americans
- If not, imposes a tax / penalty
- Caps annual medical expenses ("shared responsibility") at $5,950 per person or $11,900 per family

The ACA & Collateral Source Evidence

- **Key Provisions of the ACA Affecting Litigation:**
  - No exclusions for pre-existing conditions
  - Rating / premium variations based only on age, geographical area, family composition, & tobacco use – not pre-existing conditions
  - Dependent coverage up to age 26
  - No annual or lifetime limits on coverage payouts
  - Mandatory coverage for items in “Essential Health Benefits Package”

The ACA & Collateral Source Evidence

- **When collateral source evidence is already admissible:**
  - **In theory, at most, defendants should be responsible for:**
    - Annual cap on medical expenses – currently $5,950
    - Items not included in Essential Health Benefits Package

The ACA & Collateral Source Evidence

- **When collateral source evidence is already admissible:**
  - Changing role of experts
    - Life care planners
    - Annuitist
      - Annuities to purchase non-covered items
      - Guaranteed vs. Non-Guaranteed Payouts
    - Health Insurance Industry experts – ??

The ACA & Collateral Source Evidence

- **Billed Charges vs. Paid Charges:**
  - Same rationale as the Collateral Source Rule
  - Again, the ACA undermines the rationale
  - Paid charges relevant to:
    - "Reasonable & Necessary"
    - Duty to mitigate damages

The ACA & Collateral Source Evidence

- **Billed Charges vs. Paid Charges:**
  - Arguably, the Collateral Source Rule should not preclude evidence of negotiated (paid) rates for medical expenses
    - CA, TX, MN, PA, KS agree
  - Lien & subrogation rights
    - Areas for potential reform

The ACA & Collateral Source Evidence

- **Jury Instructions on statutory provisions of ACA:**
  - Coverage for pre-existing conditions
  - Rating / premium variations based only on age, geographical area, family composition, & tobacco use – not P/E conditions
  - Dependent coverage up to age 26
  - Preventive care for infants, children, & adolescents
  - No annual or lifetime limits on coverage payouts

The ACA & Collateral Source Evidence

- **Jury Instructions on statutory provisions of ACA:**
  - Mandatory coverage for items in "Essential Health Benefits package"
    - Ambulatory care services
    - Emergency services
    - Hospital care
    - Maternity & newborn care
    - Mental health & substance abuse services
    - Prescription drugs
    - Rehabilitative services & devices
    - Laboratory services
    - Preventive / wellness services & chronic disease management
    - Pediatric services, including dental & vision care

The ACA & Collateral Source Evidence

- **Jury Instructions on statutory provisions of ACA:**
  - Opposing arguments
  - Go to the weight of the evidence
  - The ACA creates our opportunity to win these battles!

Potential Implications of the ACA in Litigation

- **<u>EMR's, ESI, & Electronic Discovery:</u>**
  - Incentives for more EMR's under the ACA
  - More EMR's = More Metadata
    - "data about data"
  - ESI – Electronically Stored Information
    - exponential growth in general

Potential Implications of the ACA in Litigation

- **<u>EMR's, ESI, & Electronic Discovery:</u>**
- Increased potential for **electronic discovery** into numerous aspects of the EMR:
  - When an entry was actually started, finished, signed, verified, CHANGED / AMENDED, etc.
  - Pre-populated fields, information carried over from previous notes or other areas of the chart
  - When the chart was accessed & by whom . . . properly or improperly
  - What information was available to providers & When . . . VS's, labs, radiology, ultrasound, EKG, echocardiogram, etc.
  - Software features or issues
  - Much other metadata

Potential Implications of the ACA in Litigation

- **EMR's, ESI, & Electronic Discovery:**
- Other General Observations
  - Use of templates, checklists, etc. . . good & bad
  - "Data" ≠ Substantive Information
  - "Displayed" version in EMR vs. Printed version for litigation

- **EMR's, ESI, & Electronic Discovery:**
  - **Litigation Holds**

    By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence."

    Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 462 (S.D.N.Y. 2010) ("Zubulake Revisited").

Potential Implications of the ACA in Litigation

- **EMR's, ESI, & Electronic Discovery:**
  - **Litigation Holds**
    - Spoliation & other potential sanctions for failure to preserve ESI
      - Monetary sanctions
      - Adverse inference instruction
      - Preclusion of evidence
      - Or worse
    - Generally bad outcome even if unintentional or inadvertent

Potential Implications of the ACA in Litigation

- **EMR's, ESI, & Electronic Discovery:**
  - **Litigation Holds**
    - **Duty to Preserve:**
    - Once a party **reasonably anticipates litigation**
    - **Logistics:**
    - May be difficult to implement with EMR's

Potential Implications of the ACA in Litigation

- **EMR's, ESI, & Electronic Discovery:**
  - **Litigation Holds**
    - **Potential Triggers – No bright-line rules; case by case analysis:**
      - Lawsuit filed, demand letter . . . Easy
      - Notice of administrative proceeding
      - Records request??
      - Patient complaint??
      - **Putting the carrier on notice??**
      - Numerous other possibilities

Potential Implications of the ACA in Litigation

- **EMR's, ESI, & Electronic Discovery:**
  - **Bottom line:** EMR's & electronic data issues potentially increase both:
    - Liability exposure
    - Litigation expense

Potential Implications of the ACA in Litigation

Questions?

Thank You!

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