**Colorado's Newest Measure of Future Medical Expense Damages:
The Affordable Care Act**

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Introduction

The Patient Protection and Affordable Care Act is now in effect.[2] Although the exact confines of the Act remain subject to variation,[3] the Act has overcome its greatest hurdle and is likely here to stay.[4] As a result, commentators have begun contemplating the Act's impact on Americans, including an injured party's ability to collect future damages.[5] This article examines the Act's impact on Coloradans and its potential use as a new measure for future medical damages in civil actions.

Under the Act, citizens are not only required to purchase health insurance as a result of the individual mandate,[6] but health insurers can no longer discriminate against individuals with pre-existing conditions by either denying coverage or charging higher premiums.[7] As a result, an injured person who once was unable to get health insurance because of an incident now has a legal obligation to do so.

Since all Colorado health insurance plans are subject to annual deductible limits, an injured person can incur no more that her annual premium and her maximum deductible in health care costs each year for medical treatment guaranteed by the Affordable Care Act.[8] In other words, it is arguable that under the Act an injured individual will no longer be forced to pay the actual cost of her medical treatment but just a premium and deductible of an approved health insurance policy. In Colorado, future medical expenses are measured by the actual costs an injured party will likely incur for future treatment.[9] Therefore, Colorado's measure for future medical damages could become the price an individual will pay to obtain health insurance, rather than the actual expenses associated with anticipated future care. This would mean that in

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[1] Special thanks to Matt Broderick and Billy-George Hertzke for their contribution to this article.
[2] 26 U.S.C. 5000A(a)-(c) (stating that those who do not obtain health insurance in 2014 may be subject to the Act's tax penalty).
[3] *CSC v. United States*, No. 10-910-DRH, 2013 WL 6795723, *15-16 (S.D. Ill. Dec. 20, 2013) (questioning the Act's continued viability).
[4] *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012).
[5] *See*, *e.g.*, Joshua Congdon-Hohman & Victor A. Matheson, *Potential Effects of the Affordable Care Act on the Award of Life Care Expenses*, College of the Holy Cross, Dept. of Econ., Faculty Research Series, Paper No. 12-01 (Sept. 2012); Jack Hipp and Caryn L. Lilling, *Can the Affordable Care Act Be Used to Mitigate Future Damages?*, Litigation Management, Winter 2014, pp. 35-38.
[6] 26 U.S.C. § 5000A(a); *Nat'l Fed'n of Indep. Business*, 132 S. Ct. at 2581.
[7] 42 U.S.C. § 300gg-3; § 300gg-4(a); 42 U.S.C. § 300gg(a).
[8] 42 U.S.C. § 18022(b) (listing essential benefits); 42 U.S.C. § 18022(c) (limiting annual deductibles); Connect for Health Colorado, http://connectforhealthco.com/individual (last visited Mar. 10, 2014) (allowing individuals to search for plans, and demonstrating that each plan has a maximum deductible of $6,350 per person and $12,700 per family).
[9] *Wallbank v. Rothenberg*, 74 P.3d 413, 419 (Colo. App. 2003).

Colorado, future medical damages for covered care could be capped at approximately $16,000.00 per year.[10]

However, what remains to be seen is whether the collateral source rule will stand in the way of the Affordable Care Act's change.[11] The Act has largely relieved the concerns of justices, jurists and judges worried that offsetting damages due to insurance coverage would punish responsible insurance purchasers who happened to get injured.[12] Moreover, it has remedied Colorado's concern that a defendant will profit off of a plaintiff's purchase of her own health insurance.[13] Now that health insurance is federally required, measuring medical expenses by the costs of health insurance will not deter individuals from obtaining it since a person's foresight and prudence in purchasing health insurance has now been replaced by the individual mandate.[14] Moreover, and as discussed below, tortsfeasors will not profit from an injured person's purchase of health insurance, but rather, the tortfeasor could simply pay for the health insurance (or perhaps a percentage) of those they injure. Injured parties will focus on the collateral source rule. However, the Act's potential to serve as the measure for future medical damages may allow Colorado Court's to revisit the collateral source rule and determine a new measure for future medical damages.

The New Measure: Expense of a Health Insurance Policy and Yearly Deductible

The Patient Protection and Affordable Care Act, commonly referred to as Obamacare or the Affordable Care Act, was signed into law on March 23, 2010.[15] Effective January 1, 2014, the Affordable Care Act requires all citizens of the United States to obtain health insurance covering essential health benefits or face a monthly tax penalty.[16] Essential health benefits include:

- Ambulatory patient services;
- Emergency services;
- Hospitalization;
- Maternity and newborn care;
- Mental health and substance use disorder services, including behavioral health treatment;
- Prescription drugs;

[10] This number is based upon Colorado's Gold Plan for a 40-year-old in Summit County. The monthly premium is $774.00, and the individual deductible is $6,350.00. Connect for Health Colorado, *Coverage Levels*, http://connectforhealthco.com/how-it-works/coverage-levels/ (last visited Mar. 10, 2014) (describing how rates are determined by geography and plan design); Connect for Health Colorado, *Health Insurance Options and Assistance, Summit County*, http://connectforhealthco.com/wp-content/uploads/2013/09/Summit-County.pdf (last visited Mar. 10, 2014); Electa Draper, *After Tax Credits, Highest Costs Seen in Denver Area,* Denver Post, Mar. 2, 2014, at B1 ("Colorado's mountain resort communities have some of the highest health insurance premiums in the country . . . .").

[11] *The Atlas*, 93 U.S. 302, 310-11 (1876) (describing early authority for collateral source rule).

[12] *See*, *e.g.*, *Riss & Co. v. Anderson*, 114 P.2d 278, 281 (Colo. 1941) ("[A] tort-feasor may not plead his victim's prudence and foresight [by obtaining insurance] to relieve him from the consequences of his own wrong.").

[13] C.R.S. § 13-21-111.6.

[14] 26 U.S.C. § 5000A(a).

[15] *See* Pub. L. 111-148, 124 Stat. 119.

[16] 26 U.S.C. 5000A(a)-(c).

- Rehabilitative and habilitative services and devices;
- Laboratory services;
- Preventive and wellness services and chronic disease management; and
- Pediatric services, including oral and vision care.[17]

In Colorado, rehabilitative services include medical treatment rendered by a chiropractor.[18]

The Affordable Care Act provides for four levels of coverage – Bronze Level, Silver Level, Gold Level, and Platinum Level.[19] Each level must cover the essential health benefits, and they are generally distinguishable based upon differing actuarial values.[20] No matter the plan, annual deductibles are statutorily restricted to a particular maximum amount.[21] Although this deductible maximum is subject to adjustment,[22] Colorado's 2014 annual maximum is $6,350 per person and $12,700 per family. Therefore, whichever plan is chosen, a health insurance policy must cover all of the essential health benefits and can allow for no greater than a $6,350 individual deductible.

Along with mandating health insurance, the Affordable Care Act prohibits insurers from discriminating against insureds due to pre-existing injury.[23] Coverage cannot be denied because of pre-existing condition or genetic disposition,[24] and premiums cannot be increased due to prior medical disorders or injuries.[25] Instead, subject to enrollment deadlines and an insurer's capacity to provide coverage, "each health insurer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in that State that applies for such coverage."[26] Moreover, premium prices can only fluctuate based upon:

- Whether the plan is for an individual or family;
- Geographic area;
- Age; and
- Tobacco use.[27]

Colorado's highest monthly premium for an individual health insurance policy is approximately $774 a month.[28] While such premiums may be subject to tax credits which would

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[17] 42 U.S.C. § 18022(b)(1)(A)-(J).
[18] Dept. of Reg. Agencies, Div. of Ins., Bulletin No. B-4.60 (May 29, 2013) (interpreting C.R.S. § 10-16-104(7), C.R.S. § 10-16-107.7, as well as federal law, to conclude that "chiropractic services and services of chiropractors" was not a valid exclusion under Colorado's benchmark essential health benefits plan, and that chiropractic services are included).
[19] 42 U.S.C. § 18022(d).
[20] *Id.*
[21] 42 U.S.C. § 18022(c)(1).
[22] *Id.*
[23] 42 U.S.C. § 300gg-3; § 300gg-4(a); 42 U.S.C. § 300gg(a);
[24] 42 U.S.C. § 300gg-3; § 300gg-4(a).
[25] 42 U.S.C. § 300gg(a).
[26] 42 U.S.C. § 300gg-1(a).
[27] 42 U.S.C. § 300gg(a)(1)(A)(i)-(iv).
[28] Connect for Health Colorado, *Health Insurance Options and Assistance, Summit County*, http://connectforhealthco.com/wp-content/uploads/2013/09/Summit-County.pdf (last visited Mar. 10, 2014).

lower the actual annual amount spent on health insurance each year,[29] a Coloradan will likely spend no more than approximately $9,288 on health premiums anywhere in the state. Based on the Olympic themed coverage levels, the higher the premium, the lower the annual deductible.[30] But, even assuming that Colorado's highest premium also required the maximum allowable annual deductible of $6,350, a Colorado taxpayer could spend no more than approximately $16,000 a year on health care expenses. Although this is no little sum, it drastically changes the actual medical expenses an individual could incur in a year or over several years.[31]

In the context of a civil action, medical expenses, like any damage award, are determined by a jury. Although a jury decides the amount of damages to award, any damage amount is limited by what the law will allow.[32] The court establishes that limit - the measure of damages, and jurors use that measure to asses reasonable damages based upon the evidence presented.[33] In Colorado, "[a]n award of future medical expenses must be based upon substantial evidence which establishes the reasonable probability that such expenses will necessarily be incurred."[34] Therefore, future medical damages are measured by the actual costs an injured party is likely to face for future medical treatment.

Under the Affordable Care Act, an injured Coloradan will not face medical expenses greater than approximately $16,000 per year for services related to essential health benefits.[35] In other words, there is no "reasonable probability" that medical expenses above $16,000 annually will necessarily be incurred by a damaged Coloradan for any medical treatment encompassed by 42 U.S.C. § 18022(b)(1)(A)-(J).[36] As a result, Colorado courts could use the cost to purchase an Affordable Care Act's insurance policy as the proper measure of future medical damages because the Act has rendered expenses beyond such policies unlikely, and arguably impossible, to ever be incurred.[37]

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[29] Electa Draper, *After Tax Credits, Highest Costs Seen in Denver Area,* Denver Post, Mar. 2, 2014, at B1 ("Lower- and middle-income people will qualify for substantial help – with some of the biggest subsidies going to Colorado's resort areas."); *see also* 26 U.S.C.A. § 36B.

[30] [30] 42 U.S.C. § 18022(c)(1).

[31] *See* Barbara Martinez, *Cash Before Chemo: Hospitals Get Tough*, *Bad Debts Prompt Change in Billing; $45,000 to Come In*, THE WALL STREET JOURNAL (Apr. 28, 2008), http://online.wsj.com/news/articles/SB120934207044648511 (highlighting insurance coverage deficiencies and hospital policies prior to the enactment of the Affordable Care Act which would have subject a patient to an upfront cost of $105,00 before admission to hospital for cancer care).

[32] *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 510 (Colo. App. 2009).

[33] *Id.*

[34] *Wallbank v. Rothenberg*, 74 P.3d 413, 419 (Colo. App. 2003) (quoting *Reynolds v. Reichwein*, 510 P.2d 895, 896 (Colo. App. 1973) (unpublished)).

[35] This number is based upon Colorado's Gold Plan for a 40-year-old in Summit County. The monthly premium is $774.00, and the individual deductible is $6,350.00. Connect for Health Colorado, *Coverage Levels*, http://connectforhealthco.com/how-it-works/coverage-levels/ (last visited Mar. 10, 2014) (describing how rates are determined by geography and plan design); Connect for Health Colorado, *Health Insurance Options and Assistance, Summit County*, http://connectforhealthco.com/wp-content/uploads/2013/09/Summit-County.pdf (last visited Mar. 10, 2014); Electa Draper, *After Tax Credits, Highest Costs Seen in Denver Area,* Denver Post, Mar. 2, 2014, at B1 ("Colorado's mountain resort communities have some of the highest health insurance premiums in the country . . . .").

[36] *See Wallbank v. Rothenberg*, 74 P.3d 413, 419 (Colo. App. 2003).

[37] Or, in cases where an Affordable Care Act Plan does not provide coverage for the service sought, the measure of future medical damages should rely on the Act's insurance coverage to the degree coverage is provided.

Duty to Mitigate: Obtain the Best Coverage Available

In light of the Affordable Care Act's contested origin, some claimants may choose not to purchase health insurance, pay the tax penalty, and incur traditional medical expenses.[38] While this may be well within a claimant's right for past medical expenses incurred due to an injury,[39] parties seeking redress for damages have a duty to mitigate damages by taking reasonable steps to avoid costs that could have been avoided by the use of reasonable effort or expenditure.[40] As the Colorado Supreme Court made clear, "This means that the plaintiff may not recover damages for injuries which he or she may reasonably might have avoided."[41]

Although the Affordable Care Act's enforcement is in its infancy, there are court rulings prior to the ACA, which held evidence of failure to purchase health insurance can be presented at trial to show that a plaintiff failed to mitigate damages.[42] In *Pattee v. Georgia Ports Authority*, a former employee brought suit against his past employer for being inappropriately fired allegedly in retaliation for alerting Homeland Security about port safety concerns.[43] His compensation included health insurance coverage.[44] Two months following his departure from the port authority, the former employee suffered an unrelated personal injury.[45] Because he was uninsured at the time of the injury, he incurred over $76,000 in out-of-pocket medical expenses.[46] In the action, the former employee demanded compensation for his out-of-pocket medical expenses, asserting that had he remained employed his medical expenses would only have been the related health insurance premiums.[47]

When evaluating a motion in limine on the topic, the trial court allowed the past employer to put on evidence that the former employee failed to mitigate his damages because he did not purchase health insurance prior to his injury.[48] As the court stated, "[Plaintiff] could have insured against future medical expenses by procuring substitute insurance. Thus, at trial, defendants will be allowed to present evidence that it was unreasonable for [Plaintiff] to fail to purchase substitute insurance after his termination."[49]

Additionally, in *Grabau v. Target Corp.*,[50] a United States District Court for the District of Colorado recognized a party's duty to mitigate damages by obtaining health insurance.[51]

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[38] *See U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 600-01 (6th Cir. 2013) (rejecting plaintiff's argument that the individual mandate infringes upon right to refuse unwanted medical care).
[39] *E.g.*, hospitalization or emergency room care following an incident.
[40] *Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997); *see Winkler v. Rocky Mountain Conference of United Methodist Church*, 923 P.2d 152, 160 (Colo. App. 1995) (recognizing duty to mitigate tort damages); *Martin v. Porak*, 638 P.2d 853, 855 (Colo. App. 1981) (noting duty to mitigate tort damages by taking medical action).
[41] *Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997).
[42] *Pattee v. Georgia Ports Authority*, 512 F. Supp. 2d 1372, 1380-82 (S.D. Ga. 2007).
[43] 512 F. Supp. 2d at 1374-75.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 1379.
[47] *Id.* at 1379-80.
[48] *Id.* at 1381-82.
[49] *Id.* at 1382.
[50] No. 06-CV-01308, 2008 WL 659777, at *1 (D. Colo. Mar. 6, 2008).

Grabau dealt with a motion in limine seeking to exclude an allegedly late disclosure related to the plaintiff's uninsurability in her premises liability action.[52] Although the court sided with the plaintiff, it found that, "[I]f [Plaintiff] is claiming damages resulting from her status as an uninsured person, I think she has a duty to mitigate damages and continue to seek insurance."[53]

Whatever authority these cases provide in the context of a claimant seeking future medical damages now that the Affordable Care Act is in force, it appears there is some support for the notion that an injured person should obtain health insurance in order to mitigate against future out-of-pocket medical expense. Since health insurance is now mandatory and a claimant cannot be denied coverage because of the injuries suffered, it would appear unreasonable for a claimant to choose to incur traditional medical expenses rather than comply with the Federal mandate to purchase health insurance.

Collateral Source: Adapting an Ancient Rule to an Unprecedented Law

The Affordable Care Act makes it unlikely that an individual will incur heath care costs in excess of a health insurance policy and related deducible, and it creates a duty to obtain health insurance coverage. The collateral source rule appears to be the only impediment to adoption of a new measure of future medical damages. At common law, the collateral source rule prevents a plaintiff's damage claim from being reduced by benefits already received from a third party for the injury or harm underlying an action.[54] In operation, the collateral source rule allows a plaintiff to recover medical expenses from a tortfeasor even if the Plaintiff will never pay the medical bills.[55]

The rationale behind the collateral source rule dates back well over 150 years to the Supreme Court decision *The Propeller Monticello v. Mollison*.[56] *Monticello,* like other early cases acknowledging the doctrine, based its adoption of the rule on the idea that insurance constituted a "wager between third parties, with which the [defendant] has no concern."[57] Important to the early rationale was that "[t]he policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and the procurement of which the defendant was in no way contributory."[58] In other words, because a defendant did not pay the insurance premiums, she should not benefit from disbursement of the insurance proceeds.[59]

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[51] *Id.* at *1.
[52] *Id.*
[53] *Id.*
[54] Robert Hernquist, *Arthur v. Cator: An Examination of the Collateral Source Rule in Illinois*, 38 Loy. U. Chi. L.J. 169, 175 (2006).
[55] *Id.*
[56] 58 U.S. 152 (1854)(adopting the English rule to American law).
[57] *Id.* at 155.
[58] *Harding v. Town of Townshend*, 43 Vt. 536, 537 (1871).
[59] *Dillon v. Hunt*, 16 S.W. 516, 518-19 (Mo. 1891) ("There can be no abatement of damages [when] partial compensation received . . . comes from a collateral source, ... To permit a reduction of damages on such a ground would be to allow a wrong-doer to pay nothing, and take all the benefit of a policy of insurance without paying the premium.").

Colorado adopted the common law collateral source rule at the beginning of the 20th century by surveying relevant case law at that time.[60] The Colorado Supreme Court favorably quoted many foreign cases focused upon defendants' failures to pay or contribute consideration towards the insurance policies in dispute.[61] Later, Colorado emphasized its policy rationale for the collateral source rule, that a "tort-feasor may not plead his victim's prudence and foresight [in obtaining insurance] to relieve him from the consequences of his own wrong."[62]

In 1986, Colorado modified the common law collateral source rule because the rule allowed plaintiffs to recover double damages for a single harm.[63] Colorado Revised Statute § 13-21-111.6 allows a court to reduce a plaintiff's verdict by the amount the plaintiff "has been or will be wholly or partially indemnified or compensated for his loss by any other . . . insurance company . . . ."[64] However, grounded in the fundamental notion that a defendant should not benefit from an insurance contract for which she never paid or contributed, the Colorado legislature kept alive a portion of the common law collateral source rule.[65] Surviving the reform, any collateral source reductions for "a benefit paid as a result of a contract entered into and paid for or on behalf of by the plaintiff" remains prohibited.[66]

More recently, the Colorado Supreme Court interpreted § 13-21-111.6 to hold that the pre-verdict evidentiary component of the collateral source rule remains intact.[67] As a result, evidence of benefits paid before trial is inadmissible at trial, even when the introduction of medical damage evidence is intended to contest the reasonable value of the damages claimed. *Id.* The Colorado Supreme Court based its holding on policy considerations resulting in prejudice to a plaintiff: (1) the unjustifiable risk that the jury will infer the existence of insurance coverage; and (2) a danger that the jury will reduce damages based upon an insurer's arrangement with a healthcare provider to accept reduced payment of medical bills.

The collateral source rule's control over future medical benefits paid by an insurer may be called into question on both policy and practical grounds. Importantly, a clear distinction should be made between past and future medical benefits. Although the ACA mandates that all individuals obtain health insurance, there still may be some who fail to obtain it and chose to suffer the tax penalty. Moreover, those that do purchase health insurance prior to an accident will pay for and provide consideration for the insurance policy absent any involvement by a defendant. Therefore, the rationale for the collateral source rule for past medical benefits incurred prior to an incident may largely be unaffected by the ACA.[68] However, the reasons which support the antiquated collateral source rule for future medical damages are now absent.

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[60] *Rhinehart v. Denver & R.G.R. Co.*, 158 P. 149 (Colo. 1916), *overruled in part on other grounds by Morgan Cnty Junior College Dist. V. Jolly*, 452 P.2d 34, 36 (Colo. 1969).
[61] *Id.* at 151-53.
[62] *Riss & Co. v. Anderson*, 114 P.2d 278, 281 (Colo. 1941).
[63] *See* C.R.S. § 13-21-111.6; *Wal-Mart Stores Inc. v. Crossgrove*, 276 P.3d 562, 565-66 (Colo. 2012).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Wal-Mart Stores Inc. v. Crossgrove*, 276 P.3d 562, 566-68 (Colo. 2012).
[68] *E.g.*, the risk that a claimant may be presumed to have insurance, enough though she does not, could remain; and a defendant would be benefiting from an insurance policy that she in no way contributed towards.

As a practical matter, future medical expenses are, by definition, not yet paid. Since *Crossgrove*'s prohibition on the pre-verdict admission of paid insurance benefits for medical care already received said nothing of not-yet-paid future medical expenses, Colorado is without a clear binding precedent on this issue.[69] Even if *Crossgrove*'s holding could be construed otherwise, the policy reasons for the collateral source rule no longer support it.

First, the ACA's insurance mandate replaces a party's prudence, foresight, and responsibility in obtaining health insurance.[70] Individuals will no longer be deterred from entering into insurance contracts due to a potential lawsuit because all Coloradans are now legally obligated to purchase health insurance.[71] In fact, the ACA actually deters individuals from forgoing health insurance by penalizing them for every month they fail to buy it.[72] After 2015, the applicable tax penalty will run Coloradans 2.5 percent of their taxable income or $695 a month, whichever is the lessor.[73]

Second, individuals will no longer face the risk that they will be unjustifiably presumed to have health insurance. Due to an injured plaintiff's duty to mitigate damages, an uninsured plaintiff who does not have health insurance at trial has an obligation to obtain health insurance afterwards.[74] Because of the insurance mandate, a plaintiff will be presumed to have health insurance. In a reversal of roles, under the ACA, it will likely be Plaintiffs who want the jury to know they failed to have the mandated health insurance, and tort defendants will argue to exclude any evidence as to the lack of health insurance for future medical expenses.

Lastly, and perhaps more fundamental to application of the collateral source rule, defendants could be liable for paying the premiums of the injured person's insurance policy. Rather than presenting evidence at trial of an insurance contract paid for by an injured plaintiff to off-set damages,[75] defendants will offer evidence of the cost to purchase a health insurance policy, and the expenses necessary for all future yearly deductibles, to be paid by the defendant in the form of damages. This result not only comports with the Colorado's legislative intent behind C.R.S. § 13-21-111.6 – to end double recovery, but resolves the age old concern of justices and jurists that a defendant would be able profit from the plaintiff's insurance contract.[76] Now, a plaintiff can be made whole by a defendant who buys her health insurance for her.

The idea that a defendant would be, in effect the purchaser of a plaintiff's health insurance policy may also undermine a health insurer's claim to subrogation rights.[77] In Colorado, an insurer cannot pass a loss back to its insured for paying benefits covered under an

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[69] *Crossgrove*, 276 P.3d 562, 566-68 (Colo. 2012). *See also Carr v. Boyd*, 229 P.2d 659, (Colo. 1951) (prohibiting admission of past benefits paid by holding, "Benefits *received* by the plaintiff from a source other than the defendant and to which [the defendant] has not contributed are not to be considered in assessing damages.").
[70] *See* 26 U.S.C. 5000A(a)-(c); *Riss & Co. v. Anderson*, 114 P.2d 278, 281 (Colo. 1941).
[71] 26 U.S.C. 5000A(a)-(c);
[72] *Id.*
[73] *Id.*
[74] *See* Duty to Mitigate, *supra*, at 4.
[75] *See Crossgrove*, 276 P.3d 562, 566-68 (Colo. 2012).
[76] *Rhinehart v. Denver & R.G.R. Co.*, 158 P. 149 (Colo. 1916), *overruled in part on other grounds by Morgan Cnty Junior College Dist. V. Jolly*, 452 P.2d 34, 36 (Colo. 1969).
[77] *See Vitetta v. Corrigan*, 240 P.3d 322, 330-31 (Colo. App. 2009) (describing the anti-subrogation rule).

insurance policy.[78] Instead, subrogation rights exist to allow an insurer to "stand in the shoes of its insured to seek recovery from a third party tortfeasor and thereby avoid double recovery by [a] plaintiff[]."[79] But, if the threat of double recovery no longer exists, and benefits are paid to a plaintiff under a policy effectively purchased by the tortfeasor, it would seem subrogation by a health insurer would be in question.

Conclusion

The Affordable Care Act mandates an injured party purchase health insurance. Therefore, unless the injured person violates the law found in the ACA, she will not incur actual medical expenses greater than yearly health insurance premiums and deductibles. The Act mandates that citizens obtain health insurance, and it guarantees essential health benefits to everyone. The question is whether the collateral source rule can still stand in the way of measuring future medical damages with an ACA health insurance policy.[80]

Some courts who have addressed this issue in the context of motions in limine have welcomed authority explaining why the collateral source rule would not apply.[81] One court limited a defendant's ability to address this issue, providing it an opportunity to rebut a plaintiff's position that he was required to fully re-pay an insurer out of proceeds obtained at trial.[82] And another refused to entertain a life care planner's evidence that future medical expenses would be completely covered by an ACA health insurance policy because of the laws questionable "continued viability" in the present political landscape.[83]

Although the majority holding is yet to be identified, what is certain is that arguments for the measurement of future medical damages based upon an ACA health insurance policy are being raised in many venues across the country.[84] Sooner or later, a court will have to decide how to adapt the collateral source rule to the unprecedented mandates of the Affordable Care Act. Even if the result troubles some court's early in the development of the new rule, Colorado's unique position on the collateral source rule may provide for a result favoring an ACA health insurance policy measure for future medical damages.

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[78] *Id.* (citing *DeHerrera v. American Family Mut. Ins. Co.*, 219 P.3d 346, 351 (Colo. App. 2009).
[79] *Id.* (internal quotations omitted).
[80] *See Cowden v. BNSF Railway Co.*, ___ F. Supp. 2d ____, 2013 WL 5838718, at *19-20, 20 n. 12 (E.D. Mo. Oct. 30, 2013) (reserving ruling on Plaintiff's motion in limine to exclude defense of future medical damages based upon the Affordable care act until trial, but instructing defendant, "Should this issue arise at trial, Defendant must come forward with authority that any coverage under Affordable Care Act does not constitute a collateral source.").
[81] *Id.*
[82] *Brewster v. Southern Home Rentals, LLC*, No. 3:11CV872-WHA, 2012 WL 6101985, at *4 (M.D. Ala. Dec. 7, 2012).
[83] *CSC v. United States*, No. 10-910-DRH, 2013 WL 6795723, *15-16 (S.D. Ill. Dec. 20, 2013).
[84] *See*, *e.g.*, *CSC v. United States*, No. 10-910-DRH, 2013 WL 6795723, *15-16 (S.D. Ill. Dec. 20, 2013).