



50 State Collateral Source Rule Overview

- United States (50 states and Washington D.C.)
- United States Virgin Islands
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United States

ALABAMA

The current state of the law regarding collateral source rule in Alabama is at issue and a matter of much debate. The current rule on the books favors defendant and allows the jury to hear the amount that is owed to collateral sources and what amounts have been written off. However, the plaintiff's bar has been successful in recent years in getting some judges to rule that evidence of the amount paid by collateral sources is not admissible at trial.

Under the current rule followed by most judges (and not yet overturned by the Supreme Court), Alabama law provides that in all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiffs medical or hospital expenses have been or will be paid or reimbursed shall be admissible. Upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce "evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses ALA. CODE § 12-21-45(c) (1975).

"Upon proof ... that the plaintiff is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed, evidence relating to such reimbursement or payment shall be admissible." Plaintiff may also introduce into evidence the cost of purchasing the insurance which provided the medical benefit. ALA. CODE § 12-21-45(c) (1975). However, numerous trial court orders have been entered taking the plaintiffs' lawyers position and hold that defendants are not allowed to prove the amount paid by the collateral source. There are numerous trial court orders to this effect that are being made readily available by the plaintiffs' bar.

The proper position to take in negotiation is that the collateral source payment is the true evidence of medical expenses and that the Supreme Court has not ruled otherwise. Claims professionals

negotiating with plaintiffs should ask if a judge in the county where the case is pending has taken a position on the issue. If the case is in any of the larger counties, it is likely that plaintiff's counsel will be able to point to an order from at least one judge in that county. However, it is still appropriate to take the defense position in negotiation until the Supreme Court rules otherwise.

Please contact the Alabama Harmonie firm of **Norman, Wood, Kendrick and Turner** for more specific details, sample orders from trial judges and questions specific to particular venues.

ALASKA

Both the billed and paid amounts are allowed into evidence. Plaintiffs can also put on evidence of premiums paid. Alaska Stat. § 9.17.070. Alaska Stat. § 9.55.548: limits medical expenses in health care negligence cases to amounts what collateral source has already paid.

ARIZONA

Collateral source evidence is not admissible in general bodily injury claims, but it is admissible in medical malpractice claims.

Concerning BI claims, a plaintiff may recover the full amount billed by a medical provider, even if the provider accepts a lower amount from a collateral provider as payment in full See *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 207, ¶ 26, 129 P.3d 487, 496 (2006). Normally the court will not allow the defense to introduce evidence of the collateral source. *Id.*

The legislature has carved out an exception to this rule for medical malpractice actions. Arizona Revised Statute 12-565 expressly permits the defense to introduce evidence of collateral sources. Where the defense elects to introduce such evidence, however, the plaintiff is allowed to introduce evidence of premiums paid or that recovery from the defense is subject to a lien or that the provider of the collateral benefit has a right of reimbursement. Evidence introduced pursuant to 12-565 is admissible for the purpose of establishing damages in a medical malpractice action and shall be given the weight that the trier of fact deems fit.

ARKANSAS

Does not allow evidence of collateral source payments. *Bell v. Estate of Bell*, 318 Ark. 483, 490, 885 S.W.2d 877, 880 (1994). See also *Green Forest Pub. Sch. v. Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985). There are some exceptions including the admission of collateral source evidence to rebut testimony that the plaintiff paid his or her own bills. *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004)

CALIFORNIA

In California the "collateral source rule" tends to favor plaintiffs, in that defendants are barred from introducing any evidence of payment from a collateral source and a plaintiff's recoverable damages are not reduced by such payments. This rule includes payments from insurance companies who reserve the right to subrogate to the rights of the plaintiff as well as gratuitous sources and insurance companies who are unable to recover any of the money they paid plaintiff. California's justification for this rule is the desire to encourage charitable/gratuitous action.

Although California strictly adheres to the collateral source rule, there do exist two scenarios where a defendant is entitled to introduce such evidence. The first scenario is with relation to medical malpractice claims. Pursuant to *California Civil Code* §3333.1, when an action for personal injury is brought against a healthcare provider based on that provider's professional negligence, the healthcare provider can elect "to introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury." However, if the defendant does elect "to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence." It is important to note, however, that this is only applicable in medical malpractice claims.

A recent court decision modified the rule to include an additional scenario where such payments can be introduced as evidence. Oftentimes insurance companies have arrangements with certain healthcare providers, whereby the insurance companies pay reduced rates. For example, while the regular rate for a certain service that a plaintiff receives could be one amount, due to an agreement between the healthcare provider and the insurance company, the insurance company would pay a reduced amount, while the plaintiff would receive the same service. In *Hamilton v. Howell Meats and Provisions, Inc.* (2011) 52 Cal.4th 541, the Supreme Court of California held that a plaintiff's damages can be reduced to the amount the insurance company actually paid on their behalf in scenarios such as these.

Aside from the two scenarios discussed above, the general and longstanding rule in California, is that evidence of payment from a collateral source is inadmissible, and a plaintiff's damages are not reduced as a result of payment from a collateral source. Please contact the California Harmonic firm of **Spile, Leff & Goor, LLP** for more specific details, with regard to any of the above.

COLORADO

Colorado's collateral source statute, C.R.S. § 13-21-111.6 provides as follows:

In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained; *except that the verdict shall not be reduced by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person.* The court shall enter judgment on such reduced amount.

(emphasis added).

The mechanics of this statute are that: (1) amounts paid to a plaintiff from a collateral source can and do reduce the amount of the verdict, and this reduction will be applied by the court following the jury verdict; (2) but in nearly all instances, evidence of payments from collateral sources will not be presented to the jury; and (3) the "except" clause, above, which is commonly referred to as the contract exception to the collateral source rule, will bar defendants from attempting to reduce

plaintiff's damages awards for any benefit the plaintiff received as a result of contract entered into and paid for by or on behalf of the plaintiff.

This contract exception applies to bar reduction of the plaintiff's damages for everything from payments received from private health insurance policies, to employment-related policies and other benefits typically covered by worker's compensation laws, state and federal disability payments, and fire, police and other forms of pensions. In short, any type of benefit that can be said to have derived from a plaintiff's employment, or from any other form of insurance or other agreement the plaintiff has entered into and for which the plaintiff received some sort of benefit related to the plaintiff's damages claims, will likely be excluded under the contract exception to the collateral source rule.

Notably, because insurance or other types of benefits that an individual either purchases or procures through their employer are covered by the contract exception, the ancillary benefits that flow through these arrangements likewise cannot be used to reduce or offset a plaintiff's jury award. For example, if, by virtue of the agreement between the insurance carrier and the care providers, the care providers are actually paid a discounted rate for their services by the insurance carrier, such discounted rate is not admissible even to establish the reasonable value of the services provided. *See Crossgrove v. Wal-Mart Stores, Inc.*, 280 P.3d 29 (Colo. App. 2010); *aff'd* 276 P.3d 562 (Colo. 2012). Rather, the plaintiff is entitled to recover the full amount of the medical expenses as billed, without any offset for the amounts that were actually paid by the insurance carrier(s) for such services. *See Volunteers of Am. v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010).

Jury verdicts can be reduced under the collateral source rule by amounts paid by settling parties who are later designated as nonparties at fault under C.R.S. § 13-21-111.5, unless those parties are also collateral sources to the plaintiff covered by the contract exception. *See Smith v. Zufelt*, 880 P.2d 1178 (Colo. 1994).

CONNECTICUT

The laws of Connecticut subtract the amount of collateral source benefits from the entire amount of economic damages that are awarded to a plaintiff at trial. Collateral sources are payments from health or sickness insurance, automobile accident insurance with health benefits, or any contract that pays or reimburses plaintiff for healthcare services. *See* Conn. Gen. Stat. § 52-225(b). Money a plaintiff receives in the form of a settlement is not a collateral source. *Id.* Additionally, voluntary write-offs by healthcare providers are not collateral sources. *Hassett v. City of New Haven*, 858 A.2d 922 (Conn. Super. Ct. 2004), *aff'd*, 880 A.2d 975 (Conn. App. Ct. 2005). An involuntary write-off that is undertaken in accordance with any contract or insurance agreement is a collateral source and will be subtracted from a damage award. *McInnis v. Hospital of St. Raphael*, No. CV030480767, 2008 WL 4150056, at ¶ 1 (Conn. Super. Ct. 2008). The damages reductions outlined by § 52-225(b) do not occur for "any collateral source for which a right of subrogation exists" or "the percentage of the plaintiff's own negligence." Conn. Gen. Stat. § 52-225a(a). The amount paid to secure the collateral source payments (insurance premiums) is credited against the amount of the collateral source payments for the years in which the medical expenses were incurred. § 52-225a(a); *Pikulski v. Waterbury Hospital*, 269 Conn. 1 (2004). In the case where a jury awards less than the total amount of the plaintiff's medical bills, the burden is on the defendant to submit jury interrogatories to identify specific items of damages included in the verdict. *Pikulski v. Waterbury Hospital*, 269 Conn. 1 (2004); *Jones v. Kramer*, 267 Conn. 336 (2004).

DELAWARE

The Delaware collateral source rule allows a tortfeasor no right to any mitigation of damages because of payment or compensation received by the injured person from an independent source. *Yarrington v. Thornburg*, 205 A.2d 1 (Del. 1964). Delaware courts prefer for a plaintiff to receive a double recovery of collateral source benefits and damages than for tortfeasors to receive a benefit from a collateral source in which the tortfeasor has no interest. If the tortfeasor did in fact contribute to the collateral source that the plaintiff benefitted from, then a reduction of damages is appropriate. *Id.* It is a requirement that the plaintiff paid at least a slight amount of consideration for the collateral source. If the benefit was free for the plaintiff than double recovery will be barred. *State Farm. Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71 (Del. 1989). The Delaware Supreme Court has not ruled on the issue of if Medicare and Medicaid are considered collateral sources for which no consideration was paid, but the Superior Court has ruled that such plans have the same effect as insurance for which the plaintiff paid consideration. *Pardee v. Suburban Propane, L.P.*, No.Civ.A.98C-12-206RRC, 2003 WL 21213413, at ¶ 9 (Del. Super. Ct. 2002). In the Superior Court, Medicare and Medicaid benefits to a plaintiff do not reduce tort damage awards. *Id.* Delaware statutes create the following collateral source rule exceptions: medical malpractice awards are reduced by the amount of benefits from Social Security or Medicare and lost earnings and future medical expenses awards are reduced by collateral source payments from PIP insurance. 18 Del. C. § 6862; 21 Del. C. § 2118(h). Any evidence that medical expenses were written-off before fully satisfied on the plaintiffs behalf is inadmissible. *Mitchell v. Haldar*, 883 A.2d 32, 35 (Del. 2005).

FLORIDA

The current state of the law regarding the Collateral Source Rule in Florida is well settled. The Collateral Source Rule functions both as a rule of damages and a rule of evidence. *See Gormley v. GTE Products Corp.*, 587 So. 2d 455, 456 (Fla. 1991). As a rule of evidence, the Collateral Source Rule prohibits the presentation of evidence to the jury that the claimant was compensated for his or her injuries by others. *See id.*

As a rule of damages, section 768.76, Florida Statutes, requires the trial court to reduce the damage award by the amount of collateral sources for which no subrogation rights exist. Section 768.76(1) states:

In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of the claimant's immediate family to secure her or his right to any collateral source benefit which the claimant is receiving as a result of her or his injury.

§ 768.76(1) Fla. Stat. (2010). Accordingly, the jury determines the total amount of damages and the court then determines the amount of collateral source benefits and deducts that amount from the jury's verdict. The judgment will be reduced by the statute if benefits have been paid or if such

benefits are presently available to the injured party. The reduction of damages is limited to payments made by entities that meet the statutory definition of a collateral source. As long as no subrogation right exists, sources within the following four categories of benefits are considered “collateral sources” subject to a set-off:

(1) Disability and medical insurance payments made under the Social Security Act, the provisions of state or local disability acts, and other public programs providing similar benefits; (2) Payments made under health, disability, and accident insurance policies; (3) Payments made under a contract to reimburse the cost of a hospital, medical, dental or other health care service provider; and (4) Payments made under a wage continuation plan designed to cover the payments of wages during the period of disability.

See § 768.76(2)(a)(1)-(4), Fla. Stat. It is important to note that life insurance benefits, benefits received under Medicare, Medicaid, and the Workers’ Compensation Law are expressly excluded under the statute as collateral sources. § 768.76(2)(b).

Further, the rule mandating a set off is inapplicable if the collateral source provider has a right of subrogation against the tortfeasor. When a collateral source payment is made pursuant to a right of subrogation, the insured party must reimburse the collateral source from the total damages recovered against the tortfeasor, so it would be inappropriate to reduce plaintiff’s damages by that sum.

In light of the foregoing, the proper position to take in settlement negotiations is that the amount of economic damages should be reduced by the amount of collateral source payments made or which are available without a right of subrogation to satisfy plaintiff’s claim. While this is appropriate for settlement discussions, a defendant should be aware that the total amount of economic damages will be admissible before the jury without any evidence of the availability collateral source payments. As discussed previously, only after the jury has awarded the total amount of damages to plaintiff will the court reduce that amount by the availability of collateral source payments.

The information provided is intended as a general overview of the Collateral Source Rule in Florida. Please contact any of the Florida Harmonie Firms for more specific details or more specific questions.

GEORGIA

The collateral source rule remains in force in Georgia, barring the introduction of any evidence plaintiff received partial or complete recovery from sources other than the defendant(s). *See Wardlaw v. Ivey*, 297 Ga. App. 240, 244 (2009) (“The collateral source rule bars a tortfeasor from offering evidence that a claimant has received payment from a third party – such as an insurer -- for damage caused by the torfeasor’s conduct. This is because a tortfeasor is not allowed to benefit by its wrongful conduct or mitigate its liability by collateral sources provided by others.”) (citation and quotation omitted); *see also Harper v. Barge Air Conditioning, Inc.*, 313 Ga. App. 474, 480 (2011) (“In Georgia, the collateral source rule bars the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking credit toward the defendant’s liability and damages for such payments.”) (citation and quotation omitted).

The Georgia courts distinguish, however, the absolute bar against collateral source evidence in tort cases from the conditional bar against collateral source evidence in contract disputes, where such evidence is permitted if relevant to show the extent of plaintiff's loss:

[A]n evidentiary distinction between tort and contract cases does exist with regard to the applicability of the collateral source rule. The collateral source rule is applicable in *tort* cases because collateral source evidence *cannot* be admitted to diminish the defendant's liability for the *actual harm* that was caused by his tort. However, the collateral source rule is not applicable in *contract* cases because collateral source evidence *can* be admitted if it is relevant to demonstrate the extent of the plaintiff's *actual loss* that was caused by the breach.

Amalgamated Transit Union Local 1324 v. Roberts, 263 Ga. 405, 408 (1993) (italics in original; citation omitted).

Please contact the Georgia firm of **Drew Eckl & Farnham, LLP** for more specific details and questions specific to particular venues.

HAWAII

Plaintiffs in Hawaii that receive payments or benefits from an independent source do not have recovery from the wrongdoer diminished. Plaintiffs may have a double recovery as a result because it is better for the plaintiff to benefit than if the damages are reduced and a windfall goes to the tortious party who caused the injury. *Bynum v. Magno*, 101 P.3d 1149 (Haw. 2004). If there is a write-off of medical expenses, "The collateral source rule prohibits reducing a plaintiff's award of damages to reflect the discounted amount paid by Medicare/Medicaid." *Id.* at 1157. "The proper measure of damages depends on the reasonable value of the services rendered, and not how much the plaintiff was actually charged by the health care provider." *Id.* at 1149.

IDAHO

The collateral source rule is a common law doctrine under which an injured party's damage award may not be reduced by payments, also intended to compensate the harm caused by the tortfeasor, received from third parties. Restatement (Second) of Torts § 920A cmt. b & d (1979). Idaho, like several other jurisdictions, enacted a statute abrogating the common law rule requiring collateral source payments to be deducted from damage awards. Idaho Code § 6-1606. That statute mandates that a tortfeasor is liable only for those damages that remain after most forms of collateral source payments have been taken into account. The statute's purpose is to prevent double recovery.

Idaho law is currently in a state of flux as it pertains to applying Idaho Code § 6-1606 in the context of personal injury cases involving contractual adjustments or write-offs to medical bills involving plaintiff's health insurer (whether public or private). Until recently, plaintiff's counsel in Idaho relied on *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003) to present the unadjusted amount of medical bills to the jury, with any applicable reductions occurring via post-trial motion practice. In *Dyet*, the Idaho Supreme Court treated a Medicare write-off as a collateral source under

Idaho Code § 6-1606 even though it acknowledged the write-off was “technically not a collateral source.”

Such a result is problematic for the defense in that it paints a misleading picture for the jury by allowing plaintiff to artificially inflate the damages actually suffered and by promoting a fiction as to the medical bills actually incurred. It also allows Plaintiff’s counsel to utilize the higher special damages figure when arguing for a larger general damages award.

However, the Dyet case was recently overruled by *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011). Pursuant to the holding in *Verska*, there is no basis or authority for a court to treat a contractual write-off as a collateral source under Idaho Code § 6-1606, which ultimately occurred in *Dyet*.

Our law firm has been successful recently on pre-trial motions where the trial court has ruled the plaintiff can only present to a jury the adjusted amount of medical bills, or only the amount reflecting the actual sums paid by a health insurer or Medicare. The rulings can have major implications in a case involving significant injuries with significant medical expense. In a recent case, there was a \$500,000 difference between the unadjusted and adjusted amount.

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ILLINOIS

The collateral source rule in Illinois is based upon the Restatement (Second) of Torts §920(A)(2). While district courts throughout the state previously applied their own interpretation of the rule with differing results, the Illinois Supreme Court clarified and reaffirmed Illinois’ collateral source rule in its 2008 decision, *Wills v. Foster*, 229 Ill.2d 393, 892 N.E.2d 1018 (Ill. 2008).

From an evidentiary standpoint, the rule prevents defendants from introducing any evidence to the jury that a plaintiff’s losses have been covered, in total or in part, by a source independent of and collateral to the defendant. *Id.* at 399. From a substantive point of view, the rule prevents any benefits received by the plaintiff to diminish the potential damages otherwise recoverable from the defendant. *Id.* at 400.

A “reasonable value” approach is taken when determining the value of medical expenses incurred by the plaintiff and there is no distinction among sources from which the plaintiff received medical treatment (e.g. through private insurance, paid by the government through programs such as Medicare or Medicaid, or those who receive treatment on a gratuitous basis). *Id.* at 413. While a defendant is prevented from introducing evidence of collateral income to a jury, a defendant is able to cross-examine any witness regarding the reasonableness of plaintiff’s medical bill amounts. A defendant may also call their own witness to testify that the billed amounts do not reflect the

reasonable value of the services that plaintiff received. *Id.* at 418. Defendants cannot, however, introduce any evidence that the bills were settled for a lower amount. *Id.*

Despite the admissibility of such evidence, the collateral source rule still applies and prevents any evidence that payment was made by an insurer. *Id.* at 400.

INDIANA

The “Indiana Collateral Source Rule”, Ind. Code Ann. § 34-44-1-2, states as follows:

Sec. 2. In a personal injury or wrongful death action, the court shall allow the admission into evidence of:

(1) proof of collateral source payments other than:

(A) payments of life insurance or other death benefits;

(B) insurance benefits that the plaintiff or members of the plaintiff's family have paid for directly; or

(C) payments made by:

(i) the state or the United States;

or

(ii) any agency, instrumentality, or subdivision of the state or the United States; that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;

(2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and

(3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

The purpose of the statute is to prevent the plaintiff from recovering for damages for which the plaintiff has been paid by a third party. Ind. Code Ann. § 34-44-1-1. However, the statute does not apply to payments made by an insurer under a policy purchased by the plaintiff. Stanley v. Walker, 906 N.E.2d 852, 855 (Ind. 2009). Thus, the statute precludes a defendant from introducing evidence that a plaintiff's health insurer paid for medical services incurred for treatment of injuries caused by the defendant, even in instances in which the insurer paid and the health provider accepted an amount less than the amount billed for the services. *Id.*, at 858. However, “[t]he collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services. To the extent the adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed.” (Stanley wanted to submit evidence to the jury that would show that the amount paid and accepted in satisfaction of the medical charges was less than the what was originally billed. Because Stanley sought to do so without referencing insurance, his evidence should have been admitted).

The recent Indiana Supreme Court case of Patchett v Lee, 60 NE 3rd 1025 (Ind. 2016) has extended Walker to reimbursements by healthcare agencies administered through government programs.

Please contact the Indiana Harmonie firm of Kightlinger & Gray, LLP for more specific details and questions related to that particular venue. 317-638-4521.

IOWA

Under Iowa's collateral source rule, which follows the Restatement (Second) of Torts § 920A(2) (1979), payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability. This is true even if the collateral sources cover all or a part of the harm for which the tortfeasor is liable. *Farmers State Bank v. United Cent. Bank of Des Moines, Iowa*, 463 N.W.2d 69, 71 (Iowa 1990). In other words, benefits received by a plaintiff from another source will not diminish his or her recoverable damages. *Heine v. Allen Mem'l Hosp. Corp.*, 549 N.W.2d 821, 823 (Iowa 1996).

The purpose of Iowa's collateral source rule is to prevent a jury from reducing a tortfeasor's obligation to make full restitution for the injuries caused by his or her negligence. *Schonberger v. Roberts*, 456 N.W.2d 201, 202 (Iowa 1990). The rule is implicated if a plaintiff's recovery is reduced by the amounts paid by a collateral source, but not if the plaintiff's recovery is simply limited to those amounts. *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 156 (Iowa 2004).

Iowa courts have held that this rule applies to prevent the reduction of damages in the typical case where an insurer paid the injured party's medical bills or property losses. It has also been applied where the injured party received free vehicle repair services from a friend or family member. *See State v. Ziemelis*, 776 N.W.2d 886 (Iowa Ct.App.2009). The rule does not, however, prohibit a tortfeasor from introducing evidence of payments necessary for medical care, rehabilitation services, and custodial care in actions under the Iowa Comparative Fault Act. Iowa Code Ann. § 668.14. If such evidence is introduced, the court must further permit evidence as to any existing indemnification or subrogation rights, or costs of procurement associated with the previous payments or future right of payment. *Id.* Similarly, evidence of damages for actual economic losses paid by any source other than the assets of the plaintiff or the victim's family is admissible in medical malpractice actions. Iowa Code Ann. § 147.136. Consequently, evidence of Medicare and Medicaid payments are permissible in those specific actions. *Mohammed v. Otoadese*, 738 N.W.2d 628, 634 (Iowa 2007).

KANSAS

Kansas courts follow a common law collateral source rule that says damages awarded to a plaintiff will not be diminished by benefits received from a collateral source. *Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205, 208 (Kan. 2010). Evidence of the total amount of medical bills is admissible at trial, but so is the amount that was paid and accepted as full satisfaction of the charges. By considering the amounts that bills were discounted for full satisfaction, Kansas aims to allow the jury to determine the actual reasonable value of the medical services. *Id.* However, the source of any payments received by the plaintiff is inadmissible information under the collateral source rule. *Id.* The Kansas Supreme Court explained the rule with the following passage:

When medical treatment expenses are paid from a collateral source at a discounted rate, determining the reasonable value of the medical services becomes an issue for the finder of fact. Stated more completely, when a finder of fact is determining the reasonable value of medical services, the collateral source rule bars admission of

evidence stating that the expenses were paid by a collateral source. However, the rule does not address, much less bar, the admission of evidence indicating that something less than the charged amount has satisfied, or will satisfy, the amount billed. *Id.* at 222-223.

KENTUCKY

The Commonwealth allows a plaintiff to recover damages for medical expenses that were originally paid by a collateral source. *Daugherty v. Daugherty*, 609 S.W.2d 127, 128 (Ky. 1980). The fact that a plaintiff had the foresight to secure insurance or another source of benefits does not cause the reduction of plaintiff's damage award. This is especially true in light of the fact that insurers will often have subrogation rights to damage awards received. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995). Tortfeasors found liable for an injury are held accountable for the full costs of tortious actions. In the Bluegrass evidence of collateral source payments and benefits received by the plaintiff are inadmissible. *Id.*

LOUISIANA

A plaintiff's tort recovery may not be reduced by funds received from sources independent of the defendant. Stated another way, a defendant may not receive credit for funds obtained by the plaintiff from other sources. Only payments made by the defendant can be credited against the plaintiff's award. See *Coscino v. Wolfley*, 1996-0702 (La. App. 4th Cir. 6/4/97); 696 So. 2d 257, rehearing denied, writ denied 1997-2317 (La. 1/9/98); 705 So. 2d 1100, writ denied 1997-2539 (La. 1/9/98); 705 So. 2d 1102.

The Louisiana Supreme Court has explained that application of the collateral source rule does not result in a windfall for the plaintiff in situations where the plaintiff's patrimony has been diminished in exchange for receipt of the collateral benefit. "Patrimony," a Louisiana legal term, is the sum of a person's assets and liabilities, See *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973) and 2 La. Civ. L. Treatise, Property § 194 (4th ed.).

Louisiana courts apply the collateral source rule with the plaintiff's patrimony as the foundation of the analysis. This approach is called "the benefit of the bargain." See *Bozeman v. State*, 03-1016 (La. 07/02/04); 879 So. 2d 692. Whether the collateral source rule applies depends on whether the plaintiff procured the collateral benefits in a manner by which his patrimony has been reduced, i.e., he is not reaping a windfall. See *Bellard v. American Cent. Ins. Co.*, 07-1335 (La. 4/18/08); 980 So. 2d 654.

The rule awards the plaintiff the full value of his medical expenses, including any amount written off by his healthcare providers per contractual agreement with an insurance company, when the plaintiff paid consideration for the benefit of the write off. The plaintiff's payment of his insurance premium is the consideration for the "bargain" and is the requisite diminution of his patrimony. See *LeBlanc v. Acadian Ambulance Service, Inc.*, 1999-271 (La. App. 3rd Cir. 10/13/99); 746 So. 2d 665, rehearing denied (12/8/99).

The collateral source rule has been held to apply not only in cases where the plaintiff purchased health insurance, but also in cases involving:

- Medicare payments
- Sick leave payments
- Retirement payments
- Free medical services
- Federal Social Security benefits
- Suits brought under the Jones Act and the Longshore and Harbor Workers' Compensation Act

The rule also applies to recovery for property damage. See below for representative cases.

Medicaid and Medicare

The Louisiana Supreme Court has distinguished Medicaid payments from Medicare payments. The distinguishing factors are the funding and intended recipients of the programs. Medicaid is a social service health care provider for persons with low income and limited assets. Medicare is a healthcare insurance funded by beneficiaries and their employers. The Court held that “where the plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source benefits he receives, we hold that the plaintiff is unable to recover the ‘write-off’ amount.” Medicaid recipients are unable to collect the Medicaid “write-off” as damages because no consideration is provided for the benefit. See *Bozeman v. State*, 2003-1016 (La. 7/2/04); 879 So. 2d 692.

Evidence

From an evidentiary perspective, the rule bars the introduction of evidence that the plaintiff has received benefits or payments from a collateral source. The rule has been applied in conjunction with Louisiana Code of Evidence Article 409, which provides:

In a civil case, evidence of furnishing or offering or promising to pay expenses or losses occasioned by an injury to person or damage to property is not admissible to prove liability for the injury or damage nor is it admissible to mitigate, reduce, or avoid liability therefor. . . .

Defense Strategies

The defense can seek to demonstrate that the plaintiff did not put forth any consideration for the collateral benefit, and, thus, the plaintiff is reaping a windfall and double recovery.

Additionally, the defense should be on the lookout for plaintiff's attorneys who consistently use the same physicians. It is arguable that the plaintiff's patrimony is not reduced when the plaintiff's attorney has a standing agreement with certain physicians for reduced pricing.

The collateral source rule has been found inapplicable in cases where the plaintiff's attorney negotiated the payment due. See *Hoffman v. 21st Century N. Am. Ins. Co.*, 2013 WL 5176914 (La. App. 1st Cir. 2013). However, the rule does apply when the plaintiff's attorney paid the medical expenses on behalf of an uninsured client. *Francis v. Brown*, 671 So. 2d 1041 (La. App. 3rd Cir. 1996).

Representative Cases

Dunlap v. Armendariz, 265 So. 2d 352 (sick leave payments).
Adam v. Schultz, 250 So. 2d 811 (retirement payments).
Bosworth v. Authement, 634 So. 2d 1205, 634 So. 2d 836 (disability-retirement income).
Doerle v. State, 147 So. 2d 776 (federal Social Security benefits).
Fullilove v. U.S. Casualty Co. of N.Y., 129 So. 2d 816 (medical care rendered by Veteran's Administration).
Tipton v. Socony Mobil Oil Co., 375 U.S. 34 (suits brought under the Jones Act and Longshore and Harbor Workers' Compensation Act).
Louisiana Dept. of Transp. and Development v. Kansas City Southern Ry. Co., 846 So. 2d 734 (environmental property damage exclusion of Federal government cleanup fund)
Metoyer v. Auto Club Family Ins. Co., 536 F. Supp. 2d 664 (exclusion of evidence of Hurricane Katrina Recovery Funds)

Please contact the Louisiana Harmonie firms of Sutterfield & Webb, LLC or Cook, Yancey, King & Galloway, APLC for more specific details and questions specific to particular venues.

MAINE

Under Maine's version of the collateral source rule, payments made or benefits conferred by other sources are not to be subtracted from a plaintiff's recovery. Therefore, evidence of compensation from a source independent of the tortfeasor is inadmissible. The premise underlying this rule is that either the injured party or the tortfeasor will receive a windfall if part of a loss is paid by an independent source, and, as between the injured party and the tortfeasor, the injured party should reap the benefit of the windfall.

The Maine Supreme Judicial Court has not ruled on the issue of whether the collateral source rule applies to expenses that have been written off by health care providers. There are a couple of Superior Court decisions available online indicating that it is for the fact finder to decide, based on not only the amount accepted, but also based on evidence of the amounts billed by medical services providers, what the reasonable value of those services is. Therefore, defense counsel should inquire whether a judge in the county in which the matter is pending has ruled on the issue. As the Supreme Court has not ruled on the matter, it is appropriate to argue that the reasonable value of the plaintiff's damages is the actual amount paid.

MARYLAND

The collateral source rule has been applied in Maryland since 1899. *City Pass. Ry. Co. v. Baer*, 90 Md. 97, 44 A. 992 (1899). The rule generally provides that payment by a collateral source to a plaintiff for items of damage cannot be set up by the tortfeasor as mitigation or as a reduction of damages. The rule permits an injured person to recover the full amount of his or her provable damages, "regardless of the amount of compensation which the person has received for his [or her] injuries from sources unrelated to the tortfeasor," and generally prohibits presentation to a jury of evidence of the amount of medical expenses that have been or will be paid by health insurance. *Haischer v. CSX Transportation, Inc.*, 381 Md. 119, 132, 848 A.2d 620, 627 (2004) (quoting *Motor Vehicle Admin. v. Seidel*, 326 Md. 237, 253, 604 A.2d 473, 481 (1992) ("Payments made or benefits conferred by other

sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant.”).

There are, however, a number of potential exceptions to the rule. In medical malpractice cases, the collateral source rule has been statutorily modified to permit the reduction of a malpractice award for amounts paid through insurance benefits. The statutory scheme requires that “damages be reduced to the extent that the claimant has been or will be paid, reimbursed, or indemnified under statute, insurance, or contract for all or part of the damages assessed.” Md. Code Ann., Cts. & Jud. Proc. § 3-2A-05(h) (Repl. Vol. 2006).

Evidence of payments by a collateral source may be admitted where there is evidence of malingering or exaggeration on the part of a plaintiff. For example, evidence of payment of worker’s compensation benefits may be admissible as a reason a plaintiff has failed to return to work. Thus, where there is a reasonable suggestion of malingering or exaggeration on the part of a plaintiff, “the evidence of collateral payments is admissible . . . but evidence as to collateral payments is inadmissible in the absence of evidence of malingering or exaggeration or where the real purpose of the evidence offered as to collateral sources is the mitigation of liability for damages of the defendant.” *Kelch v. Mass Transit Admin.*, 42 Md. App. 291, 296, 400 A.2d 440 (1979), *aff’d*, 287 Md. 223, 411 A.2d 449 (1980).

Please contact the Maryland Harmonie firm of **Hodes, Pessin & Katz, P.A.** and Robert S. Campbell, Esq. (410) 938-8800 for additional information.

MASSACHUSETTS

In Massachusetts, the value of the reasonable medical expenses an injured plaintiff is entitled to recover “is not to be reduced by any insurance payments or other compensation received from third parties by or on behalf of the injured person”. *Law v. Griffith*, 457 Mass. 349, 354-355, 930 N.E.2d 126, 131-132 (2010)(internal citations omitted.) The collateral source rule is a common-law rule that has a substantive and evidentiary component. *Id.* The stated purpose for the rule is “tort deference” in that the tortfeasor “is not to benefit from either contractual agreements of the injured party with insurers or from any gifts from others intended for the injured party”. *Id.* “Collateral benefits” could include insurance policies, employment benefits such as workers’ compensation benefits, cash gratuities, gratuitous rendering of services as well as “social legislation benefits” such as welfare or pensions. *Id.* at 356, 930 N.E.2d 132. *See also Goldstein v. Gontarz*, 364 Mass. 800 (1974). *But see Harris-Lewis v. Mudge*, 60 Mass. App. Ct. 480, 803 N.E.2d 735 (2004)(affirming trial court’s admission of life insurance policies as relevant and probative of deceased’s credibility in denying drug use to his doctors).

MICHIGAN

Michigan has codified its collateral source rule at MCL 600.6303: “Collateral source benefits; reduction of damages; subrogation; definition”. The statute defines a “collateral source” and sets forth the admissibility of collateral source benefits after a verdict is rendered for the plaintiff but before a judgment is entered on that verdict. The trial court’s interpretation and application of the collateral source payment statute is a legal issue, reviewed de novo on appeal. *Schivers v. Schmiede*, 285 Mich. App. 636, 776 N.W.2d 669 (2009)(citing *Heinz v. Chicago Rd. Investment Co.*, 216 Mich. App. 289, 549 N.W.2d 47 (1996).

MINNESOTA

Minnesota's collateral source statute provides that a plaintiff cannot recover damages from the defendant, to the extent the plaintiff has already recovered compensation for those damages from certain, specified other sources. The primary purpose of the statute is to prevent double recoveries by plaintiffs. Under the current version of the collateral source statute, this purpose is accomplished via a procedure in which the district court –not the jury – determines the amount of collateral sources and reduces any damage verdict by that amount. The procedure is initiated by post-trial motion. The courts must first determine the amount of the collateral source that has been “paid for the benefit of the plaintiff or otherwise available to the plaintiff as a result of losses” (excluding those for which a subrogation right is asserted). The court must also determine the amount paid by or on behalf of the plaintiff for the two-year period before the injury to secure the collateral source benefits (i.e. insurance premiums). The court reduces the former amount by the later amount, and then reduces the verdict by the difference of those two amounts. Any reductions for collateral source must be made prior to the application of any comparative fault reductions made under Minn. Stat. §604.01, subd. 1.

Up until 2009, Minnesota courts had not conclusively addressed the issue of whether negotiated discounts between health insurers and medical providers – the so-called “gap” between what was billed and what was actually paid – constituted a “collateral source” by which a verdict must be reduced. However, in *Swanson v. Brewster*, the Minnesota Supreme Court finally provided a definitive decision regarding the treatment of negotiated discounts under the collateral source statute. The court concluded that pursuant to the unambiguous language of Minn. Stat. §548.251, the negotiated discount between plaintiff's health insurer and the medical providers was a “payment.” Therefore, negotiated discounts are collateral sources by which awards must be reduced. The Supreme Court majority noted that the consequence of holding that negotiated discounts were not collateral sources would be to award the plaintiff “a sum of money based on a portion of his medical bills that he never paid and will never have to pay” – in other words, a double recovery.

But, Minn. Stat. §548.251 expressly excludes from the definition of “collateral sources” payments for which a subrogation right is asserted. *Swanson* suggests that it is possible for either a plaintiff or a defendant to purchase the subrogation lien from a health insurer in a personal injury case. If the plaintiff chooses to do so, the plaintiff would clearly apply the application of collateral source statute. If the defendant purchases the lien, the defendant may then drag the amount of the lien, previously outside the reach of the statute, back within the statute's offset provisions – and likely obtain credit for the full amount of the health insurer's lien, versus only the amount the defendant paid for the lien.

Swanson clarifies how negotiated discounts between medical providers and private health insurers are treated for collateral source offset purposes. But the analysis did not extend to a negotiated discount between Medicare and a medical provider. Neither the legislature nor the Minnesota Supreme Court has directly answered how this is to be handled, and the outcome is far from clear. Arguably, Medicare could be deemed to be a “payment pursuant to the United States Social Security Act” which would therefore be excluded from the statute. The defense should argue that Medicare qualifies under the statute's definition of “collateral source” as a “public program providing medical expenses, disability payments, or similar benefits.”

Lastly, Swanson does not apply to no-fault actions. In *Stout v. AMCO Insurance Co.*, the Minnesota Supreme Court held that where a no-fault insured delayed payment for an insured's claim for basic economic loss benefits, thereby enforcing the insured to turn to their health insurer for payment, the no-fault insurer is not entitled to the benefit of any negotiated discount between the health insurer and the medical provider. The Swanson court carefully distinguished *Stout* by noting that it applied only to no-fault claims. Thus, it is clear that the Minnesota Supreme Court intended that its holding in Swanson would not apply to no-fault claims, and *Stout* remains good law today.

Please contact the Minnesota Harmonie firm of Meagher & Geer, P.L.L.P. for more specific details, and any questions relating to specific venues.

1. Minn. Stat. §548.251.
2. 784 N.W.2d 264 (Minn. 2010).
3. 604 N.W.2d 108, 114-15 (Minn. 2002).

MISSISSIPPI

The collateral-source rule has long been recognized by the Mississippi Supreme Court. The rule is based on common law and provides that “a wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, wholly independent of him.” *McGee v. River Region Med. Ctr.*, 59 So.3d 575, 581 (Miss. 2011) (quoting *Coker v. Five-Two Taxi Service, Inc.*, 52 So.2d 356, 357 (Miss. 1951)).

The collateral-source rule is often a source of debate in determining the proof of damages a party may present at trial. Generally, the issue arises as it did in *Wal-Mart Stores, Inc. v. Frierson*, 818 So.2d 1135, 1138 (Miss. 2002):

Prior to trial, the parties disagreed as to the proof Frierson could present to the jury with respect to the extent of his injuries. The Friersons had no private health insurance. Medicaid and Medicare paid a portion of Frierson's medical expenses. Pursuant to Medicaid or Medicare regulations, that portion of Frierson's expenses not paid by Medicaid or Medicare was ‘written off,’ or eradicated, by those who had provided medical assistance to him. The Friersons made no independent payments. Wal-Mart filed a motion in limine attempting to prevent the Friersons from introducing evidence of any of the medical expenses which had been eradicated. Wal-Mart argued that allowing the introduction of these expenses would allow the Friersons to realize an impermissible windfall as no one would ever be required to pay the amounts written off.

In *Frierson* the court ultimately extended the collateral source rule in the context of Medicare payments. 818 So.2d 1135, 1138. Although defendants have made numerous attempts to prevent plaintiffs from showing their “billed versus paid” medical bills, the Mississippi Supreme Court has continually rejected the “windfall” argument. For example, in *Brandon HMA, Inc. v. Bradshaw*, Medicaid paid plaintiff's medical bills. 809 So.2d 611, 618 (Miss. 2001). Thus, the defendant-

hospital argued that allowing a plaintiff to recover for expenses he himself never had to pay undermined the purpose of compensatory damages, which is to make the injured party whole. Id. The plaintiff countered by relying on the well-recognized collateral source rule that prevents a tortfeasor from using “the money of others (insurance companies, gratuitous gifts, etc.) to reduce the cost of its own wrongdoing.” Id.

The Mississippi Supreme Court agreed with the plaintiff and held as follows:

Today for the first time, we hold that Medicaid payments are subject to the collateral source rule. [Plaintiff’s] brief summarized the logic nicely: ‘[T]he Hospital (Brandon) does not get a break on damages just because it caused permanent injuries to a poor person.’ We conclude that the trial court did not err in admitting [Plaintiff’s] medical bills which exceed the amount paid by Medicaid.

Although Frierson and Bradshaw seem to suggest that the applicability of the collateral source rule to medical bills has no limits, the Mississippi Supreme Court has found a narrow exception to this rule. In McGee v. River Region Med. Ctr., the defendant-hospital argued that a plaintiff should not be allowed to recover the “written-off” portion of his medical bills. 59 So.3d 575, 581 (Miss. 2011). The Mississippi Supreme Court qualified its holdings in Frierson and Bradshaw by stating that “we do not read these cases to establish a per se rule that ‘written off’ medical expenses are admissible.” Id. Instead, “[f]rom an evidentiary perspective, every case turns on its own facts and the purpose for which the evidence is offered.” Id. The question comes down to relevance, “provided he or she can demonstrate relevance, a plaintiff should be allowed to present evidence of his or her total medical expenses, including those amounts ‘written off’ by medical providers.” Id. See Mississippi Code Annotated § 41-9-119 (“proof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable.”).

Along these lines, the Mississippi Supreme Court has made clear that an “opposing party may [] ‘rebut the necessity and reasonableness of the bills by proper evidence’ if desired.” Estate of Bolden v. Williams, 17 So. 3d 1069, 1072 (Miss. 2009) (quoting Jackson v. Brumfield, 458 So. 2d 736, 737 (Miss. 1984)). Therefore, it is incumbent upon the defendant to present evidence to contradict a plaintiff’s admission of medical bills into evidence in order for a jury to award a plaintiff less than the amount presented.

The Mississippi Supreme Court recently underscored this approach by allowing a defendant to subpoena documents from a medical provider, as well as obtain a 30(b)(6) deposition of the medical provider, aimed at discovering information regarding certain billing records, the necessity of the services and/or treatment rendered, and the reasonableness of the fees charged. Williams v. Memorial Hospital at Gulfport, No. 2015-IA-00792-SCT, 2015 Miss. LEXIS 367 (Miss. Jul. 20, 2015). The Court found that “in order to rebut the presumption [provided in Miss. Code Ann. § 41-9-119, defendant was] entitled to discover relevant information regarding the reasonableness and necessity of [the medical provider’s] charges which are claimed by plaintiff to be recoverable damages, and [] the trial court erred by quashing the subpoena and prohibiting the deposition.” Id. at *3. Accordingly, although a personal injury plaintiff in Mississippi can chalkboard their entire medical bills regardless of what was actually paid, a defendant can contest the *reasonableness* of these charges through proper evidence, including obtaining information directly from the medical provider.

The McGee court went on to outline the admissibility of collateral source payments issue as whether the collateral source rule applies to a plaintiff's *recovery* of damages even though the total medical bills may be found to be relevant and admissible. Id. Importantly, the court found the following:

Applying the rule to the facts of this case, we find that the collateral source rule simply does not apply to the 'written-off' portion of the [hospital's] bill. The rule, by its very language, applies only to prohibit the introduction of evidence of payments from collateral sources *wholly independent of the tortfeasor*. In this case, [the hospital], to whom the bill was owed, is also the alleged tortfeasor. [The hospital] provided medical services, but was not paid by [Plaintiff], Medicare, or any other source for a large portion of those services. To accept [Plaintiff's] argument would require [the hospital] to absorb the cost of services rendered for which there was no reimbursement and then be potentially liable for those services again in damages. We therefore find that, although the entire medical bill may be relevant to aid the jury in assessing the seriousness and the extent of the injury, [Plaintiff] may not recover as damages those amounts 'written off' by [the hospital].

Id. (emphasis by the court).

Although the Mississippi Supreme Court found a narrow exception to the collateral source rule in McGee, Mississippi courts have been reluctant to expand this narrow exception in subsequent cases. For example, the District Court for the Southern District of Mississippi held that, in a medical malpractice case against a governmental entity, the plaintiff's award cannot be reduced despite Medicaid, *i.e.* the government, being the payer of plaintiff's medical bills. Chickaway et al. v. United States, No. 4:11-CV-00022-CWR-LRA, 2012 WL 3236518 (S.D. Miss. August 7, 2012). In its holding, the district court rejected the government defendant's argument that the collateral source rule did not apply because it was both the tortfeasor and source of the medical payments. *Id.* See also Johnson v. 21st Century Centennial Ins. Co., No. 1:15CV74-LG-RHW, 2016 WL 4471887 (S.D. Miss. Aug. 2016) (Noting that *McGee v. River Region Med. Ctr.* "did not overrule well-settled Mississippi law on [the collateral source issue].")

Additionally, the Mississippi Supreme Court has found that payments disbursed by a defendant's insurance company are not from a collateral source and can therefore be credited against the amount of damages that the claimant is entitled to recover. Pearl Pub. Sch. Dist. v. Groner, 784 So. 2d 911, 916 (Miss. 2001). Moreover, the collateral-source rule applies only when the compensation is for the same injury for which the damages at issue are sought. Wright v. Royal Carpet Serv., 29 So. 3d 109, 113-14 (Miss. Ct. App. 2010). Therefore, if the source of damages is derived from separate and distinct alleged torts, the collateral source rule is inapplicable. Id. For example, in a case where the compensation derived from a settlement for injury of mesothelioma due to asbestos exposure, the settlement was not precluded from being admissible evidence in a case for unlawful termination of health insurance. Geske v. Williamson, 945 So. 2d 429, 431 (Miss. Ct. App. 2006).

If the evidence is introduced for a purpose other than to mitigate defendant's damages, the collateral-source rule is not violated, and the evidence is properly admitted. Wright, 29 So. 3d at 115. The Supreme Court has reiterated that for purposes of impeachment, evidence of collateral source payments may be admitted in certain cases where the plaintiff testifies falsely that he paid for

expenses himself when the expenses were actually paid by a third party. Robinson Prop. Group, L.P., v. Mitchell, 7 So. 3d 240, 244-45 (Miss. 2009). However, when evidence of collateral-source payments is admitted for the narrow purpose of impeaching false or misleading testimony, granting a limiting instruction may be appropriate to avoid jurors' consideration of plaintiffs' claims as unimportant or trivial and to avoid a refusal or reduction of plaintiffs' verdicts. Id. at 245. No Mississippi court has specifically addressed the collateral source rule in the context of punitive damages.

Please contact the Mississippi Harmonic firm of **Butler Snow LLP** with questions or to obtain further specificity.

MISSOURI

Section 490.715 was passed as one part of the 2005 Missouri tort reform and has been described as an attempt to limit or eradicate the collateral source rule as to recovery of medical treatment expenses. With respect to payments from an insurer, the law in Missouri has consistently supported the collateral source rule, despite defendants' protests of it providing plaintiff "double recovery". The common law collateral source rule has been codified and slightly modified in RSMo § 490.715. Subsection 2 of § 490.715 allows a defendant to introduce evidence that someone other than the plaintiff paid all or part of the plaintiff's special damages, but the defendant cannot identify any source of the payment. *Deck v. Teasley*, 322 S.W.3d 536, 538 (Mo. Banc 2010).

Section 490.715 provides that there is a rebuttable presumption that the value of medical treatment rendered to a plaintiff is the dollar amount paid and/or the dollar amount necessary to satisfy the financial obligation to the health care provider. To rebut the presumption, the plaintiff is required to present substantial evidence that the value of the medical treatment rendered is an amount different from the dollar amount necessary to satisfy the financial obligations to the health care providers. *Deck*, 322 S.W.3d at 540. The evidence needs to be presented to the judge outside of any hearing by a jury. *Berra v. Danter*, 299 S.W.3d 690 (Mo. Ct. App. 2009). Once such substantial evidence is proffered, the presumption in § 490.715 is rebutted, and the question of the value of the medical services becomes a fact question for the jury. *Deck*, 322 S.W.3d at 539.

Both parties may present evidence to the jury regarding the value of medical expenses, including evidence of medical bills incurred, amounts actually paid and amounts which are not yet owed or paid but will be owed in the event of recovery. Once the presumption is rebutted, the trial court has no authority to weigh the competing evidence. *Id.* at 541-42. It is a question of fact for the jury to determine, and it is presented to the jury free from any presumption. *Id.* at 539. Despite the admissibility of such evidence, the collateral source rule still applies and prevents any evidence that payment was made by an insurer. *Id.* at 542.

MONTANA

The current state of the law regarding the collateral source rule in Montana is in line with the Restatement (Second) of Torts § 920A, cmt. b (1977), in that Montana generally favors providing an injured party with the possibility of receiving a double recovery rather than allowing a tortfeasor to benefit because the injured party received compensation from a collateral source. The Montana Legislature has codified this rule in Mont. Code Ann. § 27-1-308. However, the rule does contain a limiting factor which modifies the extent to which an injured party can recover by ensuring "that a

plaintiff's eventual recovery has a ceiling no higher than the full amount of the award, minus appropriate collateral offsets." *Shilbanek v. D-2 Trucking, Inc.*, 2000 MT 16, ¶ 29, 298 Mont. 101, 994 P.2d 1105. Collateral source offsets however are subject to a variety of exceptions which make application of the rule less than straightforward.

Under Montana's collateral source reduction statute, if a plaintiff receives a jury award greater than \$50,000.00 in an action involving bodily injury or death, the "recovery must be reduced by any amount paid or payable from a collateral source," as long as the plaintiff will be fully compensated "exclusive of court costs and attorney fees." Mont. Code Ann. § 27-1-308(1). Therefore, Montana follows the Restatement by beginning its inquiry with the basic premise that "benefits received by a plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." *Lee v. Lee*, 2000 MT 67, ¶ 63, 299 Mont. 78, 996 P.2d 389 (citing *Five U's, Inc. v. Burger King Corp.*, 1998 MT 216, 290 Mont. 452, 962 P.2d 1218). In practical application, the collateral source rule in Montana favors the plaintiff in most circumstances. Plaintiffs are often successful in asserting that there should be no collateral source offset because they are never "fully compensated" once they have paid attorneys fees in pursuing a recovery. Further, even though the plain language of the statute requires a recovery on a verdict over \$50,000.00 to be reduced, it is still evident that the legislature sought to preserve an injured plaintiff's recovery as much as possible. For example, before a policy payment may be used to reduce an award, a court must first deduct the amount the plaintiff paid for the policy preceding and after the date of injury. Mont. Code Ann. § 27-1-308(2). Unlike some states that allow the jury to hear the amount owed to collateral sources, Montana does not allow the issue of collateral source payments to be presented to the jury. Mont. Code Ann. § 27-1-308(3).

A threshold inquiry in applying the collateral source rule in Montana is whether "the collateral source at issue possesses a subrogation right . . .", *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 108, 303 Mont. 274, 16 P.3d 1002. Under the *Schuff* decision, if there is a subrogation right, then the statute does not apply. Mont. Code Ann. § 27-1-308(1). For example, workers compensation insurers are entitled to subrogation in Montana and thus the benefits workers compensation insurer paid "cannot be deducted as a collateral source." See e.g. *Haman v. Maco Ins. Co.*, 2004 MT 44, ¶ 16, 320 Mont. 108, 86 P.3d 34.

In light of the collateral source reduction statute and various Montana Supreme Court holdings, it is apparent that the collateral source rule is intact in Montana and that the rule favors plaintiffs even though courts may be required to reduce a plaintiff's recovery in certain limited circumstances.

NEBRASKA

Nebraska courts apply the collateral source rule in negligence actions when determining the proper measure of damages. In Nebraska, the general rule in negligence actions is that evidence of any source of collateral compensation available to the party seeking damages is inadmissible to the issue of the measure of damages. See 1 Neb. Prac., NJI2d Civ. 5 (2010-11 ed.). The Nebraska Supreme Court has held, "[B]enefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. [This] prevent[s] a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice." *Himay 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 767, 443 N.W.2d 872, 875 (1989). Some categories of payments inadmissible under the collateral source rule include insurance payments, Medicare and

Medicaid payments, and pension and disability benefits. See, e.g., *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 802-03, 790 N.W.2d 873, 882 (2010) (insurance payments); *Fickle v. State*, 273 Neb. 990, 1009, 735 N.W.2d 754, 772 (2007) (Medicare and Medicaid payments); *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 847-49, 560 N.W.2d 451, 455-56 (1997) (pension and disability benefits).

The collateral source rule has some limitations under Nebraska law. For example, it does not apply to benefits paid by the wrongdoer because such payments are not from a “collateral” source. See, e.g., *Beeder v. Fleeer*, 211 Neb. 294, 298-99, 318 N.W.2d 708, 711 (1982). See, also, 1 Neb. Prac., NJI2d Civ. 5 (2010-11 ed.). Further, evidence of compensation from a collateral source is not necessarily inadmissible to issues other than the measure of damages. For example, it may be admissible as evidence of the extent of an alleged injury. *Id.*; *Ferlise v. Raznick*, 202 Neb. 745, 748-49, 277 N.W.2d 94, 95 (1979).

Please contact the Nebraska Harmonie firm of **Erickson | Sederstrom** for more information on the application of the collateral source rule in Nebraska.

NEVADA

Nevada follows a strict collateral source rule. Evidence of a collateral source of payment for an injury is inadmissible. In sum, a tortfeasor (and his or her liability insurance carrier) is not entitled to introduce evidence that a portion of the injured person’s medical bills was paid for by health insurance or any other source unrelated to the tortfeasor. See *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853, 854 (1996). However, statutory exceptions exist which mandate the introduction of collateral source evidence when worker’s compensation is involved, *Tri-County Equip & Leasing v. Klinke*, 286 P.3d 593 (2012), or in medical malpractice claims. See NRS 42.021. Most recently, the Nevada Supreme Court issued a decision which clarified that medical provider discounts, or “write-downs,” are collateral source and therefore inadmissible, but at the same time determined that medical liens are admissible for purposes of establishing bias and therefore not subject to the collateral source rule. See *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52 (July 28, 2016).

NEW HAMPSHIRE

In New Hampshire, under the collateral source rule, if a plaintiff is compensated in whole or in part for his damages by some collateral source, he is still permitted to make full recovery against the tortfeasor. Therefore, an award of damages may not be reduced by the amount of payments a plaintiff receives from a collateral source.

Proponents of the rule reason that a tortfeasor should not be allowed to escape the consequences of his act merely because his victim received payments from a collateral source. Those opposed to the rule argue that the plaintiff should not be placed in a better financial position than before the accident. In addressing this argument, the New Hampshire Supreme Court explained that in personal injury cases, the collateral payor is usually subrogated to the extent of its payment so that the plaintiff does not receive a windfall. In cases where the plaintiff has received workers’ compensation payments, the employer (or the employer’s compensation carrier) has a lien on all disbursements made since allowing the plaintiff to keep the entire compensation award *and* his common law recovery would amount to double recovery.

The New Hampshire Supreme Court has not ruled on whether the collateral source rule applies to expenses that have been written off by health care providers. The Superior Court, however, has had several occasions to decide the issue. Of the handful of decisions that are available online, it appears that the Superior Court has more often than not held that the rule applies. As a result, the plaintiff's recovery is not limited to the actual amount charged for medical services, but is instead measured by the "reasonable value" of such services. Defense counsel should inquire whether a judge in the county in which the matter is pending has ruled on the issue. As the Supreme Court has not ruled on the matter, it is appropriate to argue that the reasonable value of the plaintiff's damages is the actual amount paid.

One final point of interest is that New Hampshire at one time had an outright abolishment of the collateral source rule in medical malpractice cases. The abolishment was ruled unconstitutional, but is still on the books at RSA 507-C:7:

The damages awarded may include compensation for actual economic losses suffered by the injured person by reason of medical injury, including but not limited to, the cost of reasonable and necessary medical care, rehabilitation services, custodial care, loss of services and loss of earnings or earning capacity. The defendant may introduce evidence of amounts recovered or recoverable by or on behalf of the injured person from health, accident, sickness or income-disability insurance or from governmental, employment, service or other benefit programs. Where the defendant does so, the plaintiff may introduce evidence of the total of any amounts which the plaintiff has paid or contributed to secure his right to any such benefits as to which the defendant has introduced evidence. When such evidence is introduced, the jury shall be instructed to reduce the award for economic loss by a sum equal to the difference between the total benefits received and the total amount paid by the plaintiff to secure such benefits.

NEW JERSEY

New Jersey's collateral source statute, N.J.S.A. 2A:15-97, applies to civil actions "brought for personal injury or death[.]" Id. Its "primary effect was to eliminate double recovery to plaintiffs." *Perreira v. Rediger*, 169 N.J. 399, 409 (2001); *County of Bergen Employee Benefit Plan v. Horizon Blue Cross & Blue Shield of N.J.*, 412 N.J. Super. 126, 133-34 (App. Div. 2010). Per the statute, a successful plaintiff is required to disclose to the court any "benefit [received] for the injuries allegedly incurred from any other source other than a joint tortfessor[.]" and, where the amount of those "benefits" "duplicated any benefit contained in the award[.]" the court should deduct it from plaintiff's recovery. N.J.S.A. 2A:15-97; These "benefits" include payments that were covered by health insurance, less insurance premiums paid by plaintiff or a member of plaintiff's family. N.J.S.A. 2A: 15-97. Also included are social security disability payments, but "only those future payments of social security benefits that are neither contingent nor speculative nor subject to change or modification may be included." *Woodger v. Christ Hosp.*, 364 N.J. Super. 144, 153-54 (App. Div. 2003) (citing *Parker v. Esposito*, 291 N.J. Super. 560, 565-566 (App. Div.), certif. denied, 146 N.J. 566 (1996))

NEW MEXICO

While New Mexico generally prohibits double recovery, it recognizes an exception in regards to the collateral source rule. *Sunnyland Farms, Inc. v. Cent. New Mexico Elec. Co-op, Inc.*, 301 P.3d 387, 400-01

(N.M. 2013). “[I]f a plaintiff is compensated for his or her injuries by any source unaffiliated with the defendant, the defendant must *still* pay damages, even if this means that the plaintiff recovers twice.” *Id.* at 401. One justification for this rule is the thought that if plaintiff can recover his or her full damages from the defendant, then plaintiff has the means to reimburse the collateral source. *Id.* (citing *Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.*, 140 N.M. 720, 148 P. 3d 806 (N.M. 2006)). “This allows the ultimate burden of compensating the plaintiff to fall on the defendant, rather than on blameless but generous parties.” *Id.*

NEW YORK

New York’s law on the admissibility of collateral source payments is codified as a rule of evidence at N.Y. C.P.L.R. § 4545. That statute applies to actions for personal injury, property damage or wrongful death where plaintiff is seeking to recover the costs of medical care, dental care, custodial care, rehabilitation services, loss of earnings or other economic loss. N.Y. C.P.L.R. § 4545(a) (McKinney’s 2009). The court can consider evidence that tends to establish that any past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source. *Id.* Collateral sources do not include life insurance or payments for which there is a statutory right to reimbursement. *Id.* The statute provides specific instructions as to how an award shall be reduced in the event that past or future costs or expenses will, with reasonable certainty, be replaced or indemnified from any such collateral source. *Id.* The burden is on the defendant to prove that a plaintiff’s award should be reduced by payments received from collateral sources. *Damiano v. Exide Corp.*, 970 F.Supp. 222 (S.D.N.Y. 1997).

NORTH CAROLINA

North Carolina’s law governing the admissibility of evidence relating to collateral sources of payments on medical expenses was changed by the General Assembly’s 2011 tort reform legislation. Tort Reform for Citizens and Businesses Act, 2011 N.C. Sess. Laws 283. Section 1.1 of the tort reform legislation amended the North Carolina Evidence Code to create Rule 414. Rule 414 provides that “[e]vidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of the payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied.” *Id.* at § 1.1. Section 1.2 of the legislation also amended N.C. Gen. Stat. § 8.58-1, and now limits medical expense testimony by plaintiffs or qualified witnesses to “the amount paid or required to be paid in full satisfaction of such charges. *Id.* at § 1.2.

Prior to the establishment of Rule 414, the full amount of medical expenses *billed* by a provider could be admitted into evidence. Any evidence of paid medical expenses, however, was inadmissible. In effect, plaintiffs could introduce the full amount of medical bills as evidence of actual damages, while defendants were barred from submitting evidence as to the amount actually paid, or the amount that could be paid to render full satisfaction. As a result, payments of medical expenses by insurers and other collateral sources were deemed inadmissible.

North Carolina’s Rule of Evidence 414 now limits evidence of past medical expenses to the amounts actually paid or that will need to be paid to satisfy the bills, no matter the source of the payment. In this way, Rule 414 is generally valuable for defense counsel as the amount required to satisfy a medical bill is often far less than the total value billed by a provider.

To provide consistency with Rule of Evidence 414, section 1.2 of the legislation amended N.C. GEN. STAT. § 8.58-1. Previously, this section allowed plaintiffs to offer evidence as to the “amount of such [medical] charges” without regard to whether the expenses were already paid or discounted. Section 8.58-1, *amended by* Tort Reform for Citizens and Businesses Act, 2011 N.C. Sess. Laws 283. Now, plaintiffs’ testimony is restricted to “the amount paid or required to be paid in full satisfaction of the charges.” *Id.* This new language should limit the presentation of medical expense evidence to paid medical expenses, and amounts that would render full satisfaction of a medical bill.

These changes to the North Carolina General Statutes and Rules of Evidence are applicable to all cases arising on or after October 1, 2011. North Carolina courts have yet to substantively evaluate Rule 414 and N.C. GEN. STAT. § 8.58-1, therefore it is uncertain how this legislation may affect the introduction of evidence as to a plaintiff’s insurance coverage, and evidence that would clearly identify the source of paid medical expenses. The legislative history, however, tends to indicate that the General Assembly intended to modify the collateral source rule. In one draft of House Bill 542, the drafters provided that “[n]othing in this rule modifies current law governing the admissibility of evidence relating to collateral sources of payments.” However, this language was subsequently removed, which may provide a compelling argument for practitioners seeking to clarify the boundaries of North Carolina Rule of Evidence 414.

Please contact the North Carolina Harmonic firm of **Cranfill Sumner & Hartzog LLP** for more information and for additional assistance with your legal needs.

NORTH DAKOTA

In North Dakota, the collateral source statute provides that a party responsible for payment of an award of economic damages may apply to the court for a reduction to the extent the economic damages are covered by payment from a collateral source. A “collateral source” payment is defined to include “any sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages.” Explicitly excepted from this definition are “life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages.” These exceptions are intended to encourage people to secure personal insurance. Over all, the legislative purpose of the collateral source statute is to reduce the size of jury verdicts and control rising insurance rates.

Under a service benefit agreement, a health care provider may agree to charge an insurer a reduced amount for services performed for persons covered under the insurer’s policy. This type of service benefit agreement between an insurer and a health care provider is also excluded from North Dakota’s collateral source rule. In *Dewitz v. Emery*, the Court discussed such an agreement. The Court concluded that, to the extent the recovering party benefited from this agreement, the benefit was traceable to the party’s health insurance policy and grounded in that contract. Based on the legislative goal of encouraging people to buy personal insurance, the Court held that the service benefit agreement was properly included in the personal insurance exception of the collateral source rule. Consequently, an award of damages may not be reduced to take into account the reduced amount for services performed based on a service benefit agreement.

In *Krein v. Industrial Company of Wyoming*, the U.S. District Court, applying its interpretation of North Dakota’s collateral source rule, addressed the question of whether social security disability benefits payments are a collateral source that reduces the amount of the economic damages award

the defendant is required to pay to the plaintiff. The court determined social security is insurance purchased by an individual using a percentage of his or her paycheck. Accordingly, social security is excluded under the plain language of the statute as a collateral source received because the party recovering economic damages purchased insurance. In Krein, the court explained it could not justify creating a windfall for a tortfeasor by finding social security disability benefits within the statutory collateral source rule.

In *Leingang v. George*, the North Dakota Supreme Court rejected that payments from Indian Health Services fell within the personal insurance exemption under the collateral source rule. The plaintiff made no showing that benefits from Indian Health Services “were in any way ‘purchased’ under the plain meaning of that word.” The rationale supporting the Court’s decision included the legislative history “indicating the exception was to encourage people to ‘purchase’ insurance and stating that benefits such as Workers Compensation and Social Security do not fall under the exception”

The coordination of benefits provision of the North Dakota Auto Accident Reparations Act permits a health insurer to require a no-fault insurer to pay the first \$5,000 of an insured’s medical expenses. Examining this statute in light of the collateral source rule, the North Dakota Supreme Court held that a no-fault insurer is not required to duplicate payment of benefits for medical expenses, where they have been separately paid by health insurance “coordinated” with the no-fault policy as authorized by the statute. This was the issue in *Kiefer v. General Casualty Company of Wisconsin*. In *Kiefer*, the plaintiff contended that the collateral source rule should preclude the no-fault insurer from benefitting from another insurance policy separately obtained by the insured. Seeking to avoid a statutory reading that would require double payment of benefits for the same economic loss covered by a no-fault policy and a coordinated insurance policy, the Court concluded the collateral source rule did not apply. An important consideration was the cost of no-fault insurance—if insurers were not permitted to coordinate coverages, the cost of mandatory no-fault coverage would increase, presenting a public policy problem. The result of the Court’s holding is that a no-fault insurer is not required to pay medical expenses that are also covered (and paid) by a “coordinating” health insurer.

Please contact the Harmonie firm of Meagher & Geer, P.L.L.P. for more specific details and any questions relating to specific venues.

1. N.D. Cent. Code. § 32-03.2-06 (1987).
2. 508 N.W.2d 334 (N.D. 1993).
3. 2003 WL 22415867 (D.N.D. Oct. 21, 2003).
4. 1999 ND 32, 589 N.W.2d 585.
5. N.D. Cent. Code. § 26.1-41.
6. 381 N.W.2d 205 (N.D. 1986).

OHIO

Ohio’s Collateral Source Rule is codified in Ohio Revised Code Section 2315.20, which provides in pertinent part:

- (A) In any tort action, the Defendant may introduce evidence of any amount payable as a benefit to the Plaintiff as a result of the damages

that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating right of subrogation, a contractual right of subrogation, or a statutory right of subrogation, or if the source pays the Plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the Plaintiff's employer paid for the life insurance or disability policy, and the employer is a Defendant in the tort action.

The Ohio Supreme Court in *Moretz v. Muakkassa* (2013), 137 Ohio St.3d 171, further clarified that this rule “pertains only to evidence of any amount payable as a benefit to the Plaintiff.” (Emphasis added). In other words, within the context of the Ohio Revised Code and Common Law Collateral Source Rules, introduction of evidence of write-offs does not constitute a violation of the collateral source rule, as write-offs are not considered evidence of an amount paid to the Plaintiff. See also, *Robinson v. Bates* (2006), 112 Ohio St.3d; *Jaques v. Manton* (2010), 125 Ohio St.3d.

Accordingly, pursuant to the well-established Ohio Supreme Court authority set forth in *Moretz*, *Jaques* and *Robinson*, both the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical care. The essence of these decisions provides that where damages for personal injury are sought, evidence may be admitted of both the amount billed to the Plaintiff, as well as the amount actually paid. This allows for the jury's understanding of the amount that was written-off, and not paid by any party. The jury is permitted to thereafter decide the “reasonable” amount of damages associated with the medical care. That amount may either be the amount billed, the amount paid, or some number in between.

Further, pursuant to Ohio law, medical bills are determined to be *prima facie* evidence of the reasonable value of charges for medical services. Litigants need not present expert testimony in order to introduce evidence of the amounts charged, and the amounts paid, within the medical bills. See, *Moretz*; See also, O.R.C. 2317.421.

OKLAHOMA

Oklahoma recognizes the collateral source rule as part of its common law. See *Denco Bus Lines v. Hargis*, 229 P.2d 560 (Okla. 1951). The rule states that, unless the damage payment is made by the tortfeasor or someone on his behalf, a payment is considered to be from a collateral source and is inadmissible to reduce or mitigate the amount for which the defendant is liable. *Worsham v. Nix*, 145 P.3d 1055, 1072 (Okla. 2006). A federal district court in Oklahoma has determined that the collateral source rule even applies to amounts that have been “written-off” by Medicare pursuant to Medicare's payment schedules. See *Simpson v. Saks Fifth Ave., Inc.*, 2008 WL 3388739 (N.D. Okla. 2008). Courts have reached the opposite conclusion with respect to Medicaid write-offs and amounts that have been written-off pursuant to fee schedules developed by the Oklahoma Worker's Compensation Court Administrator. See *Compton v. Hale*, 2012 WL 5385680 (E.D. Okla. 2012); *Tate v. Statco Engineering and Fabricators*, 2014 WL 509521 (E.D. Okla. 2014) (“[T]o allow Plaintiffs to seek damages for medical bills which never amounted to a legal obligation to pay would amount to a windfall in favor of Plaintiffs.”)

Statutory law has eroded the collateral source rule in several areas. For instance, the recently-adopted Worker's Compensation Act, 85A O.S. §1 *et seq.*, provides that any benefits payment to an injured employee under the Act will be reduced "dollar-for-dollar" by any amounts the claimant receives from a group health care service plan, a group disability policy, a group loss of income policy, a group accident, health or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract (unless the employee has paid for the policy). 85A O.S. §44.

Another exception is codified at 63 O.S. §1-1708.1D, and applies in medical malpractice cases when the court makes a determination that a collateral payment is not subject to subrogation or other right or recovery. In that case, evidence of the payment from the collateral source will be admitted.

In 2011, the Oklahoma Legislature adopted 12 O.S. § 3009.1, which provides that the amounts "paid" will be admitted as evidence at trial, as opposed to the "amounts billed," as long as the medical provider signs a statement indicating that no lien attaches to any amounts in excess of the amounts paid. This new statute has the effect of excluding amounts that have been "written off," and is consistent with the idea that a "write-off" does not constitute a true "collateral source."

Finally, the Oklahoma Governmental Tort Claims Act contains an exemption from liability that could be described as an exception to the collateral source rule. The exemption provides that the state or a political subdivision is not liable for a loss or claim where the "loss to any person [is] covered by any workers' compensation act of employer's liability act." 51 O.S. § 155(14).

OREGON

Oregon law allows a plaintiff to recover as economic damages the reasonable value for any medical treatment received. A plaintiff is entitled to recover the "reasonable value" for medical treatment received, without regard to the amount that is actually paid. Medical expenses that are "written off" by the medical provider are considered recoverable "economic damages" under Oregon law. Likewise, a jury is generally barred under Oregon's collateral source rule from hearing evidence that the plaintiff was not actually obligated to pay the full amount for medical expenses billed.

The rule that a plaintiff is entitled to recover the reasonable value of medical expenses incurred, regardless of the amount actually paid, derives from ORS 31.710. The statute defines "economic damages" to mean "objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services[.]" Oregon courts have focused on phrase "reasonable charges necessarily incurred" in holding that a plaintiff is entitled to recover medical expenses that were never actually paid, so long as they represent a reasonable value for the service. To recover medical expenses, a personal injury plaintiff must show (1) that the supplies/services were actually provided; (2) the reasonable value for such supplies/services; and (3) the supplies/services rendered were necessary for treatment of the injury in dispute.

The defendant's right to introduce evidence of medical "write offs" was hotly contested at the trial court level up until a few years ago. In 2008, the Oregon Court of Appeals weighed in on the issue and held that a plaintiff is entitled to recover the reasonable value for medical treatment at the time such treatment is received. The Court of Appeals went on to rule that the trial court did not err in denying defendant's motion in limine that sought to limit plaintiff's evidence on economic damages

to the amount paid, and sought to permit defendant to introduce evidence of the amounts written off. *White v. Jubitz Corp.*, 347 Or 212, 219 P3d 566 (2009).

Please contact the Oregon Harmonic firm of **MB Law Group, LLP** or **Gordon & Polscer, L.L.C.** for more specific details, sample orders from trial judges and questions specific to particular venues.

PENNSYLVANIA

Pennsylvania follows the common-law collateral source rule. “[P]ayments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer.” *Johnson v. Beane*, 664 A.2d 96, 100 (Pa. 1995). But Pennsylvania does not allow double recovery for a single injury. *AAA Mid-Atlantic Ins. Co. v. Ryan*, 624 Pa. 93, 84 A.3d 626 (2014).

In certain types of cases the collateral source rule has been abrogated by statute. The Motor Vehicle Financial Responsibility law statutorily abrogates the collateral source rule and prevents double recovery by automobile accident victims of medical expenses and lost income for which they received first-party benefits under an automobile insurance policy. The statute does not apply to out-of-state resident accident victims and insurers. *Armstrong v. Antique Automobile Club*, 670 F.Supp. 2d 387,94 (M.D.Pa.2009), citing 75 PA. Cons. Stat. §1720, 1722. The Pennsylvania Supreme Court has allowed an insureds’ underinsured motorist recovery to be offset against all damages paid in satisfaction of the judgment pursuant Section 1722. *AAA Mid-Atlantic Ins. Co. v. Ryan*, *supra*. Also, the Medical Care Availability and Reduction of Error Act (“MCARE”) has “negated the substantive collateral source doctrine in medical professional liability actions.” *Gallagher v. Pennsylvania Liquor Control Board*, 584 Pa. 362, 883 A.2d 550, 554 n.3 (Pa.2005), *citing* 40 Pa. Cons. Stat. § 1303.508(a).

Pennsylvania courts have held that the collateral source rule does not apply to amounts written off by an insurer, since those amounts are never paid by any collateral source. *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 790 (Pa. 2001), *abrogated on other grounds*, *Northbrook Life Ins. Co. v. Com.*, 949 A.2d 333 (Pa. 2008) (relating to the issue of calculating an insurer’s tax credit).

Please contact the Pennsylvania Harmonic firm of **Zimmer Kunz, PLLC** for more specific information regarding the collateral source rule.

RHODE ISLAND

In Rhode Island, “evidence of payments made to an injured party from sources independent of a tort-feasor are inadmissible and shall not diminish the tort-feasor’s liability to the plaintiff”. *Gelsomino v. Mendonca*, 723 A.2d 300, 301 (R.I. 1999). The rationale behind the rule is “that the injured person is entitled to be made whole, since it is no concern of the tort-feasor that someone else completely unconnected with the tort-feasor has aided his victim, and the wrongdoer, responsible for injuring the plaintiff, should not receive this windfall.” *Id.* (internal citations omitted.) In the context of medical malpractice actions, Rhode Island has codified its collateral source rule at Gen. Laws § 9-19-34.1. Medicaid benefits are not considered to be a collateral source subject to this statute. *Esposito v. O’Hair*, 886 A.2d 1197, 1204 (R.I. 2005).

SOUTH CAROLINA

South Carolina has long followed the collateral source rule. Under South Carolina law, a tortfeasor has no right to a reduction of damages because of payments or compensation received by the injured party from a source *wholly independent* of the wrongdoer. Stated differently, a tortfeasor has no right to reduce or offset damages for which it is liable by proving that the plaintiff has received, or will receive, compensation or indemnity for the loss from a collateral source, wholly independent of the tortfeasor.

South Carolina courts have liberally applied this rule to preclude the reduction of damages. See *Otis Elevator v. Hardin Construction, Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967) (tortfeasor's liability for damages not reduced by disability payments from employer); *New Foundation Baptist Church v. Davis*, 257 S.C. 443, 186 S.E.2d 247 (1972) (tortfeasor's liability for damages not reduced by value of gratuitous repairs).

The only requirement for the collateral source rule is that the source be wholly independent. A "wholly independent" source has been defined as a source that the wrongdoer has not contributed to, or a source that has not made payments to the injured party on behalf of the wrongdoer. If the collateral source is wholly independent, the rule will be applied and the injured party's damages will not be reduced by the payments received from the collateral source. It should be noted that a joint tortfeasor does not qualify as a collateral source. *In re: W.B. Easton Const. Co., Inc. v. Gregory*, 320 S.C. 90, 463 S.E.2d 317 (1995).

A wrongdoer cannot take advantage of payments or compensation provided by a collateral source for the plaintiff's benefit, regardless of whether that source is an insurance company, an employer, a family member, or other source. South Carolina allows the plaintiff to enjoy both gratuitous and nongratuitous benefits. In short, "a negligent defendant is not entitled to enjoy the fruits of fortuitous circumstances, employer generosity, or diligent effort on the part of the injured plaintiff." *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 428 S.E.2d 737 (Ct. App. 1993). The benefits received by the injured party should not be shifted so as to become a windfall for the wrongdoer.

The defense bar has attempted to attack South Carolina's adherence to the collateral source rule through tort reform. Opponents to the rule argue that collateral sources result in double recovery. Supporters have maintained a "fairness argument," arguing that if anyone is to have a windfall, it should be the injured party, not the wrongdoer.

Please contact the South Carolina firm of **Richardson, Plowden & Robinson P.A.** for more specific information about the collateral source rule and its application by South Carolina courts.

SOUTH DAKOTA

South Dakota courts recognize the collateral source rule. In 1975, the South Dakota Supreme Court adopted the rule previously enunciated by Idaho's Supreme Court:

Total or partial compensation received by an injured party from a collateral source, wholly independent of the wrongdoer, does not operate to reduce the damages recoverable from the wrongdoer.

Moore v. Kluthe, 234 N.W.2d 260, 269 (SD 1975)(quoting *Swift and Co. v. Gutierrez*, 277 P.2d 559 (Id. 1954)). In adopting the rule, the Court acknowledged that there was “no reason in law, equity, or good conscience advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act. If there must be a windfall, it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.” In 1976, the South Dakota Supreme Court applied the collateral source rule to medical service gratuitously provided medical services. See *Degen v. Bayman*, 241 N.W.2d 703 (SD 1976).

In 1977, however, the South Dakota Legislature limited the application of the collateral source rule in medical malpractice cases. South Dakota law states:

In any action for damages for personal injury or death alleging healthcare malpractice on the part of any physician, chiropractor, dentist, hospital, registered nurse, licensed practical nurse, or other practitioner of the healing arts, whether founded upon tort or contract, if it is alleged that the claimant suffered special damages by reason or such injury or death, evidence shall be admissible which is relevant to prove that any such damages were paid for or are payable by, in whole or in part, insurance which is not subject to subrogation and which was not purchased privately, in whole or in part, by the claimant, claimant’s decedent, or a member of the immediate family of claimant or claimant’s decedent, or were paid for or are payable by, in whole or in part, state or federal governmental programs not subject to subrogation.

SDCL § 21-3-12. However, the South Dakota Supreme Court continues to apply the collateral source rule in a variety of tort cases despite the fact that the “Legislature has intervened to partially limit its scope with respect to medical malpractice” suits. *Papke v. Harbert*, 2007 SD 87, ¶ 80, 738 N.W.2d 510, 536.

In 2007, the South Dakota Supreme Court analyzed the collateral source rule at length in *Papke v. Harbert*, which addressed written off medical expenses. The Court concluded that it is “well settled that plaintiffs are entitled to receive the reasonable value of their medical services, and what constitutes a reasonable value for those services is a jury question.” *Id.* at ¶ 78. While the Court declined to make a “broad declaration that the reasonable value of medical services equals the amount paid, not the amount billed” it also declined to hold that “a plaintiff is always entitled to recover the entire amount billed, rather than the amount paid.” The *Papke* Court concluded “when establishing the reasonable value of medical services, defendants in South Dakota are currently prohibited from introducing evidence that a plaintiff’s award should be reduced because of the benefit received wholly independent of the defendants. *Id.* at ¶ 79. The Court reasoned that further rule changes in the medical malpractice context be left for the Legislature. *Id.* at ¶ 80.

Please contact the South Dakota Harmonie Firm of **Gunderson, Palmer, Nelson & Ashmore, LLP**, for more specific details.

TENNESSEE

The Volunteer State has a collateral source rule that allows a claimant to recover tort damages for reasonable and necessary expenses without evaluation of what expenses were paid by a collateral source. *State Auto Mut. Ins. Co. v. Hurley*, 31 S.W.3d 562, 566 (Tenn. 2000). Collateral sources on Rocky Top include Medicare, Medicaid, and private insurance providers. When a plaintiff receives payments from a collateral source, those benefits are not admissible as evidence and do not reduce a defendant's liability. *Donnell v. Donnell*, 415 S.W.2d 127, 134 (Tenn. 1967). The exceptions to this rule are medical malpractice claims. T.C.A. § 29-26-119 reduces the damages of a medical malpractice claim by the value received by the claimant to avoid double recovery in these cases.

TEXAS

In Texas, the collateral source rule “precludes any reduction in a tortfeasor’s liability because of benefits received by the plaintiff from someone else – a collateral source.” *Haygood v. DeEscabedo*, 356 S.W.3d 390, 394-95 (Tex. 2011). For example, “insurance payments to or for a plaintiff are not credited to damages awarded against the defendant.” *Haygood*, 356 S.W.3d at 395 (citing *Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999); *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980)). As stated by the Texas Supreme Court, “[t]he theory behind the collateral source rule is that a wrongdoer should not have the benefit of insurance independently procured by the injured party, and to which the wrongdoer was not privy.” *See Brown*, 601 S.W.2d at 935. The collateral source rule reflects “the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor.” *Haygood*, 356 S.W.3d at 395.

However, “[t]o impose liability for medical expenses that a health care provider is not entitled to charge does not prevent a windfall to a tortfeasor; it creates one for a claimant.” *Id.* (citing *Daughters of Charity Health Serv. of Waco v. Linnstaedter*, 226 S.W.3d 409, 412 (Tex. 2007)). Thus, the Texas Supreme Court has held that “the common-law collateral source rule does not allow recovery as damages of medical expenses a health care provider is not entitled to charge.” *Haygood*, 356 S.W.3d at 396.

As codified in section 41.0105 of the Texas Civil Practice and Remedies Code, “recovery of medical of health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.” TEX. CIV. PRAC. & REM. CODE ANN. §41.0105. As clarified by the Texas Supreme Court “actually paid and incurred” means “expenses that have been or will be paid, and excludes the difference between such amount and charges the service provider bills but has no right to be paid,” differences such as adjustments, write-offs, credits or discounts. *Haygood*, 356 S.W.3d at 396-97. Furthermore, “[s]ince a claimant is not entitled to recover medical charges that a provider is not entitled to be paid, evidence of such charges is irrelevant to the issue of damages” and must be excluded at trial. *Id.* at 398. Rather, “only evidence of recoverable medical expenses is admissible at trial.” *Id.* at 399. However, “the collateral source rule continues to apply to such expenses, and the jury should not be told that they will be covered in whole or in part by insurance [n]or should the jury be told that a health care provider adjusted its charges because of insurance.” *Id.* at 400. Similarly, the rule does not allow the tortfeasor to avoid liability for medical expenses borne by a charity that was designed to benefit the patient. The expenses borne by the charity on behalf of a patient are actually incurred and are recoverable by the injured plaintiff at trial. *Big Bird Tree Serv. v. Gallegos*, 365 S.W.3d 173 (Tex. App.—Dallas 2012, n.p.h.).

UTAH

Utah's collateral source rule provides that "[a] wrongdoer is not entitled to have damages, for which he is liable, reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source." *Wilson v. IHC Hospitals, Inc.*, 2012 UT 43, ¶ 31, 289 P.3d 369 (citing *Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶ 37, 96 P.3d 893). Utah's Legislature has modified the collateral source rule by statute in the context of medical malpractice cases, so that "[u]pon a finding of liability and an awarding of damages by the trier of fact," trial courts "shall reduce the amount of the award by the total of all amounts paid to the plaintiff from all collateral sources which are available to him." Utah Code Ann. § 78B-3-405(1)-(2) (2008). However, collateral source evidence is not appropriate for jury consideration in any case. Utah courts routinely grant pre-trial motions to prevent the jury from hearing collateral source evidence because of the substantial likelihood of prejudicial impact on jurors. *See, e.g., Wilson*, 2012 UT 43, ¶¶ 43, 47; *Robinson v. All-Star Delivery, Inc.*, 1999 UT 109, ¶ 23, 992 P.2d 969.

VERMONT

Vermont's collateral source rule prevents the defendant from receiving a set-off for payments typically made to plaintiff by an insurer or third source as compensation for a loss. *Hall v. Miller*, 143 Vt. 135, 142, 465 A.2d 222, 226 (1983); *see also Windsor School Dist. v. State*, 183 Vt. 452, 470, 956 A.2d 528, 542 (2008). However, application of the collateral source rule is typically limited to "compensation provided an injured party through insurance, unemployment benefits or similar compensation yielded because the plaintiff actually or constructively paid for it, or in cases where the collateral source would be recompensed from the total recovery through subrogation, refund or some other arrangement". *My Sister's Place v. City of Burlington*, 139 Vt. 602, 612-13, 433 A.2d 275, 281 (1981). Vermont courts may apply the collateral source rule to actions in tort and in contract. *Hall* at 143, 465 A.2d 226.

VIRGINIA

In Virginia, the collateral source rule provides that the presence or absence of insurance benefits of any type (liability insurance, health, employment-related benefits, medical payments coverage, etc.) for either the plaintiff or defendant shall not be considered at trial. *See* V.M.J.I. 9.015. Damages recoverable for personal injuries arising from the negligence of another are not to be reduced by reason of the fact that the injured party had been partly compensated for his loss. *See Acuar v. Letourneau*, 260 Va. 180, 188 (2000). The Virginia Supreme Court holds that compensation or indemnity received by a tort victim from sources collateral to the tortfeasor may not be applied as a credit against the quantum of damages the tortfeasor owes. Thus, a plaintiff can prove the full amount of a medical bill even though an insurer pays all or a portion of that bill.

This rule excludes any evidence that all or a portion of the plaintiff's medical bills have been paid, and it applies in situations where a third party, such as an insurer, employer or family member provides payments on the plaintiff's behalf. *See Payne v. Wyeth Pharmaceuticals, Inc.*, 2008 WL 4890760. As a result, a plaintiff can receive multiple recoveries for a single injury through health insurance, medical payments coverage, and liability insurance. *See Virginia Mun. Group Self-Ins. Ass'n v. Cranford*, 66 Va. Cir. 236, 2004 WL 3132010 (2004) (Fairfax). The rationale for this rule is that an injured plaintiff should be made whole by the tortfeasor, not by a combination of compensation from the

tortfeasor and collateral sources. *Bullard v. Alfonso*, 267 Va. 743, 746 (2004), and any windfall should go to the injured person instead of favoring the tortfeasor.

Some possible exceptions to Virginia's Collateral Source Rule include:

Debts discharged by operation of law through bankruptcy – While the Virginia Supreme Court has expressly declined to rule on this issue (*See Barkley v. Wallace*, 267 Va. 369, 372 (2004)), some circuit courts have held that the collateral source rule does not apply to medical bills discharged in bankruptcy. (*See Choice v. Kruse*, 57 Va. Cir. 13 (2001) (Chesterfield); *Daniels v. Owens*, 54 Va. Cir. 284 (2000) (Norfolk); *Morganthal v. Piper*, 38 Va. Cir. 354 (1996) (Virginia Beach); *Walker v. Long*, 57 Va. Cir. 419 (1993) (Richmond); *But See Dodd v. Lang*, 71 Va. Cir. 235 (2006) (Roanoke). However, if medical bills discharged in bankruptcy are excluded, they are still admissible to support non-monetary elements, such as pain and suffering. *See Barkley* at 374.

Reduction of Medical Payments Coverage Owed to an Insured – Under Virginia Code §38.2-2201, recovery of “incurred” expenses are permitted under Medical Payments Coverage. An expense is not considered incurred if it is reduced by write-off, paid by a health insurer, or subject to the provider's charitable forgiveness. This is unlike in a personal injury action where the traditional collateral source rule applies.

Please contact the Virginia Harmonie firm of **Harman, Claytor, Corrigan & Wellman** for more specific details or questions

WASHINGTON D.C.

In the District of Columbia, evidence of payments from a collateral source is not admissible at trial to mitigate damages or in any manner which would mislead, improperly influence or prejudice the jury. *Jacobs v. H.L. Rust Co.*, 353 A.2d 6, 7 (D.C. 1976). A plaintiff may seek full compensation for claimed damages from the tortfeasor even if those damages have been reimbursed by a third party. *District of Columbia v. Jackson*, 451 A.2d 867 (D.C. 1982). Thus, a plaintiff's receipt of payments from a collateral source will not reduce his or her damages. Unpaid or “written off” medical expenses are considered benefits from a collateral source and, therefore, a plaintiff is entitled to recover those expenses. *Hardi v. Mezzanotte*, 818 A.2d 974 (D.C. 2003).

The collateral source must be independent of the tortfeasor. For example, in *Jackson*, the Court held that the collateral source rule did not apply to medical expenses paid by the District of Columbia in a tort action against the District of Columbia because it would result in a double payment by the tortfeasor. 451 A.2d at 873. There, the District of Columbia was entitled to a credit for any claimed medical bills that were paid by Medicaid. *Id.* at 871.

Please contact **Harman, Claytor, Corrigan & Wellman, P.C.** for more information regarding the collateral source rule in the District of Columbia.

WASHINGTON STATE

In the context of personal injury actions, the collateral source rule has been the rule in Washington for 85 years. *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798, 953 P.2d 800 (1998). Pursuant to the

collateral source rule, a tortfeasor may not reduce damages that would otherwise be recoverable to reflect payments received by a plaintiff from a collateral source. *Id.*

Washington courts are relatively generous with physically injured plaintiffs in determining what can be recovered as damages. For example, a plaintiff may recover the reasonable value of medical services rendered, not the amount actually paid by plaintiff. *Hayes v. Wieber Enter., Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001). The amount actually billed or paid is not determinative. *Id.* In other words, the difference between the amount of money for services billed compared to the amount paid will be considered a collateral source, for which the defendant likely will not be entitled to a reduction.

Other types of payments that are excluded under the collateral source rule in Washington include the following: payments by industrial insurance, *Cox v. Spangler*, 141 Wn.2d 431, 440, 5 P.3d 1265 (2000); payments made to injured firefighters under Washington's Law Enforcement Officers' and Fire Fighters' Retirement System Act (LEOFF), *Washington Ins. Guar. Ass'n v. Mullins*, 62 Wn.App. 878, 887, 816 P.2d 61 (1991); and Medicare payments, *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 804, 585 P.2d (1978). *Cox* and *Mullins* are particularly interesting because employers pay into industrial insurance and LEOFF. Accordingly, payments from these systems to an injured employee are arguably payments from the employer, albeit through a third party (the state). In light of the fact that Washington already applies the collateral source rule to these types of payments, it is not a stretch to assume that it would also apply the rule to other payments made by employers.

Where subrogation interests are at issue, the insured must be made whole before subrogation is allowed. A carrier's right to subrogation is generally governed by *Thiringer v. American Motors Insurance Company*, 91 Wn.2d 215, 588 P.2d 191 (1978) and *Leader National Insurance Company v. Torres*, 113 Wn.2d 366, 779 P.2d 722 (1989). In *Leader National*, the court held that a settlement does not extinguish an insurer's equitable right of subrogation if:

- (1) the settling party knows of the rights of subrogation;
- (2) the insurer does not consent to the settlement; and
- (3) the settlement does not exhaust the settling party's assets.

For additional information or questions regarding the collateral source rule in Washington State, please contact Marissa Alkhazov at the Harmonie Firm of Betts, Patterson & Mines in Seattle, Washington.

WEST VIRGINIA

In West Virginia the collateral source rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party. Syl. Pt. 7, *Ratlief v. Yokum*, 167 W.Va. 779, 280 S.E.2d 584 (1981). It also ordinarily prohibits inquiry as to whether the plaintiff has received payments from collateral sources. The foregoing is based upon the theory that the jury may well reduce the damages based on the amounts that the plaintiff has been shown to have received from collateral sources. Syl. Pt. 8, *Ratlief v. Yokum*, 167 W.Va. 779, 280 S.E.2d 584 (1981).

The West Virginia Supreme Court of Appeals recently clarified its statement of the collateral source rule. In *Kenney v. Liston*, 233 W.Va. 620, 760 A.2d 434 (2014), the court held that the rule bars evidence of *any* third party payment to the injured party—“insurance policies, whether maintained by the plaintiff or a third party; employment benefits; services or benefits rendered gratuitously (whether free, discounted, or later written off); and social legislation benefits. The law does not differentiate between the nature of these collateral source benefits, *so long as they did not come from the defendant or a person acting for the defendant.*” *Id.*, Syl. Pt. 4. (emphasis added).

West Virginia does not allow collateral source offsets if the benefits were paid under a contractual arrangement that the plaintiff made independently of the tortfeasor. *Johnson by Johnson v. General Motors Corporation*, 190 W.Va. 236, 438 S.E.2d 28 (1993).

The Court in *Grove By and Through Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536, (1989), *quoting Quinones v. Passaic Boys Club*, 444 A.2d 630, 632-33 (N.J. Super. Ct. Law Div. 1982), *overruled on other grounds, Dall'ava v. H.W. Porter Co.*, 488 A.2d 1036, 1037-38 (N.J. Super. Ct. App. Div. 1985) held that, “it is axiomatic that a party who becomes obligated to pay damages because of a wrong done may not benefit by payments or medical services rendered to the injured party from collateral sources.” In defining collateral sources, the West Virginia Supreme Court of Appeals has found that damages for lost wages can be recovered even where a plaintiff actually received those wages as a result of sick leave benefits from an employer. *Ellard v. Harvey*, 159 W. Va. 871, 231 S.E.2d 339, (1976). The West Virginia Supreme Court of Appeals has also held that the collateral source rule applies to workers’ compensations benefits. *Jones v. Laird Foundation, Inc.*, 156 W.Va. 479, 195 S.E.2d 821 (1973). Similarly, in *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1984), the Court held that, under the collateral source rule, unemployment benefits may not be used to reduce an award of damages.

In a civil action brought under the deliberate intent provisions of W.Va.Code § 23-4-2, evidence of the value of workers’ compensation benefits must be submitted to the jury with instructions that any verdict for the plaintiff shall be for damages in excess of such benefits. Syl. Pt. 1, *Mooney v. Eastern Associated Coal Corp.*, 174 W.Va. 350, 326 S.E.2d 427 (1984). Further, in medical professional liability suits, W.Va. Code § 55-7B-2(b) specifically defines the term collateral source.

Please contact the West Virginia Harmonie firm of **Zimmer Kunz, PLLC** for more specific information regarding the collateral source rule.

WISCONSIN

The current state of the law regarding the collateral source rule in Wisconsin is that the “collateral source rule prohibits parties in a personal injury action from introducing evidence of the amount actually paid by the injured person’s health insurance company, a collateral source, for medical treatment rendered to prove the reasonable value of the medical treatment. *Leitinger v. DBart*, 2007 WI 84, ¶ 7, 302 Wis.2d 110, 736 N.W.2d 1; *Koffman v. Leichtfuss*, 2001 WI 111, ¶ 31, 246 Wis.2d 31, 630 N.W.2d 201; *Ellsworth v. Schelbrock*, 2000 WI 63, 235 Wis.2d 678, 611 N.W.2d 764.

Accordingly, the Wisconsin Supreme Court has established that Wisconsin is a jurisdiction in favor of awarding plaintiffs the full sticker price for medical expenses.

The Wisconsin Supreme Court has stated that the court's position on the collateral source rule "assures that the liability of similarly situated defendants is not dependent on the relative fortuity of the manner in which each plaintiff's medical expenses are financed." Koffman, ¶ 31, 246 Wis.2d 31.

Furthermore, the Wisconsin Supreme Court has stated that "simply put, the collateral source rule states that benefits an injured person receives from sources that have nothing to do with the tortfeasor may not be used to reduce the tortfeasor's liability to the injured person. In other words, the tortfeasor is not given credit for payments or benefits conferred upon the injured person by any person other than the tortfeasor or someone identified with the tortfeasor (such as the tortfeasor's insurance company)." Leitinger, ¶ 26, 302 Wis.2d 110.

As recently as March 7, 2012, the Wisconsin Supreme Court unanimously ruled that the collateral source rule allows for the recovery of the full amount of medical expenses billed, including the written-off amounts. Orlowski v. State Farm Mut. Auto. Ins. Co., 2012 WI 21, ¶ 27, 339 Wis. 2d 1, 18, 810 N.W.2d 775, 783.

Therefore, Wisconsin's approach to the collateral source rule is that if any windfall should ensue, the plaintiff, not the tortfeasor, should reap the benefit. Id.

While the Wisconsin Supreme Court has consistently affirmed that the collateral source rule allows for recovery of all medical expenses billed, the court's position has been met with opposition. During the 2011-12 legislative session, various defense-oriented organizations proposed legislation contesting the Wisconsin Supreme Court's holding that plaintiffs are entitled to be paid the full amount billed by the medical provider for past medical expenses, rather than the actual money paid by medical assistance or health insurers. However, such efforts have been to no avail to date and are unlikely to be successful in the near future considering how the Wisconsin Supreme Court has consistently affirmed that plaintiffs are entitled to the full sticker price of medical expenses and in consideration of Wisconsin's political climate.

Please contact the Wisconsin Harmonie firm of **Peterson, Johnson & Murray, S.C.**, for more information regarding the state of the law of the collateral source rule in Wisconsin.

WYOMING

The application of the collateral source rule to the issue of what evidence is admitted at trial regarding medical specials is in a state of disarray and still a matter of debate. The rule in Wyoming is that an injured plaintiff is entitled to recover the reasonable value of medical services from a tortfeasor. The Wyoming Supreme Court has not addressed the issue of what evidence the jury may consider to determine the reasonable value. Anecdotally, some state district courts exclude evidence of the amount actually paid by a collateral source regardless of whether the source of the payment is identified. It appears most of these will allow the defense to cross examine a provider rep on the issue of reasonable value as long as they do not mention the amount actually paid. At least one court admitted evidence of the paid amount only.

Wyoming federal courts, on the other hand, have uniformly held that evidence of the amount actually paid is inadmissible. In Lurus v. Rissler & McMurry Co., Judge Johnson allowed the plaintiff to recover the full billed amount as opposed to the amount actually paid by Medicare for the services rendered relying on the collateral source rule. *02-CV-00174-J, Findings of Fact and Conclusions*

of Law, Conclusion of Law, ¶ 4 (filed Aug. 19, 2004). The court recognized that the proper measure of damages is the reasonable value of the medical services, but it does not appear the defendant sought to establish the reasonable value by means other than referring to the paid amount.

In *Prager v. Campbell County Mem. Hosp.*, the Defendants argued that payments made by Workers' Compensation to the Plaintiff's medical-care providers should not fall under the collateral-source rule. 2013 U.S. App. LEXIS 17806, 28-29 (10th Cir. 2013). The Tenth Circuit disagreed, upholding Judge Johnson's decision to apply the collateral source rule to exclude evidence of the discounted Workers' Compensation payments. *Id.* at 31. In reaching this conclusion, the court did not rely on Wyoming law, but instead relied on cases from other jurisdictions to support its policy rationale that "a tortfeasor may not reap the benefit of any special payment arrangement involving a collateral source." *Prager*, 2013 U.S. App. LEXIS 17806 at 30.

In a more recent USDC case, Judge Skavdahl realized that he was bound by *Prager*, but also recognized that the measure of damages was the reasonable value of medical services and that plaintiff had the burden of proof on this issue. The court also recognized that chargemaster rates are rarely an expression of reasonable value. As such, he was going to require the plaintiff to put on evidence of the reasonable value and permit the defense to cross examine provider reps about the amounts they usually accept as payment in full from various sources without specifically referencing the amounts accepted for the plaintiff. After this ruling, the parties stipulated to a compromised amount for medical specials.

Please contact the Wyoming Harmonie firm of **Hirst Applegate, LLP** for more specific details, sample orders from trial judges, and questions specific to particular venues.

United States Virgin Islands

The current state of any common law rule in the U.S. Virgin Islands is difficult to predict due to recent jurisprudence of the Virgin Islands Supreme Court. In essence, in any case where that court has not definitively stated what the rule is for the Virgin Islands, counsel is required to determine and brief what the majority and minority rules are for a particular legal issue and then argue what the best rule for the Virgin Islands should be. The lower court then must decide what the rule should be based upon these assessments. Unfortunately, until a particular issue is decided by the Virgin Islands Supreme Court, it is difficult to predict what rule will ultimately prevail. As a rule of thumb, however, one should assume that the outcome that is most favorable to a plaintiff will prevail. Thus, one should generally assume that a plaintiff will be permitted a double recovery – once from the collateral source and once from the defendant.

The above analysis only applies to common law issues. In the Virgin Islands, the common law collateral source rule was partially abrogated by the Virgin Islands legislature in cases alleging damages for "any cause of action alleging damages for medical expenses or lost income sustained by or on behalf of a party, including, without limitation, actions alleging damages for bodily injury, death or property damage, or any combination." 5 V.I.C. § 427. Although the statute states that the common law rule "shall not be applied" in such cases, it fails to adequately explain what should happen. It allows "any party" to introduce evidence that the party who is claiming damages "has received, or is entitled to receive, "other compensation for such damages, including, but not limited to benefits from workmen's compensation, medical and hospital insurance, prepaid health care, social security, retirement or pension, and any employer paid program, such as wage continuation and disability benefits programs." But the statute does not explain the consequences of introducing

such evidence. Do they reduce damages so as to preclude a double recovery? The final sentence of the statute suggests that collateral source payments should be admitted to prevent a double recovery, because it states, “Nothing in this section shall be construed to reduce any award where there is a statutory lien against the judgment as a result of a third party payment.” However, given our current Supreme Court, we believe that the ultimate interpretation of the entire statute will result in a rule that evidence of collateral source payments is admissible, but that the court may not instruct the jury that the jury must reduce damages by the amount of payments received from collateral sources. In other words, it will be left to the jury to decide whether or not to compensate the plaintiff twice for such payments.

The entire statute reads:

5 V.I.C. § 427 Collateral source rule limitation

In any cause of action alleging damages for medical expenses or lost income sustained by or on behalf of a party, including, without limitation, actions alleging damages for bodily injury, death or property damage, or any combination thereof, the collateral source rule shall not be applied. Any party may introduce evidence that the other party who is claiming damages for medical expenses or lost income has received, or is entitled to receive, other compensation for such damages, including, but not limited to benefits from workmen's compensation, medical and hospital insurance, prepaid health care, social security, retirement or pension, and any employer paid program, such as wage continuation and disability benefits programs. Nothing in this section shall be construed to reduce any award where there is a statutory lien against the judgment as a result of a third party payment.

Please contact the U.S. Virgin Islands Harmonie law firm of Andrew C. Simpson, P.C. for additional information regarding the collateral source rule in the U.S. Virgin Islands.

Canada

The Collateral Source Rule in Canada

The rule against double recovery at common law has two exceptions in Canada: money received by private or public benevolence (i.e. charitable gifts), and the existence of private insurance.¹ The rationale underlying both of these exceptions is that a tortfeasor should not benefit from the charity of others, or the forethought of the defendant.

However, the common law regime in Ontario has been altered by provincial statute, namely the *Insurance Act*.² This was an effort to more concisely set out which benefits should be deducted from tort awards for loss of income and loss of earning capacity. Section 267.8(1) of the *Act* reads:

Collateral benefits

Income loss and loss of earning capacity:

¹ *Cunningham v. Wheeler*, [1994] S.C.R. 359 (S.C.C.).

² R.S.O. 1990, c. I.8.

267.8 (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, **the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced** by the following amounts:

1. All payments in respect of the incident that the plaintiff **has received or that were available before the trial** of the action **for statutory accident benefits** in respect of the income loss and loss of earning capacity.
2. All payments in respect of the incident that the plaintiff **has received or that were available before the trial** of the action for income loss or loss of earning capacity **under the laws of any jurisdiction or under an income continuation benefit plan.**
3. All payments in respect of the incident that the plaintiff **has received before the trial** of the action **under a sick leave plan** arising by reason of the plaintiff's occupation or employment.

The court has consistently ruled that the first consideration when looking at section 267.8(1) of the *Insurance Act* is to consider whether the payment received by the plaintiff would result in double recovery and/or overcompensation. When completing this analysis, it is imperative that the type of payment received by the plaintiff is considered and whether the amount received is an **indemnity or non-indemnity payment**. In other words, is the payment compensating the plaintiff for a financial loss they have sustained?

For example, under section 267.8(1)1, income replacement benefits pursuant to Ontario's no-fault benefits system are deducted from the tort award for income loss.³ In *Anand v. Belanger*, the Honourable Justice Stinson reviewed the wording of the Settlement Disclosure Notice⁴ and held that:

In my respectful view, in light of the express terms of the document and Mrs. Anand's signature on it, would do violence to that language and the contents of the statute to attempt to characterize the \$100,000.00 as something other than "for statutory accident benefits": she expressly accepted an offer that specified that amount was for "income replacement benefits".⁵

Further, the court has clarified that legal fees, disbursements and interest on accident benefit claims should not be included in the amount deducted from the tort award for income loss. For example, in *Demers v. B.R. Davidson Mining & Development Ltd.*,⁶ the Court concluded that the overdue interest is not a payment received in respect of income loss and loss of earning capacity. The purpose is to compensate the plaintiff for the "time value money" lost. Therefore, interest is not deductible from the tort award.

³ *Anand v. Belanger*, 2010 ONSC 5356.

⁴ A statutory document which must be signed by an accident benefits claimant in order for the settlement to be binding.

⁵ *Anand v. Belanger*, 2010 ONSC 5356.

⁶ *Demers v. B.R. Davidson Mining & Development Ltd.*, 2011 ONSC 2046.

Ultimately, the main consideration when conducting this analysis is to consider whether the plaintiff is being overcompensated and/or receiving double recovery by receiving the tort award and collateral benefit.