Mitigating Damages: A Framework for Limiting Future Medical Care Losses Based on The Affordable Care Act

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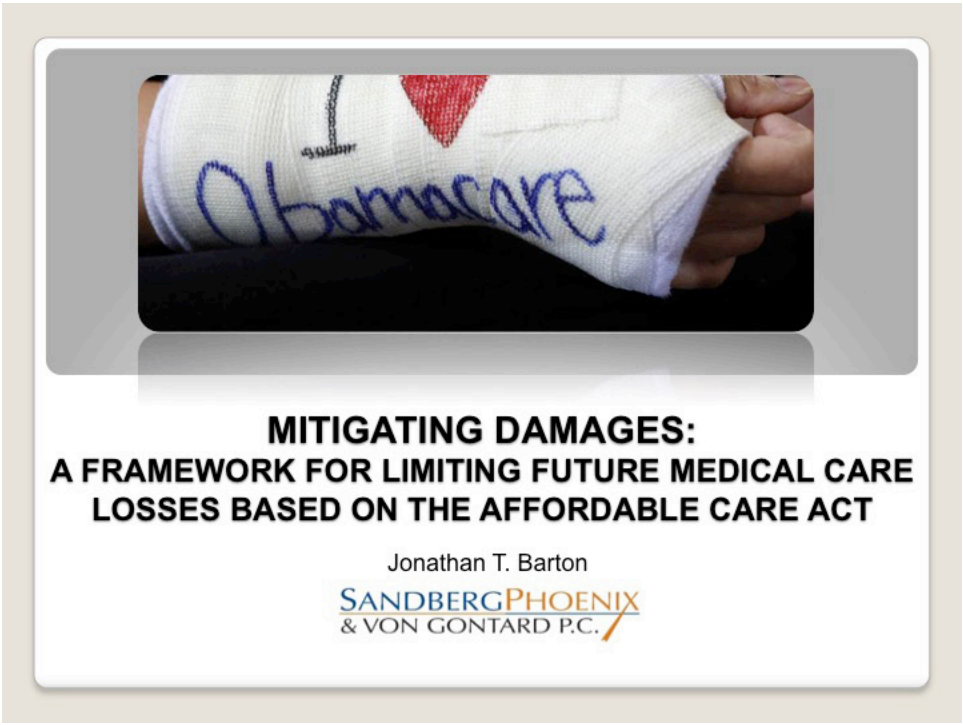
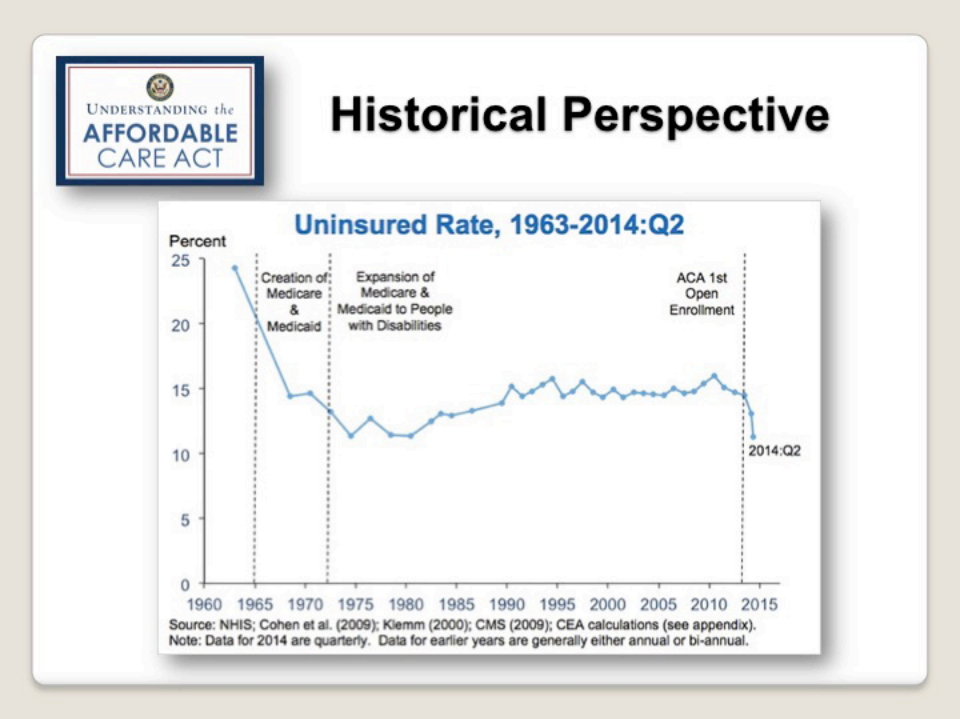
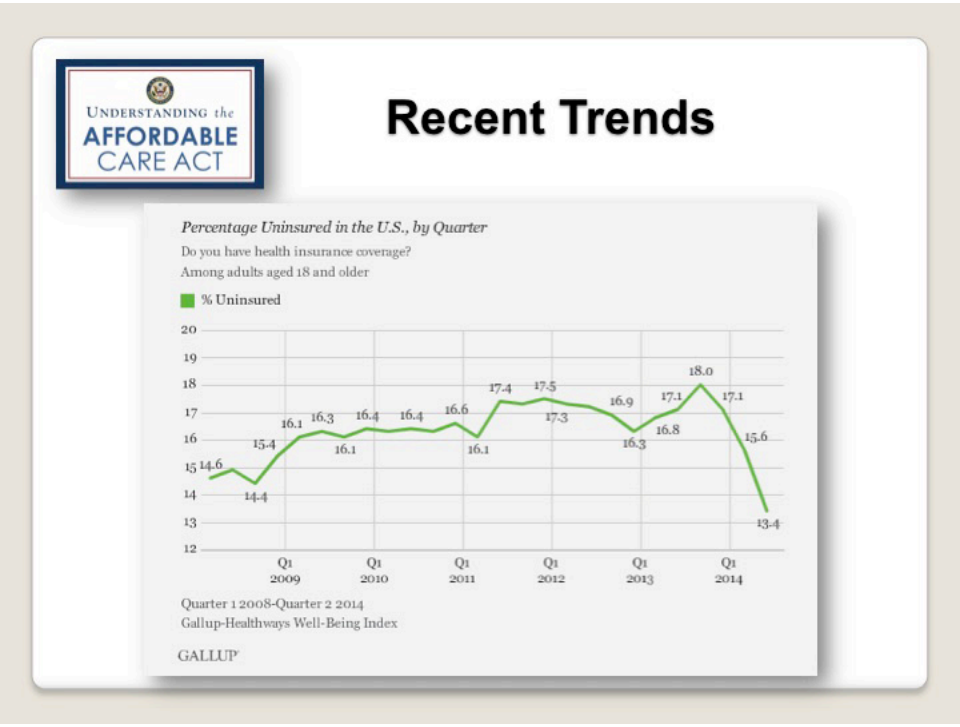
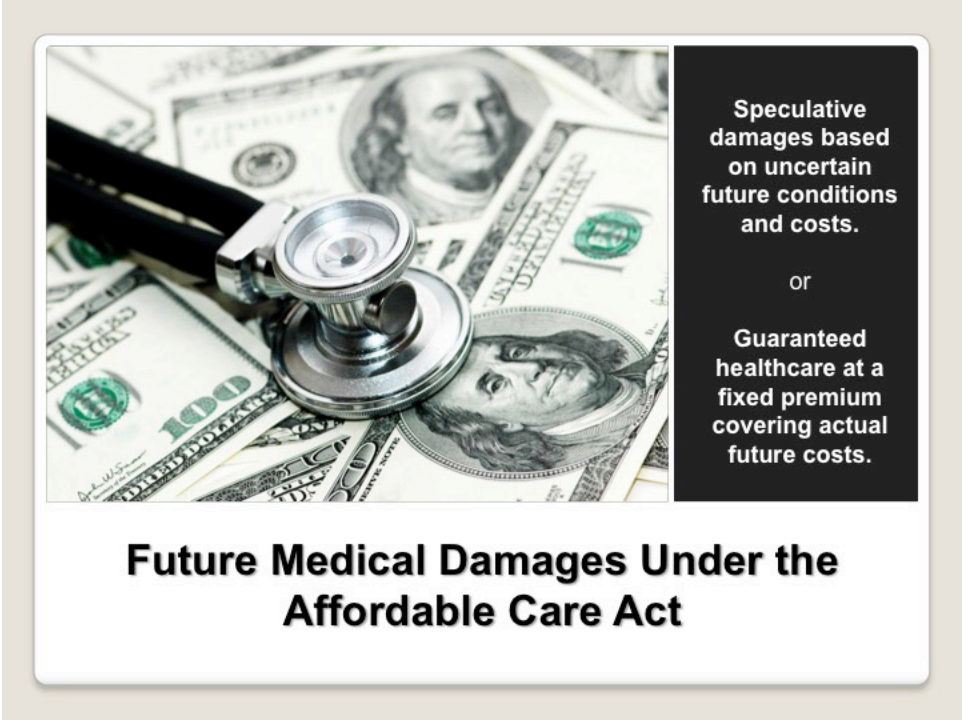
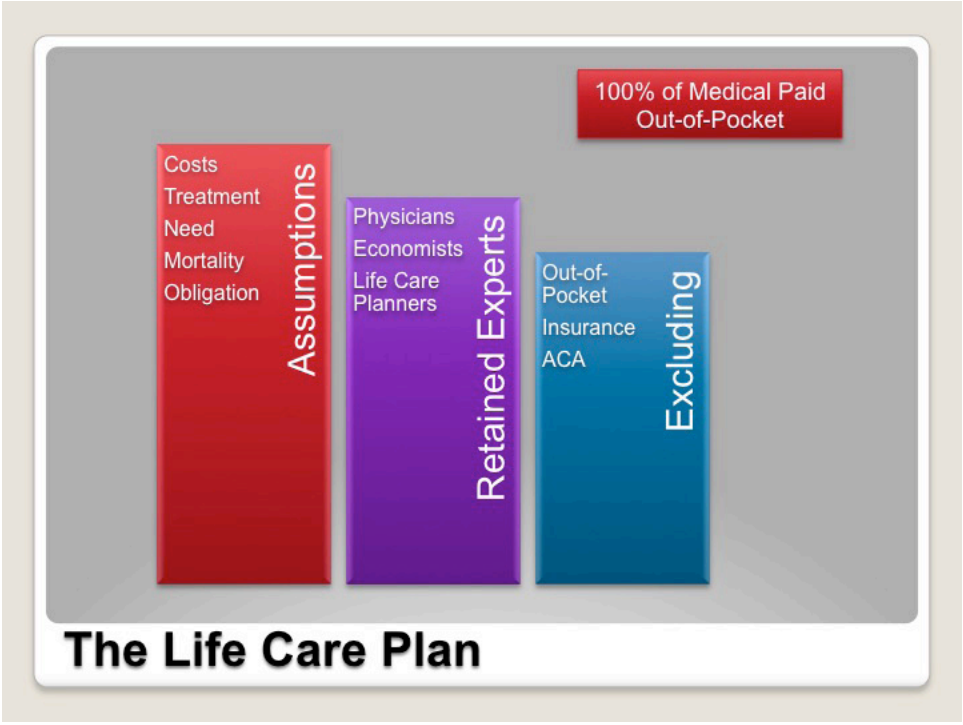
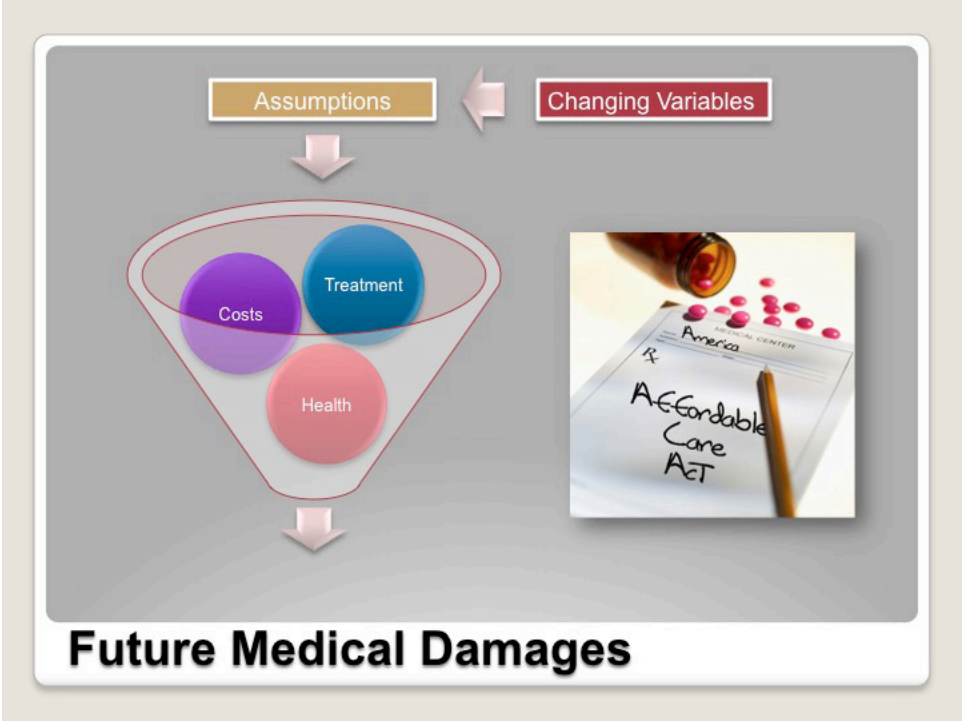


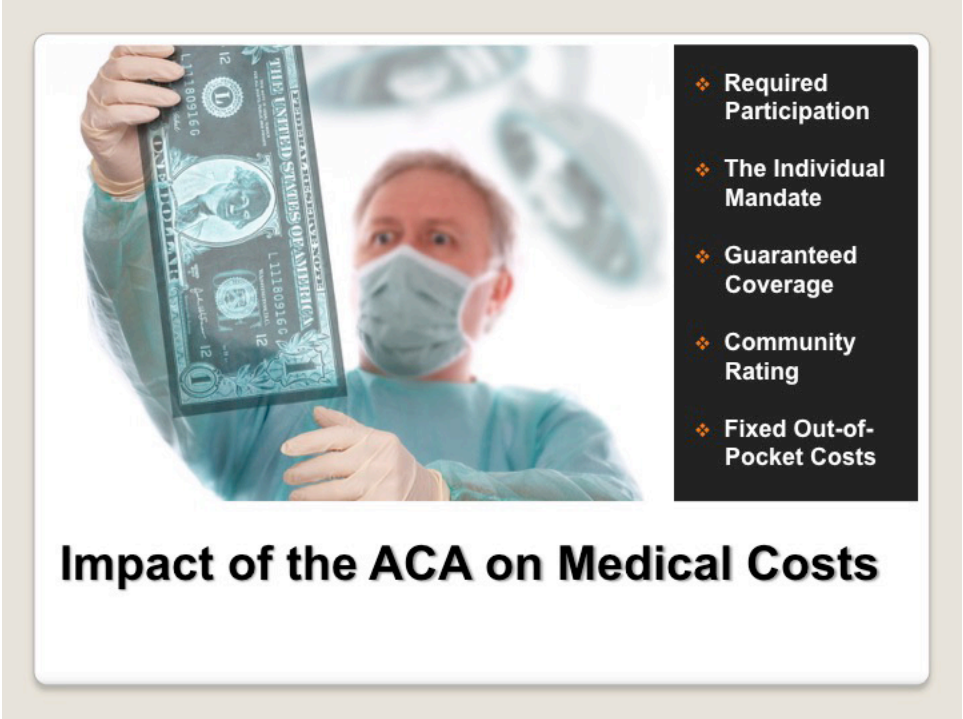

UNDERSTANDING the AFFORDABLE CARE ACT
Historical Perspective
Uninsured Rate, 1963-2014:Q2
Percent
25
20
15
10
5
0
Creation of Medicare & Medicaid
Expansion of Medicare & Medicaid to People with Disabilities
ACA 1st Open Enrollment
2014:Q2
1960 1965 1970 1975 1980 1985 1990 1995 2000 2005 2010 2015
Source: NHIS; Cohen et al. (2009); Klemm (2000); CMS (2009); CEA calculations (see appendix).
Note: Data for 2014 are quarterly. Data for earlier years are generally either annual or bi-annual.

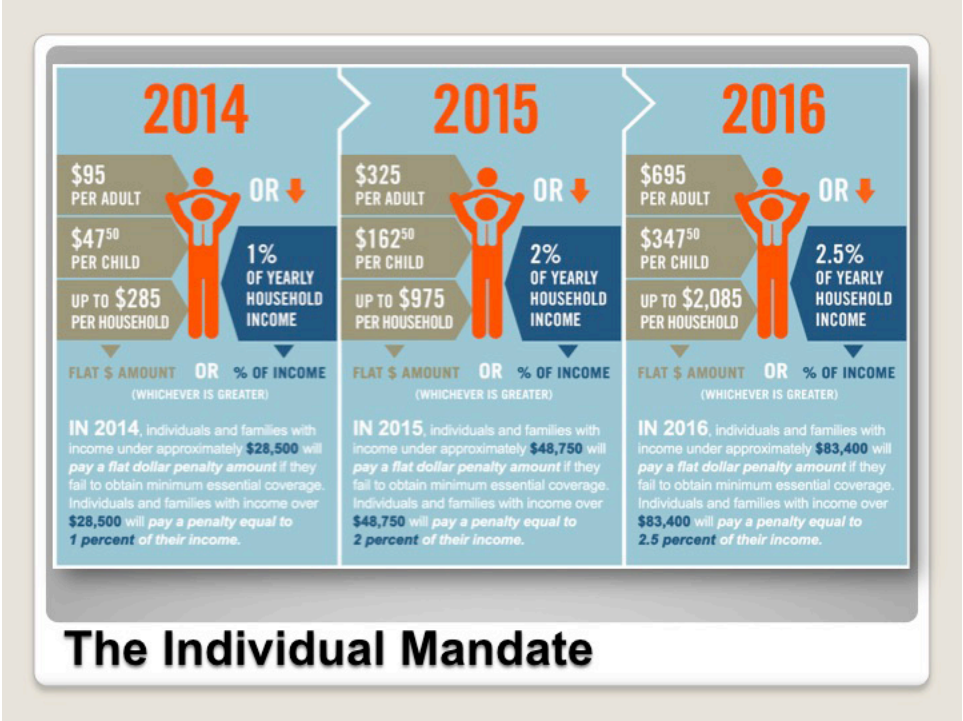

UNDERSTANDING the AFFORDABLE CARE ACT
Recent Trends
Percentage Uninsured in the U.S., by Quarter
Do you have health insurance coverage?
Among adults aged 18 and older
% Uninsured
20
19
18
17
16
15
14
13
12
14.6
14.4
15.4
16.1
16.3
16.1
16.4
16.4
16.6
16.1
17.4
17.5
17.3
16.9
16.3
16.8
17.1
18.0
17.1
15.6
13.4
Q1 2009
Q1 2010
Q1 2011
Q1 2012
Q1 2013
Q1 2014
Quarter 1 2008-Quarter 2 2014
Gallup-Healthways Well-Being Index
GALLUP

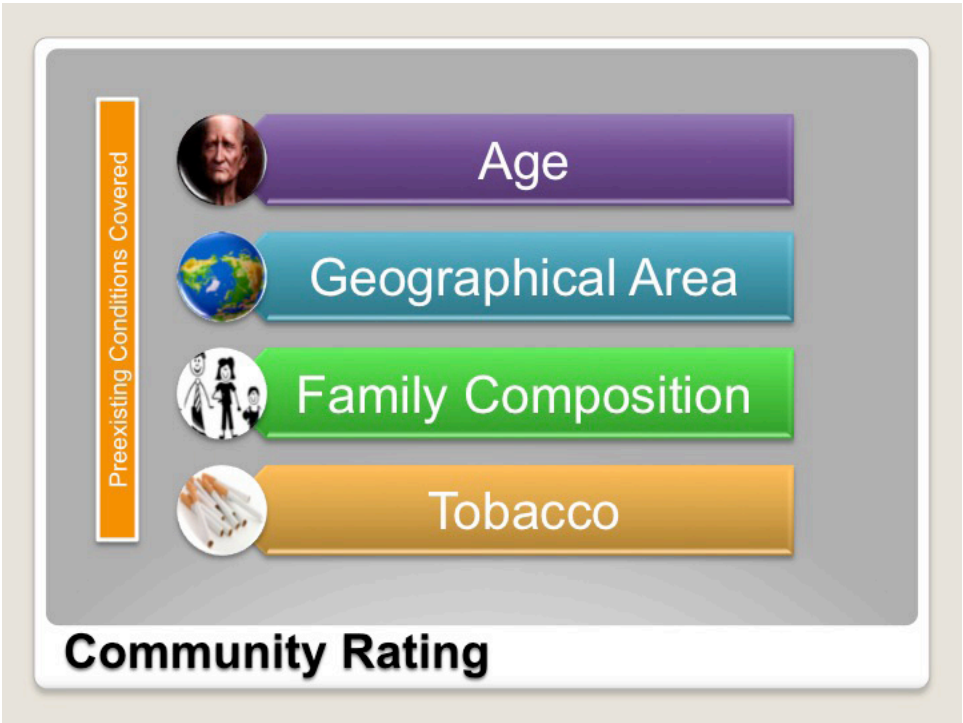

Speculative damages based on uncertain future conditions and costs.
or
Guaranteed healthcare at a fixed premium covering actual future costs.
Future Medical Damages Under the Affordable Care Act


100% of Medical Paid Out-of-Pocket
Costs
Treatment
Need
Mortality
Obligation
Assumptions
Physicians
Economists
Life Care Planners
Retained Experts
Out-of-Pocket
Insurance
ACA
Excluding
The Life Care Plan

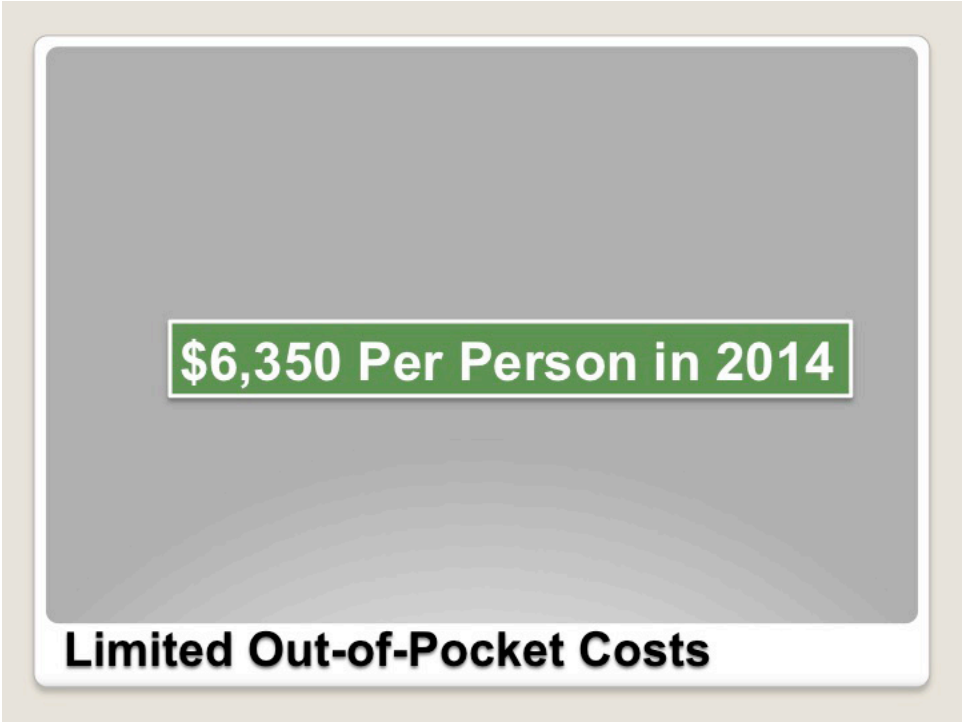

Assumptions
Changing Variables
Costs
Treatment
Health
America
A-F-Fordable
Care
Act
Future Medical Damages


Required Participation
The Individual Mandate
Guaranteed Coverage
Community Rating
Fixed Out-of-Pocket Costs
Impact of the ACA on Medical Costs

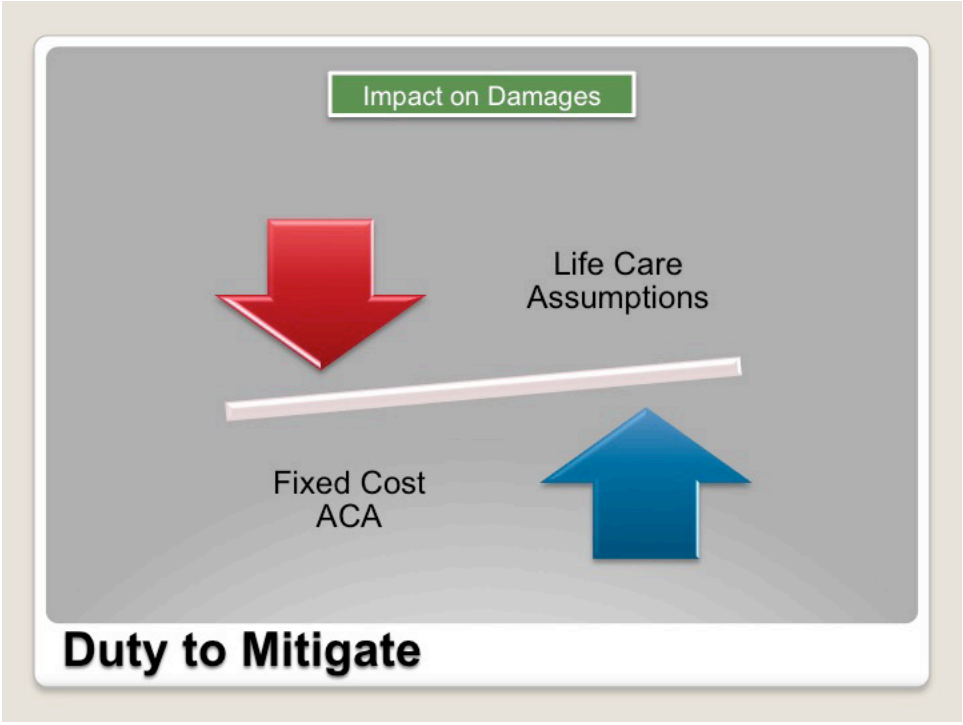

2014
$95 PER ADULT
$47.50 PER CHILD
UP TO $285 PER HOUSEHOLD
OR
1% OF YEARLY HOUSEHOLD INCOME
FLAT $ AMOUNT OR % OF INCOME
(WHICHEVER IS GREATER)
IN 2014, individuals and families with income under approximately $28,500 will pay a flat dollar penalty amount if they fail to obtain minimum essential coverage. Individuals and families with income over $28,500 will pay a penalty equal to 1 percent of their income.
2015
$325 PER ADULT
$162.50 PER CHILD
UP TO $975 PER HOUSEHOLD
OR
2% OF YEARLY HOUSEHOLD INCOME
FLAT $ AMOUNT OR % OF INCOME
(WHICHEVER IS GREATER)
IN 2015, individuals and families with income under approximately $48,750 will pay a flat dollar penalty amount if they fail to obtain minimum essential coverage. Individuals and families with income over $48,750 will pay a penalty equal to 2 percent of their income.
2016
$695 PER ADULT
$347.50 PER CHILD
UP TO $2,085 PER HOUSEHOLD
OR
2.5% OF YEARLY HOUSEHOLD INCOME
FLAT $ AMOUNT OR % OF INCOME
(WHICHEVER IS GREATER)
IN 2016, individuals and families with income under approximately $83,400 will pay a flat dollar penalty amount if they fail to obtain minimum essential coverage. Individuals and families with income over $83,400 will pay a penalty equal to 2.5 percent of their income.
The Individual Mandate


Preexisting Conditions Covered
Age
Geographical Area
Family Composition
Tobacco
Community Rating


Ambulatory Services
Emergency Services
Hospitalization
Maternity
Newborn Care
Mental Health
Prescription Drugs
Rehabilitative
Habilitative Services
Laboratory Services
Preventative
Wellness Services
Chronic Disease Management
Pediatric Services
Oral Care
Vision
Guaranteed Coverage


$6,350 Per Person in 2014
Limited Out-of-Pocket Costs


Duty to Mitigate
Compensatory Damages
Collateral Source Rule
Conflicting Public Policy


Impact on Damages
Life Care Assumptions
Fixed Cost ACA
Duty to Mitigate

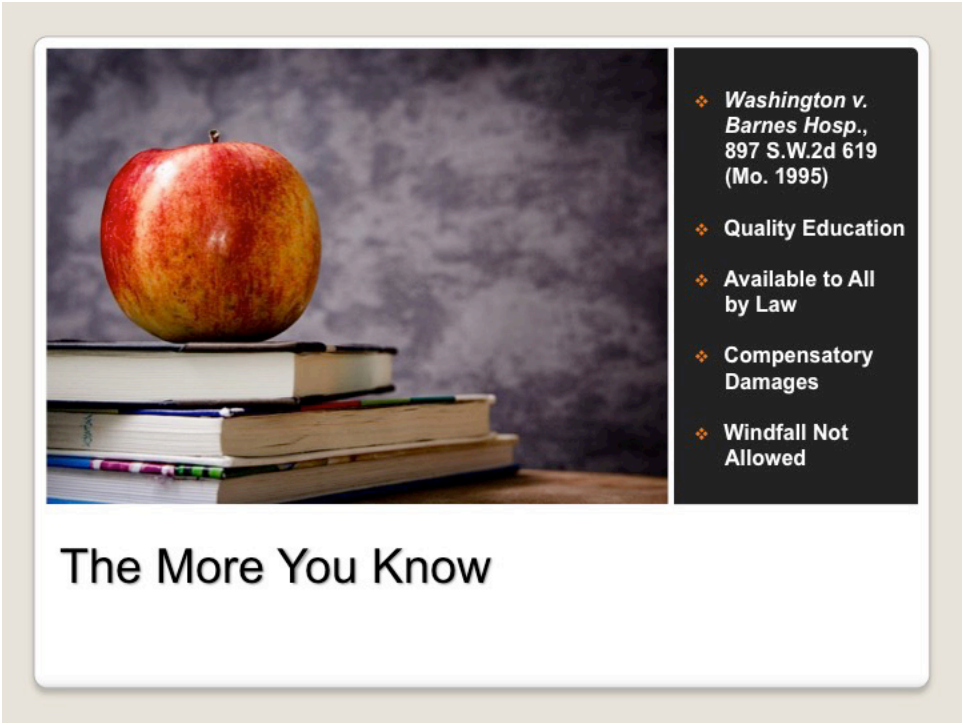
Compensatory Damages:

n. damages recovered in payment for actual injury or economic loss, which does not include punitive damages.

The collateral source rule prevents an injured person's damages from being reduced by payments from their own medical insurance or other third party sources

Pro	Con
• Encourages Insurance Participation. • Requires Wrongdoer to Pay for Damages. • Future Damages are Ascertainable through Expert Testimony	• Insurance Participation is Required Under the ACA. • Future Medical Costs are Fixed (not Speculative). • Results in Double Recovery/ Inflated Damages. • Punitive not Compensatory.

Collateral Source


Washington v. Barnes Hosp., 897 S.W.2d 619 (Mo. 1995)
Quality Education
Available to All by Law
Compensatory Damages
Windfall Not Allowed
The More You Know


UNLESS
Thank You.

MITIGATING DAMAGES: A FRAMEWORK FOR LIMITING FUTURE MEDICAL CARE LOSSES BASED ON THE AFFORDABLE CARE ACT

INTRODUCTION:

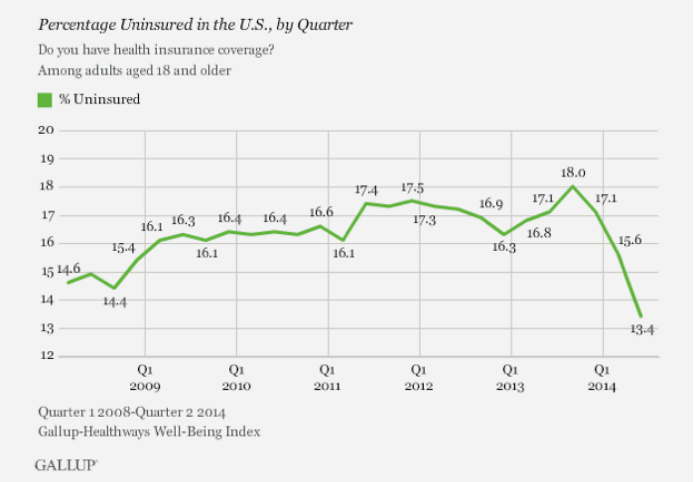
Plaintiffs in personal injury litigation often introduce evidence of future medical treatments and their associated costs as part of their compensatory damages. These plaintiffs rely on life care planners and economists to establish the amount future medical expenses through expert testimony. A life care plan has the potential to significantly inflate future medical expenses which are often one of the largest categories of damages claimed by an injured person. The plans are necessarily speculative based on assumed future medical needs and the anticipated costs associated with the treatment. These future costs are often questionable because of the uncertainty of an individual's changing health, the potential for medical complications, faster healing, advances in medical science and even the death of the patient before the future anticipated care is rendered. Add to these complications the fact life care planners often assume 100% of the future medical expenses are to be paid out-of-pocket by the plaintiff ignoring what the injured party actually pays or is obligated to pay. Nevertheless, these fictional damages are often presented to the jury without rebuttal evidence of the actual damages to be paid by the plaintiff for a variety of conflicting public policy reasons.

The Patient Protection and Affordable Care Act ("ACA") creates a new opportunity to challenge the current public policy behind excluding evidence of the actual charge for future medical care. When the law is fully implemented, the ACA, better known as "Obamacare", will result in almost all Americans being covered by some minimum level of quality health insurance without regard to preexisting conditions. Americans will be required to participate in some form of health insurance or pay a penalty for failing to do so. These guaranteed plans will provide a measurable objective costs for future medical treatment. Thus, the question that will be litigated in the coming years is whether it remains fair and consistent with the common law principles of mitigating ones damages to allow speculative and often fictitious damages based on a flawed premise (100% out-of-pocket) creating windfall recoveries as a measure of "compensatory damage" that exceeds the actual costs incurred by the injured party.

HISTORY & BACKGROUND:

For several decades approximately 85% of Americans have had some form of health insurance. However, the courts have excluded evidence of this coverage based primarily on the collateral source rule. Thus, juries have not taken into consideration that the costs of future medical care in a life care plan may be covered by health insurance. The courts reason that a tortfeasors should not avoid responsibility for damage and benefit from the bargains struck by the plaintiff with a third party to cover such losses. However, prior to the ACA there was no guaranteed and, indeed, mandated health insurance to cover all Americans—regardless of pre-existing conditions.

Federal law now mandates that every individual have health insurance and that health insurance companies not discriminate based on the status of one's health condition. In 2007 Americans without health insurance coverage totaled 15.3% of the population, or 45.7 million people. The number of Americans without medical insurance increased to 18% by 2013 and sharply declined thereafter as a result of the ACA. If this sharp decline continues virtually all Americans will be covered by insurance or have the ability to obtain heath care coverage in the future.



Congress has explicitly placed a cap on out-of-pocket expenses that individuals can be charged. The overarching goal of the Affordable Care Act, to increase the number of Americans covered by health insurance and decrease the cost of healthcare, establishes limitations on future health care costs for all Americans. As of January 1, 2014, a personal injury plaintiff, just like all other Americans are required to have health insurance. As a result, health insurance providers are prohibited from discriminating against an injured plaintiff because of their health status. Thus, the total "out-of-pocket cost" for obtaining the insurance, and therefore medical treatment will be at most a relatively modest annual premium.

A. The Individual Mandate:

The ACA requires everyone to purchase health insurance as a matter of law. Effective January 1, 2014, the individual mandate requires most Americans to maintain minimum essential health insurance coverage. 26 U.S.C. § 5000A.

Non-exempt individuals who do not receive health insurance through a third party (i.e., an employer or a government program such as Medicare or Medicaid) must satisfy the individual mandate by purchasing insurance. See § 26 U.S.C. 5000A(f).

Those who do not comply with the mandate must make a "[s] hared responsibility payment" to the Federal Government. 26 U.S.C. § 5000A(b)(l). Stated differently, under the mandate, if an individual does not maintain health insurance, he will have to pay a penalty tax that increases every year-- from 1% of income or $95 per adult, whichever is higher in 2014 to $695 per person or 2.5 percent of a household's income, whichever is greater by 2016. Id.

B. Guaranteed Coverage & Community Rating:

The ACA requires health insurance companies to cover an individual regardless of pre-existing conditions. It also prohibits health insurance companies from increasing rates for an individual based on pre-existing conditions. 42 U.S.C, §§ 300gg. The ACA permits rating variation based only on age, geographical area, family composition, and tobacco use. 42 U.S.C. § 300gg. Thus, the ACA addresses the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues through its "guaranteed-issue" and "community-rating" provisions. Nat'l Fed of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2585 (2012).

C. Coverage and Out-of-Pocket Costs:

The ACA also sets minimum standards for covered services and maximum out-of-pocket expenditures for health insurance plans. 42 U.S.C. § 18022. To do so, the ACA created an "essential health benefits package" that provides a comprehensive set of services and limits the annual out-of pocket expenses to $6,250 per individual. 42 U.S.C. § 18022. The ACA provides subsidies for health care costs (including insurance premiums) to those with low income who do not receive health insurance through the government or an employer. This can lower the amount of out-of-pocket costs to one third to two thirds of the above amounts. 42 U.S.C. § 18081.

Even with these reduced premiums, each health care plan must cover, at a minimum: (A) Ambulatory patient services; (B) Emergency services; (C) Hospitalization; (D) Maternity and newborn care; (E) Mental health and substance use disorder services, including behavioral health treatment; (F) Prescription drugs; (G) Rehabilitative and habilitative services and devices; (H) Laboratory services; (I) Preventative and wellness services and chronic disease management; and (J) Pediatric services, including oral and vision care. 42 U.S.C. § 18022. Many categories of future medical needs identified in a typical plaintiffs' life care plan are covered by the essential benefits package under the ACA.[1]

CONFLICTING PUBLIC POLICY:

A. The Duty to Mitigate of Damages:

The duty to mitigate damages requires an injured party to exercise reasonable diligence and ordinary care in trying to minimize his damages. In most jurisdictions the failure to mitigate damages is an affirmative defense that must be pled and proved by the defendant. This duty requires the injured party take reasonable steps to minimize the consequences of the injury. Without the duty to mitigate acting as a deterrent a plaintiff could conceivable inflate their damages by failing to take action that a reasonably prudent person would otherwise take to minimize a loss.

In the context of the ACA, the question presented is why should a plaintiff be allowed to choose an inflated medical charge based on future out-of-pocket expenses when the same quality health care could be acquired for significantly less? Indeed, not only could the plaintiff acquire the same medical care for less, they are federally mandated to do so. If a plaintiff has a duty to mitigate their damages then they should be required to choose the less expensive option for the same quality medical care. Further, a defendant should be allowed to rebut any such "out-of-pocket" expenses by introducing evidence of the actual costs incurred by the plaintiff under the ACA.

The vast majority of expenses claimed by life care projections are covered under the health benefits of the ACA. Therefore, plaintiffs should not be allowed seek a windfall recovery consisting of out-of-pocket costs they are not obligated to pay when they comply with federal law and participate in insurance. In the very least the premium costs associated with procuring insurance under the ACA should be presented as rebuttal evidence so the jury can properly consider the actual costs to the plaintiff. Indeed arguments could be made that a plaintiff's future medical damages should be limited to projected payments and deductibles under the ACA as a matter of law.

B. The Nature of Compensatory Damages:

Damages for future medical expenses are meant to be compensatory—not punitive. The current practice of relying on experts to predict out of pocket expenses into the future does not comport with reality and often result in damage awards in excess of the amount the plaintiff is required to pay. Soon, if current trends continue, every juror

1 Long term care, nursing care, and homecare are hardly ever covered by health insurance. Those expenses are often paid out-of-pocket or by short and long term disability insurance, if the individual has obtained such insurance. The ACA is limited to health insurance, not disability insurance, so, the decision to purchase disability insurance remains an individual choice not mandated by statute. Therefore, the portions of a plaintiff's life care plan pertaining to such expenses would remain free from the new attacks occasioned by the ACA.

will understand the impact and implication of the ACA on future potential medical costs. It will be difficult for them to ignore this reality in trying to determine the actual costs of future medical damages. The jury will know the plaintiff has insurance or has the right to acquire insurance through the ACA. As a result, speculative life care projections that ignore the benefits provided by the ACA should not be presented to the jury unrebutted—if medical damages are truly compensatory. As one Court noted "[t]o award [a claimant] compensation for medical expenses for which she has no liability would result in a windfall rather than compensation."[2] The Court reasoned that actual liability was required for an award of compensatory damages.

Indeed, most jury instructions state that if the jury finds in favor of the plaintiff, it must award such sum as it believes will fairly and justly compensate the plaintiff for any damages it believes the plaintiff sustained and is reasonably certain to sustain in the future due to the tortious conduct. The standard for recovering future medical costs requires evidence that such costs are reasonable certain.[3] Under the ACA we can be reasonably certain that medical insurance is available to parties at a fixed cost for far less than most projected life care plans. Indeed, actual damages that cover the costs of future insurance premiums under the ACA would be more reliable and far less expensive than the current practice of assuming out-of-pocket expenses for 100% of the costs.

Plaintiffs will undoubtedly argue that a wrongdoer should not be allowed to pass the bill for their negligent acts to the tax payers. However, the ACA requires that all American's have health insurance. As a result, coverage exists and is available to a plaintiff regardless of whether they choose to avail themselves of the benefits. As such, the premiums represent the actual costs incurred by the plaintiff for the treatment required. Compensatory damages in our tort system are compensatory not punitive. To charge a fictitious amount for treatment in order to deter tortious conduct is a measure of punitive damages. If that is the case, then the legislature and courts must decree that future medical costs are punitive and exemplary—not compensatory.

Consider the following Instruction from the 5th District Court of Appeals which is similar to most state and federal damage instructions:

> If you find that the defendant is liable, you must award the amount you find by a preponderance of the evidence as full and just compensation for all of the plaintiff's damages. [If there is no issue of punitive damages for the jury, continue with this instruction. If there is, however, then this instruction should be prefaced with: You also will be asked to determine if the Defendant is liable for punitive damages, and, if so, you will be asked to fix the amount of those damages. Because the method of determining punitive damages and compensatory damages differ, I will instruct you separately on punitive damages. The instructions I now give you apply only to your award, if any, of compensatory damages.] Compensatory damages are not allowed as a punishment against a party. Such damages cannot be based on speculation, for it is only actual damages—what the law calls compensatory damages—that are recoverable. . . . . You should consider the following elements of damages, to the extent you find that the plaintiff has established such damages by a preponderance of the evidence: . . . . the reasonable value, not exceeding actual cost to the plaintiff, of medical care that you find from the evidence will be reasonably certain to be required in the future as a proximate result of the injury in question.
>
> 5th Circuit Pattern Jury Instructions. 4.8 (2006) (emphasis added).

Evidence of the availability, cost, and quality of future medical care through the ACA is relevant to assist the jury in determining the reasonable and actual cost of future medical treatment. The jury must be permitted to consider evidence of future services available through ACA when deciding on the proper amount of an award of future damages—if such damages are truly compensatory.

C. The Collateral Source Rule:

The biggest evidentiary hurdle for defendants in seeking to admit the actual future medical costs under the ACA is the collateral source rule. The policy considerations behind the collateral source rule are rooted in nineteenth century understandings of health insurance. At that time, most individuals were not covered by health insurance. It was rare for employers to pay any portion of health insurance premiums, so the few individuals who were insured paid premiums out-of-pocket. Seeing the economic utility in health insurance, courts sought to incentivize and protect the individual decision to purchase insurance by prohibiting the jury from considering evidence of it when determining the medical expense portion of damages.

As a rule of damages, the collateral source rule prohibits a defendant from reducing personal liability for damages because of payments received by the plaintiff from independent sources. Generally, the collateral source rule provides that payments from a collateral source shall

2 Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818, 822 (Mo. banc 2003)

3 Breeding v. Dodson Trailer Repair, Inc., 679 S.W.2d 281, 283 (Mo. banc 1984) (testimony regarding future damages is incompetent if it lacks "reasonable certainty").

not diminish the damages otherwise recoverable from the wrongdoer. This rule was created to prevent wrongdoers from avoiding economic responsibility merely because coverage for the injury was provided by some collateral source, e.g. insurance. The rule was originally intended to prevent a wrongdoer from taking advantage of the fortuitous existence of a collateral remedy—traditionally provided at the plaintiff's own expense.

Under the ACA, purchasing health insurance is no longer a choice. The ACA provides that all citizens must obtain health insurance, with only a few exemptions. Therefore, it is no longer necessary to incentivize and protect what was historically an individual choice to purchase health insurance, because obtaining health insurance is now required by statute.

Under traditional collateral source rulings the jury is forbidden from considering evidence of a plaintiff's health insurance when determining the amount of future medical costs. Because the jury is prevented from hearing such evidence, there is the potential under the common law rule for a plaintiff to obtain a double-recovery for medical expenses; one from a jury's damages award, and one from the plaintiff's health insurance. Under the ACA the potential for a double recovery is now guaranteed. If the plaintiff recovers 100% of the out-of-pocket costs for future medical treatment they can then enroll for health coverage under the ACA to obtain the exact same medical treatment for a fraction of the cost. Thus, the application of the collateral source to the ACA will not encourage the public policy the rule was originally created to promote. Instead application of the collateral rule to the ACA would make future medical care expenses punitive and not compensatory.

CONCLUSION:

Twenty years ago the very issue of whether a publically guaranteed program could be considered collateral was litigated in the State of Missouri. Many other states have similar case law inadvertently addressing the issues presented by the ACA. In Washington v. Barnes Hosp., 897 S.W.2d 619 (Mo. 1995) the Supreme Court of Missouri undertook a scholarly discussion of the collateral source rule evidentiary doctrine describing it as an exception to the general rule that damages in tort cases should be compensatory for losses only. The case involved an analysis of whether the collateral source rule could properly operate to bar evidence at trial of a publicly-available special education program for the injured minor, "available to all by law," in opposition to plaintiff's evidence of the expense of a private school. Id. at 619-20. The Court articulated its unwillingness to permit the collateral source to allow a windfall recovery. Id. at 621. Because the plaintiff had not entered into any bargain as to the expense of this special education, the Court held the collateral source rule could not be applied to prevent the defendant from introducing evidence of the public program. As the court noted: "[w]e reject the concept that the collateral source rule should be utilized solely to punish the defendant." Id.

The same logic must now be applied to the application of the ACA in calculating a plaintiff's future potential damages. The plaintiff can continue to present evidence of the out-of-pocket costs. However, defendants must be allowed to rebut that evidence with the actual costs of the future medical care under the ACA. Indeed, the collateral source rule should not apply to the ACA because health care is now "available to all by law."

> "Unless someone like you cares a whole awful lot,
> Nothing is going to get better. It's not."
>
> — Dr. Seuss, The Lorax

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Jonathan Barton is a shareholder of Sandberg Phoenix & von Gontard. He is a member of the firm's products liability practice group and is active in the firm's general litigation and business litigation practice. Jon is engaged in all aspects of litigation from the initial claim investigation stage through trial before the bench and jury in both state and federal courts. He has extensive experience in defending products liability cases involving a wide array of industrial machinery, motorized vehicles, electrical components (including medium and high voltage equipment) and consumer goods. Jon is also experienced in cases involving fire science, premises liability, transportation law, intellectual property litigation and insurance defense.

Jon is a regular speaker to members of the Missouri and Illinois Bar as well as attorneys and general counsel on a national basis. He presents seminars on issues involving integration of technology during the discovery process and at trial as well as advanced trial and deposition skills and techniques. Jon also hosts a yearly web seminar on ethics from the litigator's perspective.

Jon received the honor of being named by Missouri Lawyers Weekly as one of the Up & Coming Lawyers in Missouri for 2008. Missouri & Kansas Super Lawyers named him a Rising Star in 2010 and a Super Lawyer from 2011 – 2014 in the area of Personal Injury Defense: Products.

He was chosen as one of the St. Louis Business Journal's "40 Under 40" recipients based on his career achievements and community work. In addition, Jon received an AV Peer Review Rating on Martindale Hubbell which was given by his peers for his high level of professional excellence.

Services
- Personal Injury and Tort Defense
- Product and Toxic Tort Liability

Industries
- Automotive
- Consumer Products
- Drugs and Pharmaceuticals
- Heavy Machinery
- Hunting and Sporting Goods
- Manufacturing / Distribution
- Medical Devices
- Recreational Products
- Trucking

Education
- Jon earned his Juris Doctor, with honors, from Drake University School of Law in 1998.
- He received his B.A. in Political Science from Saint Louis University in 1994.