

Songs You Know by Heart:

Defending Against Life Care Plans

Thomas J. Hurney, Jr.

Jackson Kelly PLLC

500 Lee Street East, Suite 1600
Charleston, WV 25301-3202
(304) 340-1346
thurney@jacksonkelly.com

Stuart P. Miller

Mitchell Williams Selig Gates Woodyard PLLC

425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
(501) 688-8896
smiller@mwlaw.com

THOMAS J. HURNEY, JR., is a trial lawyer with Jackson Kelly PLLC in Charleston, West Virginia, with thirty three years' experience in health care, serious injury and wrongful death litigation. He leads the firm's Health Care & Finance Practice Group. A longtime DRI and member, Tom is President Elect of the Association of Defense Trial Attorneys and a past President of the Defense Trial Counsel of West Virginia. He is a Fellow of the American College of Trial Lawyers and a member of the American Board of Trial Advocates. He was on the faculty for the 2014 IADC Trial Academy (the PenHooligans). He is a frequent speaker on a variety of litigation and health care topics. Tom graduated with honors from the University of Dayton School of Law in 1983. Samantha D'Anna, a summer associate with Jackson Kelly and student at the University of Dayton School of Law, Class of 2015, assisted with the article.

STUART P. MILLER, co-author of this paper, is a partner with Mitchell Williams Selig Gates Woodyard PLLC, in Little Rock, Arkansas. Active in trial practice for 27 years, Stuart is also a longtime DRI and IADC member, a Fellow of the American College of Trial Lawyers and a member of the American Board of Trial Advocates. He was also on the faculty for the 2014 IADC Trial Academy (the PenHooligans). Stuart graduated from the William H. Bowen School of Law at the University of Arkansas in 1988.

This paper is an updated and revised version of "Defending Against the Inflated Life Care Plan," a presentation given by Miller and Hurney at the Mid-Year Meeting of the International Association of Defense Counsel, February 23, 2016, Pebble Beach, CA.

Songs You Know by Heart: *Defending Against Life Care Plans*

Table of Contents

I. Introduction	5
II. Early Recognition and Evaluation	5
III. Discovery	7
A. Medical Records and Radiographic Studies	7
B. Current Therapy, Treatment, Counseling, and Medical Devices	7
C. Academic and Employment Records	8
D. Investigate Plaintiff's Life Care Planner	8
E. Obtain Pricing data from the Life Care Planner Prior to Deposition	8
IV. Qualifications of the Life Care Planner.....	8
V. Evaluate <i>Daubert</i> Challenge	10
VI. Issues with the Life Care Plan Report.....	11
VII. Future Damages and the Affordable Care Act.....	13
VIII. Some Random Ideas About Challenging Life Care Plans	15
IX. Conclusion.....	18

Songs You Know by Heart: *Defending Against Life Care Plans*

I. Introduction

In catastrophic injury cases like spinal cord impairment, traumatic brain injury, severe burns and multiple trauma or birth trauma, large, often seven to eight figure life care plans are commonplace. “The cost of future health care of an injured person with long-term health care needs is often the largest component of economic damages in a lawsuit.” Cathlin Vinett Mitchell, *Analyzing Life Care Plans*, DRI Medical Liability and Health Care Law Seminar 149, (March 2014)(this and all DRI articles cited in this paper are available online at www.dri.org). Life care plans in the right case provide the basis for large jury awards, even if they bear little or no relationship to the therapy, treatment or accommodations an injured party may truly need or may have received from treating physicians. J. Thaddeus Eckenrode and Dwight A. Vermette, *Fighting the Squeeze, For the Defense* 68, 72 (Sept. 2012)(“Fighting the Squeeze”). “Often with little more documentation than a plaintiff’s medical records and liberally interpreting some physician’s note about the plaintiff’s prognosis and treatment plan, this ‘expert’ will make artistic use of spreadsheets and tables to itemize the surgical needs, physician and psychiatric visits, medical supplies, medications, home improvements, ambulation and movement modalities, special diets, and more that the plaintiff will need and project costs for these items on a per annum or lifetime basis.” *Id.* A life care plan is a persuasive tool to convince juries to compensate the plaintiff with a large award because it provides needed medical care. “Life care plans can be unrealistic and exorbitant. As such, the issue for the defense attorney is to determine whether the contents of a life care plan are injured-plaintiff centered or attorney driven.” Gail C. Jenkins and Angela M. Kneeland, *Defense Life Care Experts* 83, DRI Preeminent Lawyers Seminar (2007). This may be particularly true in states where non-economic losses are limited by statute, and plaintiffs’ counsel turns to economic loss to drive a large settlement or verdict. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 *New York University Law Review* 391, 430 (2005)(Describing the “crossover phenomenon” where “[c]onfronted with caps on noneconomic damages in medical malpractice cases, attorneys may have learned new ways to pitch their arguments about economic damages to juries. In other words, noneconomic damages caps may have triggered innovative ways to increase economic damages.”). See also, *Fighting the Squeeze, supra* at 68 (“Those who have chosen to take on cases of any sort, however, have also started looking for every nickel that they could identify as an ‘economic’ loss for which they could seek recovery unimpeded by the cap, pursuing past medical expenses, past wage loss, future diminution of earning capacity, and future medical expenses, among other things...”).

The challenge for the defense, then, is to systematically challenge the life care plan to expose whether it is improperly researched and not designed for the particular plaintiff, inflated, or offered by an unqualified expert. In this exercise, experts, both testifying and consulting, can be retained to assist the challenge to the life care plan, either in court or behind the scenes, and to provide assistance in the cross examination of plaintiffs’ life care plan expert. We’ll discuss strategy and tactics, make some suggestions, and share some stories.

II. Early Recognition and Evaluation

Early recognition of whether a life care plan might be offered in an individual case can be invaluable, as it can guide discovery necessary to challenge the plan. While life care plans are expected in a clear catastrophic case, like an infant brain injury, paralysis or severe burns, a seemingly benign case can become significant with the appearance of a life care plan projecting treatment, therapy and various needs. See, David R.

Lucchese, Treading toward Trial: Defending the Perinatal Brain Injury Lawsuit, *For the Defense* 65 (Nov. 2007) (“Perinatal brain injury cases consistently have the highest verdicts and settlements...”). For example, a mention of potential traumatic brain injury syndrome as one diagnosis in the differential of an injured plaintiff can be a red flag of a case destined for a life care plan. See, Brandon Woodard and Greg A. Kendall, Traumatic Brain Injury: A Primer for In-House Counsel and Claims Professionals, *In House Defense Quarterly* 48 (Fall 2015) (Discussing how “a relatively minor incident with minimal injuries can escalate quickly into a high-risk scenario for companies and their insurers if claimants, their attorneys, and their doctors piece together a traumatic brain injury claim.”). Defense counsel, therefore, should routinely try to assess early on whether there are diagnoses in the medical record suggesting the possibility the case may require defending against a life care plan.

In catastrophic damage cases, an early determination of how Plaintiff’s counsel is going to prosecute the case can significantly aid in the defense of a life care plan. Plaintiff’s counsel with a large medical damage cases sometimes will have presented a life care plan to the defendant or its insurance carrier in an attempt to obtain a pre-suit settlement. As suggested above, the nature of the claimed injuries, like birth injuries, paralysis or burns, strongly suggests a life care plan will be employed. In other cases, where the catastrophic nature of the injury is not as obvious, a thorough review of the medical records, combined with discovery, can determine whether the plaintiff is receiving the type of regular care from treating physicians that lends to creation of a life care plan. Discovery should be targeted to determine whether plaintiffs’ counsel has invested in the team of experts needed to develop large medical damages, including a life care plan: a doctor, nurse life care planner, psychiatrist or neuro-psychologist. Once discovery and medical records demonstrating prognosis for long term attendant care for the plaintiff, consideration should be given to retaining a life care expert, initially as a consultant with the potential for testimony if appropriate. “A life care expert retained by the defense can play different roles as a particular case moves forward towards trial.” Caryn L. Lilling and Richard J. Montes, An Appellate Perspective: Early Case Evaluation and Risk Management, *In-House Defense Quarterly* 16 (Fall 2010) (“Defense counsel should be prepared not only to challenge the various items included in the life care plan, but should consider retaining their own life care planner to present to the jury...”). Whether in the role of consultant or as a testifying expert, the defense life care expert can be a valuable asset who can bolster the defense case, as well as the defense’s credibility, while at the same time contradict the plaintiff’s suggested damage award.” John W. Bell, Handling of the Defense Economist or Life Care Expert, *DRI Becoming A Preeminent Trial Lawyer* 57 (2005). Depending on the case, other expert consultants are valuable early additions. For example, in birth trauma cases, “[t]o evaluate the cause of the baby’s brain injury, experts in the fields of perinatology, neonatology, pediatric neurology, pediatric neuroradiology, pediatric neuropathologists and pediatricians may be necessary. Then, to prepare a defense analysis of the needs and costs of the disabled child, now and in the future as an adult, it is important to obtain the services of a pediatric neurologist to evaluate the child’s condition specifically and opine regarding the child’s need; a specialist in nursing, ancillary and residential care of disabled children and adults; a specialist in the evaluation of the life expectancy of disabled children and adults; a specialist in the formation of life care plans for disabled persons; and finally a forensic economist to provide an economic analysis of the per year costs, the gross lifetime care costs, as well as the present cash value of the total, gross numbers.” Lucchese, *supra*, at 68. See also, Jane T. Davis, Mission Not Impossible: Finding Niche Medical & Scientific Experts, *Rx for the Defense*, *DRI Drug and Medical Device Newsletter* 16 (Winter 2009)(Tips on locating experts). Through early identification, discovery can be targeted at obtaining the information necessary to challenge the plan, from the medical records to the testimony of witnesses as to the care actually recommended and received by the plaintiff. More on that later.

III. Discovery

A. Medical Records and Radiographic Studies

A song we all know by heart is that to effectively defend against an inflated life care plan, it is necessary from the outset to determine the magnitude of the injury and what future treatment may be required for the plaintiff. We all know it is important to obtain all of the plaintiff's medical records to give your experts the information they need to determine whether or not a life care plan is even warranted. See, J. Ric Gass and Brian G. Cahill, *Defending Mild TBI Cases—Integrating Medicine and Strategy* 111, 2014 DRI Complex Medicine Seminar Course Materials. While this seems routine, sometimes a reminder is helpful, and often it is the follow up on information gleaned from records you obtain that leads to important information. For example, if the records suggest a diagnosis of a traumatic brain injury (TBI), obtain all of the initial records, including EMS records and actual films of radiology studies; at the least, consult with an expert as to whether you should get them. Challenging whether the plaintiff demonstrated the essential criteria for a TBI will be critical. See, Woodard and Kendall, *supra*, at 49 (“the diagnostic criteria usually include (1) loss of consciousness, (2) alteration of consciousness, (3) posttraumatic amnesia, (4) positive findings on diagnostic imaging studies, and (5) focal neurological abnormalities such as seizures, visual or hearing disturbances, dizziness, and others.”)(citing, Victor F. Coronado *et al.*, *Traumatic Brain Injury Epidemiology and Public Health Issues*, 8 *Brain Injury Medicine* 84, 85 (2013)); Brandon A. Woodard, Gregory A. Kendall, and Neil F. Spataro, *Mild Traumatic Brain Injury Litigation: An Overview of Neuroimaging Techniques*, *For the Defense* 26 (June 2015). Many firms routinely use nurse paralegals for analysis and follow up on medical issues. Robert C. Rouwenhorst, *The Role of the Nurse Paralegal*, *For the Defense* 16 (Nov. 2012)(“When the records are obtained, nursing judgment is involved in determining if additional records are required.”).

B. Current Therapy, Treatment, Counseling, and Medical Devices

The cornerstone of an effective attack on a life care plan may well be found in the plaintiff's current therapy, treatment or counseling and in the medical goods being used. Often, plaintiff's counsel and their life care planner fail to evaluate the actual treatment prescribed and recommended by the plaintiff's treating physicians, particularly what is actually occurring with the plaintiff once the life care plan has been “published.” This is significant for two reasons. First, the life care plan should not “put the plaintiff in a better position than she was in before the accident. For example, the life care plan should not include the cost of modifying a house for a disabled plaintiff if at the time of the accident the plaintiff did not have a house.” Hope Thai Cannon, *What's in the Numbers? Effective Use and Cross-Examination of Life Care Planners and Vocational Economic Experts in Product Liability Litigation*, DRI Products Liability Seminar Course Materials (2006). Second, the recommendations of the life care planner can be compared to the actual care provided, demonstrating that actual, reasonable care does not encompass the “bells and whistles” recommended by the hired life care planner. Particularly where the plaintiff relies on a hired physician expert to testify that the life care plan represents reasonable and necessary care, the life care plan can be effectively attacked through the testimony of treating physicians who have not made the same recommendations, have never seen the life care plan and often, have never been contacted by the plaintiff's expert. “The defense attorney needs to focus on the foundation of the life care plan: whether the life care planner incorporates information from the plaintiff's medical records into the plan and whether the treating physicians agree with the items contained in the plan.” Allen C. Smith, *Experts for Truck Accidents – Who to Expect, Who to Hire*, 15 *In Transit* 3 (Nov. 15, 2012).

C. Academic and Employment Records

Academic and employment records can provide valuable information about the plaintiff's pre-injury condition that can aid in the challenge to the life care plan. Particularly in cases which are not apparently "catastrophic" (again, TBI cases come to mind) it is important to examine whether claimed deficits are truly as a result of the incident. School attendance records provide information concerning the problems that may be attributed to the claim. Similarly, work related records can provide information to evaluate performance and work skills before and after the accident. In most cases where a life care plan is presented, this information will be necessary to assess wage loss claims. These files are often full of work related issues that you can use in response to claimed damages by the plaintiff.

D. Investigate Plaintiff's Life Care Planner

Like any other expert, you should find out as much as you can about the plaintiff's life care planner. There are several sources for these materials, including expert databases maintained by DRI and IADC. Both Westlaw and Lexis (formerly IDEX) have expert data bases. Google and other search engines (Bing, Yahoo, etc.) are also great resources. You will find that most life care planners will have weighted their testimony either heavily toward plaintiffs or defendants. Inconsistencies may be discovered by reviewing prior testimony for defendants when they normally appear for the plaintiff. In addition, if you are lucky enough to find some of the other plans drafted by the Plaintiff's life care planner, you often will see a "form type approach" that presents a great opportunity to cross examine the expert on a cookie cutter plan. It is important to ask the life care planner what system they use and whether or not they used any computer software in the preparation of the life care plan. There are a number of programs that will allow you to input some basic data and the software will produce a ready made life care plan. Computer generated plans may present significant holes to explore during cross examination, and can often be shown to bear little relation to the plaintiff's actual condition and situation.

E. Obtain Pricing data from the Life Care Planner Prior to Deposition

One group of documents to obtain that may be taken for granted is the pricing information used by the life care planner in formulating the plan. It is critical to know how the planner came up with the pricing data and how they applied it to the plan. For example, did the planner consider any long term pricing contracts? Most planners run these prices up by looking at an inflationary rate. How often are goods replaced and how are they priced? Are there "free services" that are readily available in the market that the Plaintiff is currently receiving or that will always be available to the Plaintiff should they decide to take advantage of the services. There are a number of brain injury groups that provide free services to brain injured parties offered by the state and local governments. A word of caution: in some states you will draw a collateral source objection so be sure to be prepared for whether or not it you will be able to question the planner with the information. The planner's response to this inquiry is always that they do not consider any services "that may not be available" for the duration of the Plaintiff's life expectancy. These objections can be easily thwarted by showing that the services have been around for multiple decades and will be here in the future.

IV. Qualifications of the Life Care Planner

When a person is in a catastrophic state due to injuries sustained in an incident, medical costs, care and other expenses increase dramatically. Often, life care plans are prepared in order to help determine an appropriate amount to cover the present and future expenses the Plaintiff will incur in order to maintain quality of life. Life care plans are routinely defined as "dynamic documents based upon published standards of

practice, comprehensive assessment, data analysis, and research, which provide an organized, concise plan for current and future needs with associated costs for individuals who have experienced catastrophic injury or have chronic health care needs.” STANDARDS OF PRACTICE FOR LIFE CARE PLANNERS §I(A) (INT’L ASS’N OF REHABILITATION PROF’LS 2015). Although helpful tools for the plaintiff, some plans estimate costs much higher than necessary which provides opposing counsel grounds to contest the proposed plans under multiple grounds. The motive is not to escape providing care, but to establish the difference between the costs that insure plaintiff’s quality of life and other costs that are unnecessary, or far overreaching. When defending against a plan, defense counsel may look to the life care planner and his qualifications, as well as the plan and each delineated cost for areas of weakness.

The first step is to determine whether the plaintiff’s life care planner is qualified to determine if there is a potential for exclusion of the testimony. If a qualification challenge is successful, the life care planner’s testimony and potentially the entire life care plan may be excluded from the jury in their consideration of damages. To be admitted as an expert to present a life care plan, the planner must be generally qualified in the area of life care planning, and must also be qualified to substantiate the need for each element of care included in the plan to the degree required by the jurisdiction. Jean-Paul Marat, *A Defense Attorney’s Perspective on Life Care Planning*, *Health Tips* (Sept. 11, 2011)(available online at <http://tipsdiscover.com>). Life Care Planners must have an educational background in the areas of health or rehabilitation; maintain required licensure or certification to practice a professional rehabilitation or health care discipline suitable for life care planning; and act ethically within his professional scope. STANDARDS OF PRACTICE FOR LIFE CARE PLANNERS §III(1),(2) (INT’L ASS’N OF REHABILITATION PROF’LS 2015) Further, a Life Care Planner must be consistent, objective, and methodical in his or her planning. *Id.* at §III. This includes relying on appropriate medical and health related resources, and not assuming decision-making responsibility beyond the scope of his or her own discipline.

Ultimately, of course, whether an individual qualifies as an expert is left up to the trial court. Few decisions addressing qualifications of life care planners exist; and those that do vary greatly in their acceptance of qualifications. Reportedly, one court found that attending two seminars and compiling 25 plans was not sufficient to qualify one as an expert. Jean-Paul Marat, *A Defense Attorney’s Perspective on Life Care Planning*, *Health Tips* (Sept. 11, 2011) online at <http://tipsdiscover.com>. Another found that a rehabilitation counselor who prepared over 200 life care plans annually who had a bachelor’s in psychology, a master’s in rehabilitation counseling and minor in behavioral psychology, a PhD in counseling psychology, and a minor in rehabilitation counseling with a subspecialty in severe orthopedic disabilities was qualified as an expert in both his education and practical experience. *Id.*

Similarly, few states have implemented standard regulations for life care plan experts, and case law is also limited. In Arizona, a life care planner with twenty years’ experience relying on her own observations, experience, input from doctors, and readily-available pricing constituted a proper foundation of expertise. *Sandretto v. Payson Healthcare Management, Inc.* 234 Ariz. 351, 322 P.3d 168 (App. Div.2 2014). A Connecticut court held that the testimony of a certified life care planner was admissible even though he was not a medical doctor because he was an experienced expert in the care needed by the plaintiff, and reviewed his report with medical doctors and sought approval of patient’s health care providers. *Oram v. deCholnoky*, 2008 WL 4984752 (2008). In Indiana, courts allowed a certified nurse to testify to what rehabilitation expert told her when she prepared the life care plan in question because as a life care planner, it is expected to rely upon experts in preparing their plans. *Dan Cristiani Excavating Co., Inc. v. Money*, 941 N.E.2d 1072 (Ind. App.2011). A Montana court held that admission of a rehabilitation consultant’s expert testimony was not an abuse of discretion, despite his reliance on medical records, transcripts, interviews, and evaluations. *Midway Nat. Bank*

of *St. Paul v. Estate of Bollmeier*, 504 N.W.2d 59 (Mont. App.1993). In Missouri an expert witness who was a doctor, board certified in physical medicine and rehabilitation, sub-board certified in spinal cord injury medicine, was a wound care specialist, and a certified by disability evaluation commission as a life care planner was qualified to testify that the life care plan in question was based upon a reasonable degree of medical certainty. *Mitchem v. Gabbert*, 31 S.W.3d 538 (Mo. App. S.D. 2000). In New York, a court found a vocational rehabilitation specialist retained to prepare life care plan for claimant was not qualified to make an information assessment for cost of future medical procedures. *Donaldson v. Ryder Truck Rental & Leasing*, 189 Misc.2d 750, 737 N.Y.S.2d 783 (2001). In Ohio, the appellate court found that the trial court did not abuse its discretion in determining that a physician with forty-five years' experience in treating patients with similar injuries to the plaintiff's was qualified to give an expert opinion regarding the life-care plans admitted into evidence. *Adae v. State*, 2013 WL 85200 (Ohio App. 10 Dist., Franklin, 01-08-2013). In Texas, a doctor's expert testimony on damages regarding sufficiently and efficacy of life care plan prepared by another doctor was reliable based on training and experience in the field. *Taylor v. American Fabritech, Inc.* 132 S.W.3d 613(Tex App. 14 Dist. 2004). Nevada enacted a statute to ensure the duties of insurer who accepts a claim for catastrophic injury regarding life care plans. Nev. Rev. Stat. Ann. §616C.700 (West). This sampling of case law demonstrates the variation in discretion regarding the determinations of the qualifications life care plan experts across the nation. Even if there isn't sufficient basis to challenge the expert as unqualified, this exercise provides the fundamentals for cross examination, particularly when the defense has a more qualified life care planner.

V. Evaluate *Daubert* Challenge

Separate from a qualifications challenge is the "*Daubert*" challenge under Rule 702 of the Federal Rules of Civil Procedure or its state counterparts. These challenges are difficult with life care planning, which has been long recognized as a generally valid exercise.

Of interest is a response to a "frequently asked question" section of the website of a well-known life care planner, Paul Deutsch, whose writings and approach are often relied upon by life care planners. Deutsch provides a roadmap for life care planners related to *Daubert* and F.R.E. 702 challenges. In summary fashion, Deutsch recommends that life care planners who testify should (1) always expect a challenge and be prepared to educate all parties; (2) educate the referral source as a first line of defense; (3) have factual testimony proffered in order to give the life care planner an opportunity to obtain answers; and (4) come "armed" with extensive documentations including clinical practice guidelines, research literature, home health practice act for the state, Home Health Practices or the Centers for Medicaid and Medicare standards.; (5) prepare bullet point documents for the Court; (6) document the acceptance of the life care plan; and (7) be well prepared. See Life Care Planning – FAQ's www.paulmdeutsch.com; Question 17. It is these factors that many life care planners do not prepare for and do not follow in the defense of their plan. The qualifications of the planner are often the lynchpin of demonstrating the inaccuracy of the life care plan, even if a pretrial "*Daubert*" challenge is unsuccessful.

It is not uncommon to receive a life care plan from a "planner" that advertises his or her services and does not discriminate in the areas they produce or prepare reports. It is not unheard of to have a life care plan from a professional that has credentials unrelated to the area of expertise needed to properly create and defend a particular life care plan. The creation of a life care plan is expensive and even more so if the plan will not sustain a challenge from the defendant's counsel. Unlike many areas of law and medicine, this really isn't a turf battle. Nurses, lawyers, social workers, physicians, vocational rehabilitation specialist and a number of other professionals have taken their shot at creating and testifying about life care plans. The defense counsel can use a number of standards to attack a plan and planner that are outside of his or her area of expertise.

One of the tough issues for plaintiff's life care planner to overcome is the necessity and length of proposed treatment and rehabilitation services. In a Colorado case, the court examined the qualifications of a nurse with rehabilitation experience that gave life care plan testimony for an injured theater patron. The jury returned a verdict of almost seven figures and approximately one-third of the verdict was supported by life care plan testimony. It was noted that the trial court conducted painstaking examination to determine the qualifications of the nurse and the life care planner's ability to render projection of future medical needs. Testimony supported by the recommendations of the treating physician, the trial court allowed the testimony. However, when the projections extended into things such as psychiatric care, the trial judge restricted the non-physician life care planner's testimony. The court went further in restricting unsupported recommendations by the planner for medications not prescribed by a doctor. *Theater Management Group, Inc. v. Dalgliesh*, 765 A.2d 986 (Dist. Col.Ct. App.2001).

This paper will not attempt to discuss the thousands of cases that have been issued on the requirements of *Daubert* or its state counterparts. See, *M.D.P. v. Middleton*, 925 F. Supp. 2d 1272, 1275 (M.D. Ala. 2013) "[T]his court first notes that courts routinely recognize that life care planners may be qualified to provide testimony as to future care of injured patients, and the cost of such care. . . ."(citing *Deramus v. Saia Motor Freight Line, LLC*, No. 2:08cv23-MEF, 2009 WL 1664084 (M.D.Ala. June 15, 2009) (Fuller, C.J.).

However, many of these cases have observed that the rejection of expert testimony is the exception rather than the rule. In short, the defense has to chip away at the qualifications of the life care planner and in turn it will lead to fertile cross examination of various portions of the life care plan due to the lack of qualifications. It is important that once you receive the life care plan submitted by the plaintiff to keep mindful of the need to ask treating physicians about the plan, particularly if you believe they have not been furnished the plan (and often they have not). This is a slippery slope since the treating physician's endorsement of the plan will go a long way to helping the plan's contents be allowed. Even when the *Daubert* factors don't precisely fit the testimony that is being proffered, the trial court still has the responsibility to evaluate the reliability of testimony to determine its admissibility. See *e.g.*, the comments of the Advisory Panel, following F.R.C.P. 702, which encourage the trial court to consider:

- (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. *Id.* citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *Id.* citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).
- (3) Whether the expert has adequately accounted for obvious alternative explanations. *Id.* citing *Claar v. Burlington N.R.R.*, 29 F3d 499 (9th Cir. 1994).

VI. Issues with the Life Care Plan Report

Counsel for the Plaintiff would prefer nothing better than for the life care planner's work product to become a piece of admitted evidence. Irrespective of whether or not the life care planner's report is ultimately admitted, other plaintiff witnesses, such as treating physicians, independent medical experts and the economists, may find themselves referring and relying on the life care plan. If admitted, the report becomes the centerpiece of the plaintiff's damage claim that will be referred to throughout the trial.

At the outset, the written life care plan is premised and based on hearsay. Simple analysis demonstrates many of the pieces of the plan are solely based on out of court sources used to determine the costs of

the various items of care, therapy or medical goods. The life care planner is preparing a report to prove the truth of the matter asserted. This is basic evidentiary foundation that the life care plan itself should not be able to overcome.

In addition to the hearsay issues, there are other areas of attack open to a savvy defense lawyer. The planner's cost valuations and the length the treatment open the planner to significant cross examination about the speculative nature of the plan. In addition, if the life care planner is not a medical physician, the plaintiff runs the risk of not having the plan supported by medical testimony from a treating physician.

Life care projections involving a vocational rehabilitation specialist's future medical costs projections were found to be clearly speculative because the treating surgeon's affidavit did not address the need for future medical procedures and their costs. "At the least, plaintiff should have submitted an affidavit from the [orthopedic surgeon] or other admissible evidence covering those subjects." The court went on to find that the vocational rehabilitation specialist projections were beyond his qualifications. *Donaldson v. Ryder Truck Rental & Leasing*, 737 N.Y.S.2d 783 (2001).

It is critical that the defense pin down the medical basis of the life care projections. If speculative or not supported, you can argue that the projections and the expenses should be excluded as speculative. The life expectancy routinely used by life care planners is often open to challenge as being speculative as well. Plaintiff's experts will often use standard tables that do not consider studies showing that certain injuries or disabilities reduce life expectancy for the specific plaintiff involved in your case.

A well-recognized and often quoted article related to the ethical issues associated with a proper life care plan is Ethical Objectivity in Forensic Rehabilitation, by Frank Woodrich and Jeanne Patterson. The authors outline a number of issues associated with the proper life care plan. Several are instructive for the defense attorney to consider in defending against an inflated life care plan. Although not exhaustive, some of the issues raised by the article are: (1) Life Care Plans should have a factual basis and be within the provider's area of expertise and discipline (citing the International Association of Rehabilitation Professionals (IARP, n.d.); (2) Plans should focus on both assets and barriers created by the injury or disability; (3) Plans should include rehabilitation services or interventions attempting to restore the individual to a productive post-injury or post-illness lifestyle; (4) Plans should avoid, when possible, excessive use of home care services, based on the medical model of nursing care; (5) Plans should use service costs for the location where the individual will receive services; (6) Plans should not project higher costs to accommodate for settlements; (7) Plans should not state possibilities and probabilities or make predictions that are contrary to accepted fact and literature; (8) Plans should exclude physician visits, diagnostic procedures, and medication costs for conditions predating the disability in question; (9) Plans should not differ greatly from similar individuals with the same disability. Ethical Objectivity in Forensic Rehabilitation, The Rehabilitation Professional, Frank Woodrich and Jeanne Patterson (2003). Even where a life care planner does not completely follow a methodology, opinions have been allowed subject to cross. *M.D.P. v. Middleton*, 925 F. Supp. 2d 1272, 1276 (M.D. Ala. 2013) ("As to the argument that Deutsch did not follow his own methodology in this case, the evidence before the court is that Deutsch consulted with, and noted recommendations of, Dr. Pickzance, M.D.'s treating orthopedist. Deutsch also included in his plan recommendations made by Andrea Zotovas, M.D. Deutsch also included durable medical good items recommended based on medical literature regarding children with cerebral palsy....). "The court agrees with the Defendants to the extent that there may be some deficiencies in the strength of support for some of the recommendations in Deutsch's Life Care Plan, but, following the reasoning of other courts, particularly the First Circuit Court of Appeals in Rivera, the court concludes that those issues go to the weight, and not the admissibility, of Deutsch's testimony. Deutsch will be able to testify, and be subject to cross-examination, about his opinions in this case." *Id.* at 1276. **Potential Effect of the ACA.**

VII. Future Damages and the Affordable Care Act

The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111- 148, 124 Stat. 119-1025 (2010) (amending Title XVIII of the Social Security Act, 42 U.S.C. §1395 *et seq.*, by adding new §1899) as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029-84 (2010), is referred to as either the Affordable Care Act or ACA, or more commonly “Obamacare.” Its provisions designed to ensure access to universal health care provide arguments that plaintiffs should not be able to recover future medical damages because they will be paid by insurance available and indeed mandated for all. With the 2016 election returns, and the repeal of the ACA imminent, it may be too late to discuss whether it provides a defense to the recovery of future damages. We’ll discuss it anyway.

Traditionally, injured plaintiffs present evidence of medical bills, including future projected expenses, to the jury as if they will have to pay them “out of pocket” and therefore must be compensated. The presence of insurance to pay those expenses is typically excluded from evidence under the collateral source rule, the theory being that the defendant should not benefit from insurance purchased independently by the plaintiff. Of course, the vast majority of insurance policies require a plaintiff who recovers bills paid to reimburse the company and protect its subrogation interest. Federal regulations may require future damages to be “set aside” to protect Medicare as a “secondary payor.”

With the enactment of the Affordable Care Act, better known as “Obamacare,” defendants have begun to argue that its guarantee of insurance, regardless of preexisting conditions, combined with the mandate to purchase insurance, means that the payment of future benefits by insurance should be admissible against plaintiffs’ claims, as seen in life care plans, of future medical expenses. See, Erin Christen Miller and Ryan J. Sullivan, *The ACA and Market-Rate Predictability for Future Damages*, Vol. 58, No. 7, *For the Defense* 18 (DRI 2015) (“The Patient Protection and Affordable Care Act (ACA), pejoratively known as Obamacare, provides defense counsel with an opportunity to minimize plaintiffs’ recovery of future medical damages.”).

Among the ACA reforms, there are three provisions that play when challenging future medical damages. First, under the ACA, all health insurance policies must be sold on a guaranteed issue basis, which prohibits insurers from denying coverage to individuals due to pre-existing conditions. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111- 148, 124 Stat. 119-1025 (2010) (amending Title XVIII of the Social Security Act, 42 U.S.C. §1395 *et seq.*, by adding new §1899) was amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029-84 (2010). Essentially the guaranteed issue provides, regardless of the extent of the victim’s injuries, they are entitled to purchase health insurance directly from an insurer at exactly the same premium price as any other customer of the same age and geographical location. *Id.* Second, the ACA established minimum standards for health insurance policies. *Id.* In addition to the prohibition of annual or lifetime coverage caps, the minimum standard of essential 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; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care.” *Id.* Third, and arguably the most significant, the ACA provides for an individual mandate, which requires all individuals purchase acceptable health insurance or otherwise pay a fine. *Id.*

The collateral source rule is an evidentiary principle prohibiting the admission of evidence that the plaintiff or victim has received (or will receive) compensation from a source other than the damages sought against the defendant. Restatement (Second) of Torts §920A(2) Under the traditional rule, a plaintiff may recover full medical bills from the tortfeasor-defendant, even though the plaintiff’s insurer may have paid them. David Schap and Andrew Feeley, *The Collateral Source Rule: Statutory Reform and Special Interests*, THE

CATO JOURNAL VOL. 2, ISSUE 1 (2008). The intent of the rule is to promote justice by establishing fault against the tortfeasor-defendant and foreclosing the notion of mitigating damages by means of collateral payment. Id. That the benefits are provided by a government program does not matter – benefits to which a plaintiff is entitled, independent of the defendants, are inadmissible to reduce claimed damages, past or future. See, *Amlotte v. United States*, 292 F. Supp. 2d 922, 924 (E.D. Mich. 2003) (“The Court finds that the benefits that would be available to Chelsey Amlotte under both Part A and Part B of Medicare should be characterized as insurance benefits, and thus treated as a collateral source. Since payments from a collateral source may not be set off against future medical expenses under Michigan law, evidence of such payments would be irrelevant.”).

The three provisions of the ACA - the guarantee of insurance, the essential benefits, and the individual mandate – provide the basis for the argument that the ACA alters the application of the collateral source rule and how courts deal with plaintiffs’ future damages. In other words, since the plaintiff can purchase (and indeed must purchase) health insurance which covers all conditions (even preexisting conditions) the plaintiff will not incur the future costs projected in a life care plan. The defendant’s argument is that any care projected by the life care planner that is supported by a physician’s act or order will be covered; thus, there is no basis to allow the jury to award future damages. Erin Christen Miller and Ryan J. Sullivan, *The ACA and Market-Rate Predictability for Future Damages*, Vol. 58, No. 7, *For the Defense* 18 (DRI 2015) (“The Patient Protection and Affordable Care Act (ACA), pejoratively known as Obamacare, provides defense counsel with an opportunity to minimize plaintiffs’ recovery of future medical damages.”) See also, LaMar F. Jost, Marissa S. Ronk, *The Affordable Care Act and Colorado’s Collateral Source Rule*, 93 *Denv. L. Rev. Online* 1 (2016) (“As seen in the few states that have tried to address the collateral source rule in the post-ACA world, the legal landscape surrounding the law and health insurance is far from clear. What is clear, however, is that the policy justifications underlying the collateral source rule no longer exist.”); Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 *McGeorge L. Rev.* 965 (2012). A similar argument is seen where the plaintiff is billed one amount for medical care, but insurance or a government program pays a reduced amount, and the defense argues that only the amount actually paid is recoverable. See, *McAmis v. Wallace*, 980 F. Supp. 181, 186 (W.D. Va. 1997) (Under Virginia law, “[p]laintiff cannot recover the amount of her medical bills written-off by Medicaid. The collateral source rule does not require that Plaintiff receive compensation for fees that were not incurred by Plaintiff or Medicaid.”). Compare, *Pipkins v. TA Operating Corp.*, 466 F. Supp. 2d 1255, 1257 (D.N.M. 2006) (“New Mexico courts would apply the collateral source rule to medical expenses written off or adjusted by a health care provider pursuant to an agreement with the federal government under Medicare.”)

The contrary argument is that the ACA does not change the fundamental public policy supporting the collateral source rule that the plaintiffs’ purchase of insurance does not provide a windfall to the defendant. To the extent there is a windfall (recovery of money for care the plaintiff does not have to pay for) it should fall on the plaintiff and not on the tortfeasor.

As expected, courts go both ways on these issues. In *Jones v. MetroHealth Med. Ctr.*, 2016-Ohio-4858, 2016 WL 3632469 (Eighth Dist. Ct. App. 2016) the court held the trial court did not err, under Ohio statutory law, in “offsetting the damage award based on the child’s present and future access to Social Security and Medicaid benefits.” Pennsylvania courts forbid argument or cross examination about the ACA. See, *Deeds v. Univ. of Pennsylvania Med. Ctr.*, 2015 PA Super 21, 110 A.3d 1009, 1013, reargument denied (Apr. 7, 2015), appeal dismissed sub nom. *Deeds ex rel. Renzulli v. Univ. of Pennsylvania Med. Ctr.*, 128 A.3d 764 (Pa. 2015) (“Cross examination and argument that the plaintiffs’ “medical costs were being covered by Medicaid and the Affordable Care Act, and that she did not require (and accordingly could not properly seek) any additional compensation,” were improper, requiring remand for new trial.); *Cordes v. United States*, No. 2:13CV547, 2015

WL 10986360, at *2 (W.D. Pa. Nov. 20, 2015)(Applying Pennsylvania collateral source rule to deny defendant's pretrial motion seeking "permission... to cross examine Plaintiff's economic and life care planning experts on their failure to consider the Affordable Care Act in their calculations."); *Bernheisel v. Mikaya*, 2016 WL 4211897, at *5 (M.D. Pa. Aug. 9, 2016)("With respect to Defendants' third argument, that the Court should allow Defendants to cross-examine Karras and introduce evidence pertaining to Medicaid, Medicare, and the ACA, as the aforementioned case law makes clear, allowing such cross-examination or introduction of such evidence through an expert called by Defendants would violate the collateral source rule."). One California courts reached a similar conclusion, finding the defendant "failed to show that had the trial court not excluded purportedly admissible evidence of future insurance benefits, there is a reasonable probability of a different verdict as to Aidan's future medical costs." *Leung v. Verdugo Hills Hosp.*, 2013 WL 221654, at *11 (Cal. Ct. App. Jan. 22, 2013). "But the mere possibility that private insurance coverage will continue, and the availability of government programs for the purchase of insurance, do not, in themselves, constitute relevant, admissible evidence of the future insurance benefits that a plaintiff is reasonably certain to receive.... Such evidence, standing alone, is irrelevant to prove reasonably certain insurance coverage as a potential offset against future damages, because it has no tendency in reason to prove that specific items of future care and treatment will be covered, the amount of that coverage, or the duration of that coverage." Applying California law in a Federal Tort Claim action, the court in *Brewington v. United States*, 2015 WL 4511296 suggested that consideration of future available benefits, from the Veteran's Administration or ACA, was appropriate. "This Court finds it appropriate to take insurance benefits available under the ACA into consideration in calculating reasonable future life care plan needs." *Id.* at *6. See generally, Bradford G. Hughes and Teanna Buchner, *The Affordable Care Act: Using "Obamacare" to Fight Overstated Damages*. Course Materials, DRI Annual Meeting 2016 at 9-10 (listing cases supporting and opposing use of the ACA to combat future damages).

Depending on state statutory or common law, defense counsel may be able to combat future damages as not being incurred due to insurance benefits. Logically, the mandated coverage of the ACA provides for the plaintiffs' future medical needs; perhaps the defendant should have to pay the insurance premium. See, eg., W.Va. Code §55-7B-9e (Statutory reduction for payments by collateral sources to be reduced by premium payment). This argument is currently weakened by the repeal of the ACA announced by the incoming legislature (which likely will have occurred by the time of the DRI Medical Liability Seminar). If there is a repeal, then the defense should focus on whether the replacement legislation contains similar mandate and prior condition provisions similar to the ACA, supporting similar arguments. The repeal of the ACA strengthens the argument that the future payment of medical expenses by ACA required insurance is speculative and should not be considered.

VIII. Some Random Ideas About Challenging Life Care Plans

1. Anticipate: Be aware of the potential for a life care plan to surface in cases that aren't apparently catastrophic. Red flags are references to head injuries, plaintiffs who do not return to work, plaintiffs who continue to receive consistent health care.
2. Discovery:
 - a. Documents: Not surprising is the need to get all the medical records, including outpatient and rehabilitation records.
 - i. Medical records will form the basis for the life care planner's future projections, so you must be able to challenge them.

- ii. Medical records show the actual care recommended and received by the health care providers taking care of the patient. This is often a strong contrast to the “kitchen sink” approach seen in many life care plans.
- b. Similarly, get all the bills. This will allow a contrast to what is actually spent on “real” care versus the projections of the life care planner.
- c. In plaintiff’s deposition, review the care the plaintiff (or minor plaintiff) is *actually receiving* from health care providers:
 - i. All office visits
 - ii. All recommendations from treating physicians
 - 1. Referrals
 - a. Specialty physicians
 - b. Specialty clinics
 - c. Rehabilitation – physical or vocational
 - 2. Drugs
 - 3. Devices
 - 4. Assist Devices (wheelchairs, dogs, etc.)
 - 5. Other (equine therapy?)
 - iii. Any recommendation from a treating physician plaintiff did not follow and why
 - 1. Plaintiff simply declined
 - 2. Insurance denied payment
 - 3. Plaintiff did not have funds to pay
 - iv. These questions provide the basis to contrast the actual care with the Life Care plan.
 - v. For a good set of questions for the plaintiff, see Ralph F. Valitutti, Jr. and Christina A. Doyle, *Defining Damages—Medical Expenses*, DRI Complex Medicine Seminar Course Materials 11-15 (2014).
- d. Deposition of Life Care Planner
 - i. Ask for a definition of a Life Care Plan
 - 1. How are they developed
 - 2. What steps are required
 - 3. What protocol does the Planner follow
 - 4. How did you determine costs
 - a. “Sticker” vs actual vs insurance payment?
 - b. Who did you talk to, what resources did you use
 - ii. Background and qualifications
 - 1. Training in Life Care Planning
 - a. Mail order?
 - b. Any planning work with patients
 - 2. Income earned from Planning

- a. Plaintiff v. defendant
 - iii. How much time spent with
 - 1. Plaintiff
 - 2. Treating physician
 - 3. Reviewing medical records
 - a. Is Plan consistent with any discharge plan from treaters
 - iv. How did LCP estimate costs used in the Plan
 - 1. What information was used
 - a. Get all documents if not provided pre-deposition
 - 2. Who, if anyone was contacted about costs
 - v. Question about statements made in
 - 1. Prior Life Care Plans
 - a. Are any identical? Substantially similar? Cookie cutter?
 - 2. Prior Testimony
 - vi. Is Life Care Planner doing Plans not related to litigation?
 - 1. Supervising anyone following a plan?
 - a. Contrast with discharge plan
 - 2. Is Life Care Planner aware of anyone actually following a plan
 - 3. Not a “plan” anyone actually follows
 - 4. Make point that these plans are created solely for litigation
 - vii. Particular recommendations in Plan
 - 1. Review the Plan with your expert to determine particular things you need to ask about
 - 2. Tie down why each thing is included
 - 3. Ask if any treater recommended the same things and require the Planner to show in the medical records.
3. Affordable Care Act
- i. Consider filing a pretrial motion seeking to introduce ACA evidence if plaintiffs fail to do so.
4. Consider Motions
- i. Is Planner qualified?
 - ii. Does Planner follow an appropriate methodology?
 - 1. Did Planner fail to do things admittedly required?
 - 2. Can your expert support a challenge?
 - iii. Even if you can, should you file an exclusion motion?
 - 1. What are the chances of success?
 - 2. Will you merely educate the opponent and expert about weaknesses?
 - 3. Is there a need to educate the court?

5. Consider experts

- i. Medical/nursing experts to analyze recommended care
- ii. Life Care Planning expert to analyze Plan and potentially offer adverse testimony
 1. Judgment as to whether to call the expert
 - a. Set a “floor” on damages
 - b. Or leave plaintiffs’ expert unrebutted except for cross
- iii. Economic Experts
 1. Analyze economic projection of Plan and potentially offer adverse testimony
 - a. Compare cost of actual care provided to plaintiff per year vs. projection in Plan
 2. Annuity testimony as to invested lump sum and time value of money
 3. Health care cost experts
- iv. Insurance experts: Project cost of insurance into the future to support dependence on the ACA, with defendant paying premium.

IX. Conclusion

Early recognition and attention to life care plans will place defense counsel in the best position to defend a life care plan. Careful discovery provides the basis for motion practice and cross examination. As important, it sets the stage for a common sense closing argument that the future damages projected are not based on the actual care being provided to the plaintiff or that which should be projected into the future. Good luck.