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An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation

Adam G. Todd*

I. INTRODUCTION

Reports of the impending death of the collateral source rule are greatly exaggerated.¹ The rule is, in fact, alive and well in American courthouses despite being subject to forces that many predicted would lead to its demise.² In the past twenty years, its abrogation was forecasted by scholars examining U.S. healthcare legislation,³ by tort reform advocates,⁴ and by writers promoting the increase in the use and exercise of subrogation rights by health insurance providers.⁵ This Article examines why the collateral source rule, an “oddity of

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1. This sentence plays off of a phrase attributed to Mark Twain who is reported to have said, “The reports of my death have been greatly exaggerated,” after hearing that his obituary had been published in the New York Journal. See JAMES H. BILLINGTON, RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 76 (2010).


3. Schwartz, supra note 2, at 1341–44.

4. Goldsmith, supra note 2, at 829; Gobis, supra note 2, at 888.

American accident law,16 endures in the face of significant forces that would appear to lead to its demise. This Article particularly focuses on the rule as applied to collateral benefits that healthcare insurance companies pay for medical damages caused by tortious injuries. These collateral benefits have been most affected by tort reform and recent changes in health insurance regulation. The endurance of the collateral source rule for these benefits is a by-product of the fragmentation found in both the health insurance and tort systems in the United States.7 The continued relevance of the rule, however, illustrates its normative value to the current tort system in the United States.8

In the early 1990s, around the time President Clinton was elected to the White House4 and Hillary Clinton was appointed the chair of the White House Task Force on National Healthcare Reform,9 many predicted the United States would adopt some form of universal healthcare.10 During this period, and in the shadow of the proposed universal healthcare plans of the early 1990s, Professor Gary Schwartz predicted the abrogation of the collateral source rule and the implementation of subrogation in its place.12 At around the same time, tort reform advocates called for the abrogation of the rule.13 And indeed, the collateral source rule has eroded over the past twenty years, particularly as a result of tort reform legislation.14 Notably, during the past twenty years and as predicted by Professor Schwartz, subrogation has grown as a part of the tort injury compensation process.15 Today, insurance companies providing compensation for healthcare to

7. See generally THE FRAGMENTATION OF U.S. HEALTH CARE: CAUSES AND SOLUTIONS (Einer R. Elhauge ed., 2010); Alli
8. One scholar recently called the collateral source rule “tort’s soul,” due to the values underlying the rule that are consistent with tort law as a whole. Michael J. Krauss & Jeremy Kidd, Collateral Source and Tort’s Soul, 48 U. LOUISVILLE L. REV. 1 (2009).
14. See infra text accompanying notes 95–119.
15. See discussion infra Part V.
their insured regularly include and enforce subrogation rights in their insurance contracts. This increase in the use and application of subrogation had a significant effect on the collateral source rule. But rather than supplanting the rule as predicted, subrogation has merely become intertwined with the collateral source rule, further complicating and fragmenting this area of law.

Recent legislative actions to improve healthcare coverage and delivery of health insurance to Americans created a new opportunity to eliminate or scale back the collateral source rule and provide greater coherence and less fragmentation in this area of the law. The requirements under the Patient Protection and Affordable Care Act (Affordable Care Act), particularly the requirements mandating healthcare insurance for all U.S. citizens, have significant implications for the application of the collateral source rule. In the 1990s, scholars articulated that the collateral source rule, when applied to medical expenses covered by health insurers, has less utility when there is universal healthcare coverage, as is aspired to under the Affordable Care Act. In addition, federal legislation appears to permit subrogation in health insurance plans, which also directly affects the utility of the collateral source rule. It is the increased exercise of full subrogation, in combination with the potential for


20. The Patient Protection and Affordable Health Care Act § 5000A (as amended by Health Care and Education Reconciliation Act of 2010). Beginning in January 2014, failure to obtain and maintain minimum essential health insurance coverage will result in a tax penalty. The penalty phases are during 2014 and 2015, and become fully applicable in 2016. 8 Jacob Mertens, Mertens Law of Federal Income Taxation § 31B:34 (Carina Bryant ed., 2011).


universal coverage of health insurance, that lays the groundwork for the
fulfillment of the prophesies of Professor Schwartz and his cohorts.

The multipayer approach of the Affordable Care Act and multifaceted
legislation in the states related to subrogation, however, thwart the prophesies of
the rule’s demise. The Affordable Care Act appears to leave the collateral
source rule unchanged despite the Act’s otherwise sweeping changes to the
health insurance system and aspirations of providing universal healthcare
coverage to all Americans. In addition, the Act, as currently designed, does not
ensure complete universal healthcare coverage for all citizens, but allows people
to choose to forgo coverage. The absence of universal coverage undermines
arguments supporting the predicted demise of the collateral source rule. The Act
also has a multipayer structure that allows the insured to contract for various
levels of insurance coverage, thereby implicating contractual, fairness, deterrent,
and other normative benefits accrued by continuing to impose the collateral
source rule. Finally, the Act does not resolve the conflicting and opposing
approaches to subrogation found in the various states. The restrictions on full
subrogation found in many jurisdictions allow the collateral source rule to
survive because the rule plays an important administrative and equitable function
in the determination of subrogation rights. As such, the rule is particularly
important when full subrogation is prohibited or restricted.

Today, despite significant legislative changes in healthcare insurance, tort
reform, and subrogation, the collateral source rule has remained in force in many

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24. The House of Representatives bill on healthcare reform, called the Affordable Care Act (House
Resolution 3962), did create a commission to establish standards for the coordination and subrogation of
benefits. H.R. 3962, 111th Cong. § 236 (2009). Representative John Barrow of Georgia and Representative
Bruce Braley of Iowa introduced amendments to restrict subrogation until a claimant was “made-whole.” These
provisions were not included in the final bill. For a detailed outline of the aspirations and provisions of the
Affordable Care Act, see Key Features of the Law, HEALTHCARE.GOV, http://www.healthcare.gov/law/
features/index.html (last visited Sept. 20, 2012) (on file with the McGeorge Law Review); see also Kyle
Thomson, State-Run Insurance Exchanges in Federal Healthcare Reform: A Case Study in Dysfunctional
25. I.R.C. § 5000A (Supp. IV 2011). Those without coverage pay a tax penalty of the greater of $695
per year up to a maximum of three times that amount per family or 2.5% of household income. A penalty is
phased in according to following schedule: (a) flat fee: $95/2014; $325/2015; $695/2016; or (b) percentage: 1%
in 2014; 2% in 2015; 2.5% in 2016. Exemptions are granted for some situations such as financial hardship,
religious objections, if the lowest cost plan exceeds 8% of individuals’ income, and those with incomes below
the tax filing threshold. For summaries of the Act, see Summary of New Health Reform Law, HENRY J. KAISER
FAM. FOUND. (last modified Apr. 15, 2011), http://www.kff.org/healthreform/upload/8061.pdf (on file with the
McGeorge Law Review).
26. See infra text accompanying notes 133–38.
27. See infra text accompanying notes 139–47.
28. See discussion infra Part V.
29. See discussion infra notes 177–214; infra note 193.
30. See infra text accompanying notes 207–10.
jurisdictions even in the face of rising health insurance costs. This Article argues that as long as health insurance markets are fragmented, the collateral source rule will continue to play an important normative role in the administration of the tort injury compensation process. The rule also helps deter tortious behavior, supports the insured’s contractual expectations, is consistent with distributive fairness, and ensures that those engaging in risky activities bear the full cost of injuries. The collateral source will only lose its normative imperative if and when the healthcare system becomes less fragmented, either through a single-payer system or through other forms of federalization.

The Article begins in Part II by examining the background of and basis for the collateral source rule. Subsequent sections examine three issues that have recently affected the functioning of the collateral source rule: tort reform, health insurance reform, and increased subrogation. Part III examines the impact of the tort reform movement on the collateral source rule and concludes that tort reform altered, but did not abrogate, the collateral source rule in most states. Part IV looks at how recent changes in federal and state laws regarding health insurance have impacted the collateral source rule. While these laws, particularly the Affordable Care Act, undermine some of the rationales for the collateral source rule, the changes in healthcare law have done little to change the rule itself. Part V examines the rise of subrogation in U.S. health insurance practice. This rise has had the largest impact on the collateral source rule, but the limitations on full subrogation found in the laws of many states provide a continuing role for the collateral source rule in calculating tort damages. The Article concludes by acknowledging the enduring power of the collateral source rule as applied to medical expenses covered by insurance and predicts the rule’s continuing role in the tort compensation process as long as the United States’ healthcare insurance and injury compensation systems remain fragmented.

II. THE BACKGROUND OF AND BASIS FOR THE COLLATERAL SOURCE RULE

The collateral source rule affects the amount of money a plaintiff may receive in a tort action. It provides that the compensation received by an injured plaintiff from a third party (usually an insurer) will not diminish any recovery against the defendant-tortfeasor in a tort action. Courts treat the collateral source

31. See infra note 193.


34. 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, although they cover all or part of the harm for which the tortfeasor is liable.").
rule as a rule of evidence and a substantive rule of law.\(^{35}\) It allows courts to exclude evidence during a trial concerning collateral compensation\(^{36}\) and to calculate damages once the trier of fact establishes liability.\(^{37}\) In the medical insurance context, the collateral source rule allows a plaintiff to receive compensation from her insurer for medical expenses related to her injuries and receive cumulative compensation for the same economic damages from the tortfeasor.\(^{38}\)

The collateral source rule is rather abstruse as a legal rule, particularly when viewed by a non-lawyer.\(^{39}\) Intuitively, a rule excluding evidence from the jury’s consideration and allowing a plaintiff to recover cumulative compensation seems odd.\(^{40}\) But despite being called an “oddity”\(^{41}\) and subject to considerable criticism since its inception,\(^{42}\) the collateral source rule is well established and long recognized under common law.\(^{43}\) The rule was first recognized in the United States in 1854 in Propeller Monticello.\(^{44}\) In that case, the Court found the

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36. Both federal and state rules of evidence provide that evidence of the plaintiff being compensated by a collateral source for all or a portion of the damages caused by the defendant’s wrongful act is generally inadmissible. FED. R. EVID. 403. As a rule of evidence, the rationale is that if a jury hears evidence of collateral benefits, it will deduct these from the damage calculations. See Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 525-26 (1991), cited in Witzel, Jr., supra note 35.

37. See, e.g., *Restatement (Second) of Torts § 920A(2) (1979)* (directing courts not to set off the amount of damages recovered from a collateral source from the final judgment).


41. Fleming, supra note 6; see also Zorogastua, supra note 2.


44. Propeller Monticello v. Mollison, 58 U.S. 152, 155 (1854); see also Haynes v. Yale-New Haven Hosp., 699 A.2d 964, 977 (Conn. 1997); Bozeman v. Louisiana, 2003-1016, pp. 13-22 (La. 7/2/04); 879 So. 2d 692, 700-06. But see Jacobsen, supra note 36, at 525-26 (arguing the case is based on the “law of releases” and not the collateral source rule—but many courts have interpreted the case to stand for the modern collateral source rule); Krauss & Kidd, supra note 8, at 7-12.
collateral payments made by an insurance company to the plaintiff cumulative to the damages owed by the defendant since "[t]he contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern." After the *Propeller* case, states such as New York and Vermont recognized the rule, and their courts provided similar justifications for disregarding collateral benefits provided by insurance contracts when determining tort damages.

Since its early enshrinement, the collateral source rule has provoked significant debate. These debates reflect disagreement about the collateral source rule specifically and the nature and purpose of tort law in general. Indeed, the collateral source rule highlights the conflicting purposes of tort law. The justifications given for the collateral source rule, like the justifications for other tort doctrines, are varied and inconsistent. The collateral source rule has been both justified and attacked on the grounds of corrective justice, deterrence, retribution, economic efficiency, instrumentalism, distributive justice, and administrative efficiency. It is a combination or accumulation of these justifications that drive most courts to either impose or, conversely, abrogate the collateral source rule in tort liability actions, leading to an incoherent approach to this doctrine in the United States.

The collateral source rule is inconsistent with corrective or compensatory notions of justice found in other areas of tort law. Corrective justice advocates,
who view tort law as designed to “make the injured party whole,” object to the collateral source rule because it requires the tortfeasor to pay certain damages despite the plaintiff already being compensated for those injuries. This double-recovery scenario creates a situation where the plaintiff is put in a better position than before the tort occurred, thereby conflicting with the compensatory function of tort law. Thus, the potential for cumulative compensation under the rule encourages plaintiffs to bring lawsuits where they might not do so otherwise.

Under these corrective notions of tort law, damages are supposed “to return the plaintiff as closely as possible to his or her condition before the accident.” However, tort law is particularly inconsistent on this point, thus, corrective critiques of the collateral source rule are weak. For example, tort damages are usually divided between economic, noneconomic, and punitive damages. While economic damages come closest to achieving the “make-whole” ideal of tort compensation, under corrective norms, noneconomic damages do not, due to their imprecision and ethereal nature. Likewise, punitive damages, intended for deterrence and retribution, are clearly not designed to make the plaintiff whole. Allowing overcompensation by way of the collateral source rule is no more
offensive to corrective notions of tort law than awarding an injured party noneconomic and punitive damages.

In comparison, the collateral source rule is consistent with concepts of deterrence, retribution, and economic efficiency advocated by tort theorists. One of the primary justifications for the collateral source rule is ensuring that the defendant pay the full measure of damages for his tortious behavior.⁶⁴ If collateral payments made by third-party insurers reduced a defendant’s liability rather than requiring the defendant to pay the full amount of damages, the result would be under-deterrence from engaging in tortious behavior.⁶⁵ Plaintiff’s insurance would, in effect, subsidize the defendant’s tortious behavior.

The collateral source rule also receives support under law-and-economics notions of efficiency.⁶⁶ The collateral source rule causes the defendant-tortfeasor to pay the full cost of his risk-taking activities. Law-and-economics scholars point out that if a tortfeasor is not liable for the damages he causes, he will over-engage in that activity.⁶⁷ Full compensation deters not just injury-causing behavior by making it more costly, but also helps actors achieve the “optimal scale of activity” that balances risk-taking activity with its true cost.⁶⁸ The only way the true cost can be determined is by requiring the tortfeasor to pay the full measure of damages.⁶⁹ Reducing a tortfeasor’s damages, in the absence of the collateral source rule, requires the plaintiff to subsidize the defendant’s injurious and tortious behavior.⁷⁰

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⁶⁴. Fleming, supra note 6, at 1483; Perrin, supra note 13, at 989.


⁶⁶. Traditional law-and-economics legal analysis considers whether a particular law will maximize “social welfare” or “efficiency”—generally defined as “overall wealth maximization of a society.” A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7-10 (2d ed. 1989) (stating law-and-economics theory concentrates on the “efficiency” of legal rules, with efficiency defined as “the relationship between the aggregate benefits of a situation and the aggregate costs of the situation”); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 2–3 (2004); ANTHONY OGUS, COSTS AND CAUTIONARY TALES: ECONOMIC INSIGHTS FOR THE LAW 27 (2006).


⁶⁸. Saine, supra note 2, at 1080.

⁶⁹. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 90 (1987); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 310 (4th ed. 2004) (“[E]fficiency theorists to endorse compensation to tort victims only up to the point where the marginal utility of the victim’s wealth pre- and post-injury are equal.”); see also, e.g., David Friedman, What Is “Fair Compensation” for Death and Injury?, 2 INT’L L. REV. & ECON. 81, 82-85 (1982) (“Any transfer of money from uninjured defendants to injured plaintiffs beyond that point is ‘inefficient.’”); see also Saine, supra note 2, at 1079.

Concurrent with the notion of deterrence and optimal cost allocation are the moral notions of retribution that underlie the justification of the collateral source rule. Notions of fairness and justice favor the defendant-tortfeasor paying for all of the damages of his tortious behavior and not receiving the benefits of collateral source compensation provided to the plaintiff by an insurance policy. Some courts and scholars state that it would not be “fair” for the defendant to benefit from the plaintiff’s insurance policy, particularly if the plaintiff has acquired and paid for the policy herself. In addition, some invoke Solomonic fairness rationales, arguing between allowing the plaintiff to receive too much or the defendant to pay too little, it is better to err on the side of paying the plaintiff too much. This fairness rationale is amplified when factoring in the plaintiff’s attorney’s fees and the imprecision of the damage award process which can lead to the under-compensation of injured plaintiffs.

Instrumental rationales also support the collateral source rule. Instrumentalist arguments posit that the collateral source rule encourages the purchase of and promotes the benefits from insurance. These rationales are frequently cited reasons for applying the rule. While this rationale for the rule remains cogent

275, 312 (2001); Marshall & Fitzgerald, supra note 43, at 70 (“When the plaintiff is covered by medical insurance and defendant has liability insurance, the absence of the collateral source rule causes the health insurers to subsidize the liability insurers.”).


73. See, e.g., Smith v. Indus. Constructors, Inc., 783 F.2d 1249, 1255 (5th Cir. 1986).


75. See, e.g., Smith v. Indus. Constructors, Inc., 783 F.2d 1249, 1255 (5th Cir. 1986).

76. For a description of instrumentalism, see Jeffrey A. Van Dett, The Irony of Instrumentalism: Using Dworkin’s Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases, 87 MARQ. L. REV. 425 (2004). “[I]nstrumentalists build their approach to the law around questions such as the following: ‘What social value does the rule of liability further in this case?’” Id. at 523 n.3 (quoting George P. Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537, 538 (1972)); see also R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982).

77. Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61 (Cal. 1970) (“The collateral source rule as applied here embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities.”); see also Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 934 (Tex. 1980); Haascher v. CSX Transp., Inc., 848 A.2d 620 (Md. 2004); Bozeman v. Louisiana, 2003-1016 (La. 7/2/04); 879 So. 2d 692, 704 (arguing the collateral source rule encourages citizens to purchase insurance); Bellard v. Am. Cent. Ins. Co., 07-1335 (La. 4/18/08); 980 So. 2d 654, 668; Indus. Constructors, Inc., 783 F.2d at 1255 (“[I]t encourages
for certain forms of insurance, such as life and disability policies, it is less forceful in the medical insurance context. In addition, the ubiquity of government-provided health insurance, employer and government subsidization of health insurance, and impending insurance purchase mandates, have diminished the incentive-based justifications for the collateral source rule in the medical insurance context.

Arguments sounding in contract law have also been used to justify the collateral source rule, particularly in the insurance context. Indeed, contract law was the underlying policy of many early English and American collateral source rule cases. The contract-based argument for the collateral source rule is supported by the belief that the plaintiff deserves to reap the “benefit of the bargain” by contracting with the insurance company. Allowing a tortfeasor to benefit from an injured party’s insurance contract contravenes the contract principles of promoting the contracting parties’ intent and limiting third-party beneficiary rights.

Some courts have justified the collateral source rule on administrative efficiency grounds, particularly in ruling on evidentiary matters during a tort potential victims to buy insurance.”); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 152–53 (2d ed. 1977). But see Jacobsen, supra note 36, at 533 n.46 (calling the rationale “silly”).

78. See Gobis, supra note 2, at 860, 865–67.

79. See Bozeman, 879 So. 2d at 701–05; Paula Hearn Moore et al., Applying the Collateral Source Rule to Government Mandated Programs, 15 J. LEG. ECON. 31 (2008); see also infra text accompanying notes 133–38.


81. It has been noted that the decision in Propeller Monticello may have turned on the principle known as the “law of releases.” Krauss & Kidd, supra note 8, at 9. If the Court had permitted a reduction in plaintiff’s tort award by the amount of insurance proceeds received, it would be treating the insurer as a joint tortfeasor. Id. Instead, the Court invoked contract principles, recognizing “[t]he contract with the insurer is in the nature of a wager between third parties.” Propeller Monticello v. Mollison, 58 U.S. 152, 155 (1854). Contract principles also drove early English collateral source cases. Yates v. Whyte, (1838) 132 Eng. Rep. 793, 794 (K.B.) 4 Bing. (N.C.) 272 (“Plaintiff’s contract with the underwriters is res inter alios acta of which the Defendants cannot avail themselves.”), cited in Marshall & Fitzgerald, supra note 43, at 62.


83. Of paramount importance in interpreting a contract is ascertaining the intent of the parties. See Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Penn. 1983). It would be hard to argue that an insured intended, under her insurance policy, to allow her insurance compensation to decrease the amounts awarded in a lawsuit by tortious defendants. As discussed infra, however, there is a compelling argument that an insured, when purchasing an insurance policy, is doing so for the purpose of receiving “prompt and sure payments without the necessity of litigation and without regard to the liability and financial resources of prospective defendants.” Note, Unreason in the Law of Damages, supra note 2, at 751.

Calculating damages can be difficult, particularly when an insurance policy contains certain exclusions, co-payment requirements, complicated specialist rules, and negotiated discounts with certain medical providers. A jury’s calculation of damages can be made much easier when the intricacies of collateral benefits are excluded from consideration by the jury and reserved for consideration by the judge in post-verdict proceedings. In addition, the misuse of evidence of collateral benefits by the jury and its potential prejudicial impact leads some courts to exclude them.

The final rationale provided in favor of the collateral source rule is based on the distributive justice and realist arguments that plaintiffs are often undercompensated in the final outcome of a torts trial, particularly when taking into account the cost of court expenses and attorneys' fees. Under this rationale, plaintiffs' extra compensation resulting from the collateral source rule acts as an equalizer in the tort judicial process, leveling an uneven field in order to fully

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85. See Goldsmith, supra note 2, at 803; Peckinpaugh, Jr., An Analysis of the Collateral Source Rule, supra note 42, at 551; Witzel, Jr., supra note 35, at 699.

86. Law v. Griffith, 930 N.E.2d 126 (Mass. 2010); Ty A. Patton, Common Sense and the Common Law, They’re Not as Common as They Used to Be: A Critique of the Kansas Supreme Court’s New Application of the Collateral Source Rule [Martinez v. Milburn Enterprises, Inc., 233 P.3d 205 (Kan. 2010), 50 WASHBURN L.J. 537, 538 (2011) (“The Court’s decision to introduce into evidence medical bills of vastly different amounts likely will result in additional confusion for juries and for both plaintiff and defense counsel as they wrestle with the ‘reasonable’ cost of medical care.”); see also Hoffman v. Brandt, 421 P.2d 425, 429–30 (Cal. 1966); Garfield v. Russell, 59 Cal. Rptr. 379, 382 (Ct. App. 1967); Blake Hamm, Comment, A Dysfunctional Statute and Its “Plain Meaning” Kill Off the Collateral Source Rule in Texas, 51 S. TEX. L. REV. 229, 233 (2009) (“To permit the defendant to tell the jury that the plaintiff has been recompensed by a collateral source for his medical costs might irretrievably upset the complex, delicate, and somewhat indefinable calculations which result in the normal jury verdict.”).


Some states permit collateral source evidence to be introduced during trial, while Maryland and others permit introduction of such evidence only in post-verdict proceedings. In Alaska, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Michigan, Minnesota, Montana, North Dakota, and Pennsylvania, mandatory reduction of compensatory damages by collateral source payments is permitted under certain circumstances. In Alabama, Arizona, California, Delaware, Georgia, Indiana, Maryland, Missouri, Oregon, Rhode Island, South Dakota, and Washington state, discretionary reduction is permitted. In many states, however, a plaintiff is permitted to present evidence of the cost of obtaining collateral source benefits as a set off against a portion of such reductions. This enables a plaintiff to recover costs such as insurance premiums.

Narayen, 747 A.2d at 201.


89. See Hall v. Cole, 412 U.S. 1, 4–7 (1973); Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir. 1954) (noting that attorney’s fees reduced victim’s compensation); Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 68 (Cal. 1970). It has been noted that “[s]uch a validation of the CSR would also be an implicit approval of the abandonment of the American Rule for recovery of lawyer’s fees.” Krauss & Kidd, supra note 8, at 22 n.124 (citing Goldsmith, supra note 2, at 805–08).
compensate injured plaintiffs. Critics characterize this justification of the rule as misguided because it seeks to remedy the tort system’s shortcomings through the oblique and confusing mechanism of the collateral source rule.

Overall, the intuitive appeal of the corrective-justice concern of overcompensation, combined with the often inconsistent plurality of justifications for the collateral source rule, make the rule an easy target of scorn and attack by its opponents. Indeed, tort reform advocates have successfully rolled back the rule for these reasons. Nevertheless, when viewed as a whole, the rationales favoring the rule outweigh those against it, particularly in the health insurance context. The majority of courts favor overcompensation of the plaintiffs through the collateral source rule over allowing defendants to escape liability for the full measure of their damages. In addition, as discussed below, post-verdict application of subrogation has rectified concerns of overcompensation of plaintiffs when the collateral source rule is applied. Finally, the collateral source rule plays an important administrative role that favors its application in determining damages, particularly when used in conjunction with subrogation.

III. THE COLLATERAL SOURCE RULE IN THE FACE OF “TORT REFORM”

In the past twenty years, the collateral source rule came under the greatest scrutiny by tort reform advocates. "Tort reform" is a label that captures a

90. See Helfend, 465 P.2d at 68 (noting the plaintiff rarely experiences “double recovery” as juries are unaware of the large portion that goes to the plaintiff’s attorney in contrast to the favorable tax treatment of personal injury damages for defendants).

91. See Jacobsen, supra note 36, at 534 (arguing the collateral source rule should not disguise an attempt to reject the rule that each party bear their own attorney’s fees).

92. See Marshall & Fitzgerald, supra note 43, at 61 (“[T]he ‘windfall’ argument has nonetheless prevailed in that it has driven the recent state tort-reform initiatives seeking to abolish the collateral source rule.”); Krauss & Kidd, supra note 8, at 11-12 (“In the absence of a coherent theoretical defense of the CSR, legislators have been sensitive to criticism of the rule.”).

93. See Krauss & Kidd, supra note 8, at 11-12.

94. See Flynn, supra note 38, at 64-65.


96. See infra notes 223–25 and accompanying text.

97. See supra notes 85–88 and accompanying text.

98. See, e.g., Goldsmith, supra note 2; McDowell, supra note 13; Jamie L. Wershbale, Tort Reform in America: Abrogating the Collateral Source Rule Across the States, 75 DEF. COUNS. J. 346 (2008).

99. Some who questioned the changes proposed by these particular interest groups challenged the use of the term “reform” in relation to these measures that could also be viewed as making the tort system more inequitable. Rachel M. Janutis, The Struggle over Tort Reform and the Overlooked Legacy of the Progressives, 39 AKRON L. REV. 943, 944 n.2 (2006); see also Patricia W. Hatamyar, The Effect of “Tort Reform” on Tort Case Filings, 43 VAL. U. L. REV. 559, 559 n.1 (2009) (“I do not believe that most [tort reform] efforts meet the classic definition of ‘reform’ as ‘[a] change for the better; an improvement[,]’ at least in the absence of
political movement in the United States that sought to limit lawsuits, particularly personal injury suits. Championed by corporate, business, and insurance advocates, much of the reform sought directly benefited the interests of these constituents. For example, these advocates sought such measures as capping noneconomic and punitive damages, limiting class actions, narrowing traditional joint-and-several-liability rules, requiring pre-filing expert affidavits in tort cases, and abolishing the collateral source rule. Advocates for these measures argued that their proposed changes would especially help decrease liability insurance premiums.

Because the collateral source rule apparently “overcompensates” plaintiffs and provides a financial incentive for plaintiffs to bring an action, tort reform advocates who sought to limit the number and size of awards favored abolition of the rule.

Tort reform measures that were taken by legislatures, including the rolling back of the collateral source rule, were typically piecemeal. And while perhaps responsive to certain special interests, these reforms were not considerate of any consistent theory of tort liability. Indeed, the economists David Schap and Andrew Feeley’s study of the collateral source rule in 2006 concluded that the efforts to reform the rule during this period were “driven by the relative political clout of various special interests in different times and places.”

In response to these tort reform efforts, many states changed the collateral source rule from its common law form. Thirty-nine states enacted statutes that
modified or abrogated the rule. According to the most recent surveys, Arkansas, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wyoming retain the rule in its pure, unmodified form. States that modified the rule typically enacted legislation that abrogated the rule when the tort award resulted from a medical malpractice claim.

Remarkably, despite the severe criticism of and significant campaigns to repeal the collateral source rule, only six states have legislation completely abrogating the rule, at least during the post-verdict damages determination. A few states passed legislation attempting to abrogate the rule, but courts struck these measures down as unconstitutional. While tort reform as a political movement purportedly sought to improve the tort process, efforts to limit or abrogate the collateral source rule did not provide coherence to the tort system. Rather, they created greater fragmentation and inconsistency. For example, after tort reform legislation was enacted in some states, applying the collateral source rule became contingent on whether the tort

108. Schap & Feeley, The Collateral Source Rule, supra note 107, at 89 (survey conducted in 2006); see also Benjet, supra note 95, at 214 (finding forty-two jurisdictions have "enacted and retained some form of statute that restricts the collateral source rule"); Zorogastua, supra note 2, at 463–64 (Thirty-eight states had modified or abrogated the rule.).

109. See Cara Hanson, Ohio's Collateral Source Rule, 40 U. TOLEDO L. REV. 711, 720–21 (2009); Zorogastua, supra note 2, at 463 n.3; see also supra note 95, at 210.


111. See ALASKA STAT. § 09.17.070; CONN. GEN. STAT. ANN. § 52-225a (West 2011); FLA. STAT. ANN. § 768.76; MICH. COMP. LAWS ANN. § 600.6303 (West 2010); MINN. STAT. ANN. § 548.36 (West 2010); N.Y. C.P.L.R. 4545 (MCKINNEY 2009); see also supra note 38, § 19:34.

112. See discussion infra note 207.


114. Avraham & Schanzenbach, supra note 103, at 320; Geistfeld, supra note 103, at 565; Goldsmith, supra note 2 (noting that the disparate application of the collateral source rule is particularly troublesome); Marshall & Fitzgerald, supra note 43, at 62.

action was for malpractice, or where the insurer explicitly reserved subrogation rights in the insurance policy. Some of these states’ highest courts recognized the fragmentation, striking down the reforms on account of their arbitrary treatment of the collateral source rule.

In theory, abrogation of the collateral source rule holds the promise of simplifying and reforming the tort process for the better. Tort reform efforts that seek to lower costs, simplify litigation, and standardize the tort and healthcare compensation systems, would benefit from the abrogation of the collateral source rule but only as part of a comprehensive reform of health insurance and subrogation rules. In a fragmented system, both tort and health insurance reform, in the sense of lower costs and more effective results, are thwarted. Incoherency and fragmentation of the law increase the cost of both the tort system and health insurance. As long as these areas of the law remain fragmented and incoherent, however, the collateral source rule will endure because the rule provides administrative, deterrent, instrumentalist, and other important functions under a multipayer health insurance system.

IV. THE COLLATERAL SOURCE RULE IN THE FACE OF THE AFFORDABLE CARE ACT AND THE DRIVE FOR UNIVERSAL HEALTHCARE

Tort reform advocates voiced similar concerns as advocates of changes to healthcare insurance in the United States. While usually on the other end of the political spectrum, healthcare reform advocates, like tort reform advocates,

118. See Einer Elhauge, Why We Should Care About Health Care Fragmentation and How to Fix It, in THE FRAGMENTATION OF U.S. HEALTH CARE (Einer R. Elhuage ed., 2010); Hoffman, supra note 7 (discussing health insurance reform in a fragmented insurance market); see also M. Gregg Bloche, The Invention of Health Law, 91 CAL. L. REV. 247, 288 (2003); Einer R. Elhauge, Can Health Law Become a Coherent Field of Law?, 41 WAKE FOREST L. REV. 365, 377 (2006); Peter Hammer, Competition and Quality as Dynamic Processes in the Balkans of American Health Care, 1 J. HEALTH POL’Y & L. 473, 473 (2006); Pryor, Rehabilitating Tort Compensation, supra note 7, at 665 (noting the rising fragmentation in the tort compensation process).
119. See David A. Hyman, Health Care Fragmentation: We Get What We Pay For, in THE FRAGMENTATION OF U.S. HEALTH CARE (Einer R. Elhuage ed., 2010) (discussing the effects of a fragmented healthcare system on insurance costs); Michelle M. Mello et al., Fostering Rational Regulation of Patient Safety, 30 J. HEALTH POL’Y & L. 375, 388–91 (2005) (discussing the interplay between “tort liability and patient safety”); see also Geistfeld, supra note 103, at 539 (arguing that uncertainty in tort system leads to higher costs).
decried the high cost of insurance, the inadequacies of the tort process, and the
effect of these two systems on consumers and businesses alike.\textsuperscript{121}

Efforts to reform the healthcare system in the 1990s under President Clinton
were unsuccessful, but the 2008 election of President Obama revived those
efforts.\textsuperscript{122} And, in 2010, Congress passed significant legislation reforming health
insurance in the form of the Affordable Care Act.\textsuperscript{123} Among the most important
components of this legislation are “mandates,”\textsuperscript{124} effective in 2014, requiring all
U.S. citizens to carry health insurance, and concurrent requirements of large
employers to offer coverage to employees.\textsuperscript{125}

This federal legislation followed on the heels of legislative reforms in states
such as Massachusetts,\textsuperscript{126} Hawaii,\textsuperscript{127} Maine,\textsuperscript{128} and Vermont,\textsuperscript{129} which imposed
similar legislative mechanisms to provide healthcare coverage to all residents.\textsuperscript{130}
While the federal and state legislative reforms sought to lower the cost of

\textsuperscript{121} See Randolph I. Gordon & Brook Assefa, \textit{A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America’s Health Care}, 4 SEATTLE J. SOC. JUST. 693, 698 (2006) (“In the face of the
gathering [health care crises] ... it is no small source of wonder that the modern debate respecting health care
reform so often devolves into arguments concerning ... changes in ... tort law.”).

when Clinton tackled healthcare reform in the early 1990s as compared to when Obama entered office in 2009).

summary of the Act, see \textit{Overview of Health Care Reform}, WHITE HOUSE, http://www. whitehouse.gov/health-
care-meeting/proposal/whatsnew/overview (last visited July 10, 2012) (on file with the \textit{McGeorge Law Review}).

\textsuperscript{124} The central provisions of the Affordable Care Act were upheld as unconstitutional by the United States Supreme

\textsuperscript{125} The term “mandate” has been complicated in light of \textit{National Federation of Independent Business v. Sebelius},
where Justice Roberts’s plurality opinion found the Affordable Care Act’s requirement to purchase
insurance to be enforceable under the Constitution as a tax, but not as a “mandate.” \textit{See} 132 S. Ct. at 2566.

\textsuperscript{126} Patient Protection and Affordable Care Act, §§ 1501-11.

\textsuperscript{127} David A. Hyman, \textit{The Massachusetts Health Plan: The Good, the Bad, and the Ugly}, 55 KAN. L.
REV. 1103, 1115–17 (2007); MASSACHUSETTS HEALTH CARE REFORM: THREE YEARS LATER, HENRY J.
KAISER FAM. FOUND. (2009), available at http://www.kff.org/uninsured/upload/7777-02.pdf (on file with the
\textit{McGeorge Law Review}).

\textsuperscript{128} HAW. REV. STAT. § 393-1 to -51 (West 1993 & Supp. 2009). The Prepaid Healthcare Act requires
nearly all employers to provide health insurance to their employees who work twenty hours or more a week for
four consecutive weeks. \textit{Id.} § 393-3(8), -14.

\textsuperscript{129} ME. REV. STAT. ANN. tit. 24-A, §§ 6901–15 (Supp. 2011). The Dirigo Health Reform Act arranges
for “comprehensive, affordable health care coverage” on a voluntary basis. \textit{Id.} § 6902.

(providing affordable coverage for the uninsured by focusing on management of chronic care and
affordability).

\textsuperscript{130} See Roger Stark, \textit{What Works and What Doesn’t: A Review of Health Care Reform in the States},
uninsured/kcnu_statehealthreform.cfm (last visited Jan. 24, 2012) (on file with the \textit{McGeorge Law Review}).
healthcare insurance for consumers, none of the legislation included any provisions dealing with the collateral source rule.\textsuperscript{131}

The recent state initiatives and the federal insurance reforms and mandates provide some support for abrogating the collateral source rule, but the way legislation on the federal and state levels is structured and insurance is provided to consumers, the collateral source rule remains valid as a normative rule of law. As a result, the rule endures in most jurisdictions despite the significant changes in the health insurance laws.\textsuperscript{132}

The new federal healthcare legislation and similar state healthcare initiatives potentially undermine the collateral source rule in three ways. First, they undermine the instrumentalist rationale, which claims that the collateral source rule provides incentives and rewards for the purchase of insurance.\textsuperscript{133} While one scholar ridiculed this rationale,\textsuperscript{134} other scholars and judges notably put forward the instrumental rationale as a legitimate basis for allowing the plaintiff to be awarded cumulative recovery against the defendant.\textsuperscript{135} Some judges aver that the plaintiff-insured’s “foresight” in purchasing insurance should be rewarded.\textsuperscript{136} The new federal legislation clearly undermines the foresight rationale. The Affordable Care Act requires all U.S. citizens to purchase health insurance and expands coverage significantly through employer-based policies.\textsuperscript{137} Thus, the incentive

\textsuperscript{131} A number of these states did, however, abrogate the collateral source rule in medical malpractice actions. See, e.g., ME. REV. STAT. ANN. tit. 24, § 2906(2) (2000); MASS. GEN. LAWS ch. 231, § 60G(a) (2000); WASH. REV. CODE § 7.70.080 (2007). A subrogation provision was also considered as part of the Affordable Care Act but did not get included in the final bill. See The Attack On Subrogation Continues: Amendment to Obama Care Bill Contains Anti-Subrogation Trojan Horse, MATTHIESEN, WICKERT & LEHRER, S.C. (Aug. 6, 2009), http://www.mwl-law.com/CM/Newsletters/SubroAlert-8-6-09.pdf (on file with the McGeorge Law Review).

\textsuperscript{132} Only six states have enacted legislation completely abrogating the collateral source rule. See ALASKA STAT. ANN. § 09.17.070 (West 2010); CONN. GEN. STAT. ANN. § 52-225a (West 2011); FLA. STAT. ANN. § 768.76 (West 2011); MICH. COMP. LAWS ANN. § 600.6303 (West 2010); MINN. STAT. ANN. § 548.36 (West 2010); N.Y. C.P.L.R. 4545 (MCKINNEY 2009); see also Schap & Feeley, (Much) More, supra note 110; 3 STEIN, supra note 38, § 19:34.

\textsuperscript{133} See discussion supra text accompanying notes 74–78.

\textsuperscript{134} Jacobsen, supra note 36, at 533 n.46 (calling the rationale “silly”).

\textsuperscript{135} See, e.g., Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61 (Cal. 1970) (“The collateral source rule as applied here embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. . . . The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities.”); see also Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 934 (Tex. 1980); Haischer v. CSX Transp., Inc., 848 A.2d 620 (Md. 2004); Bozeman v. Louisiana, 2003-1016 (La. 7/2/04); 879 So. 2d 692, 704 (arguing the collateral source rule encourages citizens to purchase insurance); Bellard v. Am. Cent. Ins. Co., 07-1335 (La. 4/18/08); 980 So. 2d 654, 668; Smith v. Indus. Constructors, Inc., 783 F.2d 1249, 1255 (5th Cir. 1986) (“[I]t encourages potential victims to buy insurance.”); POSNER, supra note 77, at 152–53.


\textsuperscript{137} Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The Act imposes, for the first time, a requirement that most employers provide at least a minimum basic healthcare package to their employees, or must give them vouchers to buy insurance from an insurance exchange.
and reward rationales lose much of their force; people do not need to be incentivized or rewarded for what they are already required to do. But, the way the current legislation stands, the so-called “mandate” requiring health insurance has a gap in that U.S. citizens still have the “choice” of not purchasing health insurance. Instead, they can pay a rather small penalty. As such, there remains some logic to instrumentalist rationales of allowing the collateral source rule to “reward” citizens who have chosen to abide by the mandates and secure health insurance.

The new federal healthcare regulations also undermine the contract-based arguments that support the collateral source. Because health insurance will be compulsory, the contractual relationship between the insurer and insured takes on a different character than that found in voluntary insurance policies. Under the mandates, the expectations of the insured under the insurance contract will likely change in such a way that the insured no longer has the expectation of cumulative recovery in a tort action. When health insurance was voluntary, it was more akin to the purchase of “contracts of investment” such as life or disability insurance. These investment forms of insurance typically lack subrogation rights and are subject to the collateral source rule. Investment policies are in significant contrast to indemnity insurance, such as property insurance, which typically is subject to subrogation and not the collateral source rule.

Employers that fail to meet their statutory obligations will be fined. Id. § 1511. Individuals will also be fined if they could obtain affordable health insurance, either through employment or through an insurance exchange, but fail to do so. Id. § 1501. Sara Rosenbaum, Realigning the Social Order: The Patient Protection and Affordable Care Act and the U.S. Health Insurance System, 7 J. HEALTH & BIOMEDICAL L. 1, 24 (2011) (noting that individuals with income up to four-hundred percent of the federal poverty line can get federal subsidies for insurance purchases).


139. See supra text accompanying notes 80-84 (discussing contract arguments).

140. Jacobsen, supra note 36, at 540-41 (“[I]t is unlike private insurance in that the insured and the insurer to not exchange consideration pursuant to the contract.”).

141. Gobis, supra note 2, at 858, 865-67.

142. Id.

143. Id.; see also ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW 222, 227 (Practitioner’s ed. 1988) (noting that property insurance policies commonly include subrogation clauses but that life and accident policies do not); Cecil G. King, Subrogation Under Contracts Insuring Property, 30 TEX. L. REV. 62 (1951); Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation, 70 Mo. L. REV. 723, 730 n.31 (2005). But see Cunningham v. Metro. Life Ins. Co., 360 N.W.2d 33, 42 (Wis. 1985) (Abrahamson, J., concurring) (“The distinction between indemnity and investment contracts for purposes of determining legal subrogation is a tenuous one . . . .”); Spencer L. Kimball & Don A. Davis, The Extension of Insurance Subrogation, 60 MICH. L. REV. 841, 851 (1962) (noting that it is often difficult to
of health insurance under the new federal legislation would likely create the expectation that it is more akin to indemnity insurance (like property insurance, which is often required by mortgagors) and thus, the contract rationales arguably no longer apply. If health insurance becomes required in a similar way mortgagors require property insurance of homeowners, then the insured would not have the expectation of cumulative recovery. If abrogation of the collateral source rule and full subrogation rights in fact leads to lower insurance premiums, then the insured benefits, albeit indirectly, from the abrogation of the collateral source rule and is thus consistent with contract norms. The confusion for courts and consumers arises when the abrogation of the collateral source rule and the imposition of subrogation are seen as a windfall for insurers.

On the other hand, the Affordable Care Act’s multipayer market and flexibility in insurance coverage continue to support a contract-based rationale for the collateral source rule. Consumer-purchasers of insurance policies have the choice, at least theoretically, of purchasing health insurance policies that allow for cumulative recovery through the tort system. Such policies are currently available for life insurance purchasers and there is no reason why similar policies cannot be available for health insurance. A consumer could negotiate and pay at a higher cost for a waiver of the insurer’s subrogation rights in the health insurance policy. Since there will continue to be consumer choice under the

determine whether an insurance contract is one of indemnity or investment).


145. Martin v. La. Farm Bureau Cas. Ins. Co., 94-0069 (La. 7/5/94); 638 So. 2d 1067, 1070 (“Legal subrogation would bestow a windfall on [the insurer], which did not bargain for that benefit.”).

146. See Abraham, Twenty-First-Century Insurance, supra note 5, at 105–07.


149. Life insurance policies are often not permitted to have subrogation clauses. See, e.g., In re Estate of Schmidt, 398 N.E.2d 589, 590 (Ill. App. Ct. 1979); Robert H. Jerry, II, UNDERSTANDING INSURANCE LAW 710 (3d ed. 2002); Uriel Procaccia, The Effect and Validity of Subrogation Clauses in Insurance Policies, 1973 INS. L.J. 573, 579 (1973); George Steven Swan, Subrogation in Life Insurance: Now Is the Time, 48 INS. COUNS. J. 634, 638 (1981); West, supra note 40.

150. See, e.g., Alan M. Di Sciullo, Casualty and Insurance, in PRACTICING LAW INSTITUTE, REAL
state and federal multipayer health insurance regimes, purchasers of policies that permit cumulative recovery should benefit. Laws abrogating the collateral source rule for such insurance policies are arguably infringing on the freedom to contract. Under these investment insurance contracts, the insured should be allowed to recover from both the tortfeasor under the tort system and under their insurance policy as permitted under their contract. Abrogation of the collateral source rule undermines this contractual right of the plaintiff-insured, which would otherwise be permitted or even encouraged in a multipayer, competitive insurance market as designed under the current Affordable Care Act.

The third argument favoring abrogation of the collateral source rule in light of the Affordable Care Act is that jury instructions implementing the collateral source rule may become more complicated. Under the collateral source rule, jurors in a tort action are supposed to be shielded from and not consider the compensation received by an injured plaintiff from his insurer when calculating the plaintiff's damages. Achieving this goal becomes more complicated once all of the provisions of the Affordable Care Act take effect. If the Act achieves near universal coverage, a juror would have a difficult time disregarding insurance coverage for a plaintiff’s tortious injuries since a juror will expect the plaintiff to have insurance. Given that presumption, it would be less confusing to allow a jury to consider a plaintiff’s insurance recovery in calculating damages.

The Affordable Care Act's promotion of the multipayer health insurance approach potentially provides a source of confusion to juries in the calculation of damages. The collateral source rule's administrative simplicity would still justify its continuance. Under the Affordable Care Act, the insured has the choice to contract for a variety of levels of health insurance coverage. Thus, a plaintiff may have significant medical damages independent of those paid by the insurer depending on the premiums being paid, co-payments, deductibles, and other costs related to the coverage. Without the collateral source rule, jurors would face complex calculations to determine actual medical damages paid by the plaintiff, which would vary depending on the details of the plaintiff’s insurance coverage. To factor in the collateral source payments, the jury would have to

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153. See generally Oechsner & Schaler-Haynes, supra note 148 (discussing the regulatory options available within the Affordable Care Act).
155. Patton, supra note 86, at 538 ("[T]he Court’s decision to introduce into evidence medical bills of
add or subtract co-pays and deductibles, adjust certain damages based on discounts negotiated by some insurers and medical providers, and factor in premium payments.\textsuperscript{156} Under the complexities presented by a multipayer health insurance system, imposing the collateral source rule would simplify the jury's task in assessing medical damages to a more straightforward, market-cost approach. The more complex discounting could then take place in post-verdict adjustments.\textsuperscript{157}

In addition, the deterrence rationale would continue to justify the collateral source rule. The Affordable Care Act does nothing to deter negligent behavior on behalf of tortfeasors.\textsuperscript{158} Abrogating the collateral source rule, absent subrogation, allows the defendant's liability to be reduced and allows the defendant to escape the full cost of the risk-taking behavior.\textsuperscript{159} Even if an insurer maintains subrogation and reimbursement rights, the collateral source rule prevents the tortfeasor from benefitting when the insurer fails to exercise those rights.

Finally, the distributive benefits to plaintiffs would continue to justify the collateral source rule. Neither the Affordable Care Act nor other changes in healthcare laws, particularly on the state level, have made the costs of litigation lower for tortiously injured plaintiffs.\textsuperscript{160} Conversely, tort reform legislation over the past twenty years has made bringing a claim more expensive for plaintiffs.\textsuperscript{161} Abrogating the collateral source rule would further tilt the tort compensation system against injured plaintiffs.\textsuperscript{162}

While the changes to healthcare insurance, particularly the mandate (imposed through tax) requiring the purchase of health insurance, undermine some of the justifications for the collateral source rule, there appears to be no direct legislation affecting the collateral source rule relating to healthcare damages in vastly different amounts likely will result in additional confusion for juries and for both plaintiff and defense counsel as they wrestle with the 'reasonable' cost of medical care.”); see also supra notes 85–88 (discussing administrative efficiency arguments as a justification for the rule).

\textsuperscript{156} Patton, supra note 86, at 560–61.

\textsuperscript{157} See, e.g., FLA. STAT. ANN. § 768.76 (West 2011) (providing for the post-verdict reduction of a damage award where collateral benefits have been previously paid to the plaintiff); Jim M. Perdue, Jr., \textit{Maybe It Depends on What Your Definition of “Or” Is?—A Holistic Approach to Texas Civil Practice & Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History,} 38 TEX. TECH. L. REV. 241, 268 (2006); Wershbale, supra note 98, at 356–57.

\textsuperscript{158} The Affordable Care Act does, however, allocate $50 million for the next five years for Health and Human Services to award demonstration project grants to states to develop, implement, institute, and evaluate alternatives to the current tort litigation system for resolving disputes about injuries caused by physicians and other healthcare providers. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 10607 (2010); see also Steven M. Pavsner, \textit{Conflating Health Care Reform with Tort Reform,} 6 MODERN AM. 58, 58–59 (2010).

\textsuperscript{159} See infra text accompanying notes 199–203 (discussing jurisdictions which prohibit subrogation and have abrogated the collateral source rule).

\textsuperscript{160} See discussion of healthcare reform supra Part IV.

\textsuperscript{161} See discussion of tort reform supra Part III.

\textsuperscript{162} See supra note 90 and accompanying text (noting that the collateral source rule serves as an equalizer for plaintiffs).
tort actions. Enacting sweeping national healthcare reform, as embodied by the Affordable Care Act, provided an opportunity to create greater coherency and consistency to the collateral source rule across jurisdictions. A consistent and systematic abrogation of the collateral source rule would provide positive effects to the tort compensation system, provided it clarified subrogation rights and passed on savings from lower litigation costs to health insurance consumers.\textsuperscript{163} The multipayer system, fragmentation of insurance markets, and the continued contradictory jumble of state laws relating to the collateral source rule and subrogation, however, provide for a continued role for the collateral source rule. Many of the rationales in favor of maintaining the collateral source rule remain in effect and, as a result, the current health insurance reform does little to change the vitality of the rule.

V. THE COLLATERAL SOURCE RULE AND THE GROWTH OF SUBROGATION

The greatest force affecting the collateral source rule’s viability in medical insurance contexts is the growing use of subrogation by the insurance industry.\textsuperscript{164} Subrogation and reimbursement are common insurance policy provisions that allow the insurer to seek repayment of some or all of the claims paid to the insured.\textsuperscript{165} Subrogation allows the insurer to assert the rights (and claims) of the insured against a third party.\textsuperscript{166} Reimbursement allows the insurer to seek repayment of claims when the insured has received funds from another responsible party.\textsuperscript{167} Often the terms “subrogation” and “reimbursement” are used interchangeably.\textsuperscript{168} For the sake of simplicity, this Article uses the term “subrogation” to refer to both reimbursement and subrogation by insurers.

Subrogation impacts the collateral source rule because if an insurer exercises its subrogation right, the double-recovery effect of the collateral source rule

\textsuperscript{163} See generally Geistfeld, supra note 103, at 564 (arguing that legal ambiguity in general increases costs).

\textsuperscript{164} Parker, supra note 143, at 736.

\textsuperscript{165} Subrogation is defined as “[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.” BLACK’S LAW DICTIONARY 1467 (8th ed. 2004).

\textsuperscript{166} Subrogation has also been described as stepping into someone else’s shoes and asserting their legal claim. See Keeton & Widiss, supra note 143, at 219; Jerry, II, supra note 149, at 676.

\textsuperscript{167} Those in favor of permitting subrogation cite it as a way to decrease the growing cost of health insurance. According to data from insurers, the elimination of subrogation would cause “an increase of 5% to 12% in insurance premiums.” Richard C. Alkire, Report of the Special Committee to Study Subrogation, R.C. 3965, 112th Cong., at 162 (Ohio 2009), available at https://www.ohiobar.org/General%20Resources/pubs/councilfiles/SpecSubComReport.pdf (on file with the McGeorge Law Review).

disappears. Under subrogation, the plaintiff recovers damages which exclude the collateral insurance payments subrogated to the insurer and the defendant pays the full measure of damages to the plaintiff and subrogated insurer.

Subrogation, however, does not trump the collateral source rule. Instead, the collateral source rule and subrogation have a symbiotic relationship. Whether and how the collateral source rule will be applied in any given jurisdiction or in any particular case depends on the relevant subrogation rules in the jurisdiction and the subrogation rights provided by the insurance policy. Any discussion of changing or abrogating the collateral source rule in a given jurisdiction must be done in conjunction with an examination and understanding of the subrogation rules of that same jurisdiction. The fragmentation in this area of the law is particularly acute and confusing.

The inconsistencies in these areas of the law add to the fragmentation, uncertainties, and cost to both the tort and healthcare systems in the United States. Thus, both the tort and healthcare insurance systems would benefit from greater systemization of these areas of law.

A. The Inter-Relationship of Subrogation and the Collateral Source Rule in the Tort Damage Determination Process

Subrogation has long been recognized in both civil and common law. While advocates of subrogation call the doctrine “favored,” in fact, many jurisdictions have given it a rather chilly reception and there have been efforts to roll back or

170. Saine, supra note 2, at 1103.
171. See Wershbale, supra note 98, at 353–54 (discussing the relationship between the collateral source rule and subrogation in “post-verdict collateral source reduction”). But see Fischer v. Steffen, 797 N.W.2d 501, 521 (Wis. 2011); Ellsworth v. Schelbrock, 11 N.W.2d 764, 772 n.1 (Wis. 2000).
173. Kenneth S. Abraham succinctly lays out this inter-relationship between the collateral source rule and subrogation in Twenty-First-Century Insurance, supra note 5.
174. Steven Flower, Note, Toward Correcting the Misapplication of Subrogation Doctrine in California Healthcare, 77 S. CAL. L. REV. 1039, 1066 (2003); Jeffrey A. Greenblatt, Comment, Insurance and Subrogation: When the Pie Isn’t Big Enough, Who Eats Last?, 64 U. CHI. L. REV. 1337, 1341 (1997); see also Goldsmith, supra note 2 (arguing that the “disparate application of the collateral source rule” is particularly troublesome, and there should be some “uniformity in the application of the rule”).
175. See Hoffman, supra note 7.
177. See, e.g., HENRY N. SHELDON, SUBROGATION 1–3 (2d ed. 1893); James Morfit Mullen, The Equitable Doctrine of Subrogation, 3 Md. L. REV. 201, 201 (1939).
179. Roger M. Baron, Subrogation: A Pandora’s Box Awaiting Closure, 41 S.D. L. REV. 237, 238 (1996); Roger M. Baron, Subrogation on Medical Expense Claims: The “Double Recovery” Myth and the
abolish it. The differences in the receptions to subrogation usually stem from whether the subrogation is being applied under a statute, contract, or equitable principles.

The laws of subrogation arising under equity are not well settled under the common law. Historically, courts did not allow equitable subrogation of personal injury claims due to the common law prohibitions against assignment of personal injury claims and against splitting personal injury causes of action. Conversely, when an insurance contract expressly provides for subrogation, its enforceability is "a well settled rule of law." Indeed, most jurisdictions hold that an insurer has no right to subrogation absent express statutory or contractual language permitting subrogation and reimbursement. However, a number of jurisdictions statutorily prohibited subrogation provisions in health insurance contracts. These statutes have been preempted by federal legislation for most health insurance policies, specifically those covered by the Employee Retirement Income Security Act (ERISA).


180. Michelle J. d'Arcambal, The Assault on Subrogation, in ALI-ABA CONFERENCE ON LIFE INSURANCE LITIGATION 461 (ALI-ABA eds., 1997); Edeus, Jr., supra note 147, at 512–13.


182. This is also sometimes called "conventional subrogation." Mahler v. Szucs, 957 P.2d 632, 640 (Wash. 1998) (citing Ross v. Jones, 24 P.2d 622, 626 (Wash. 1933)).

183. This is often called "legal" or "equitable subrogation." Id.; S. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 22 (1964). "The doctrine of subrogation in insurance does not arise from, nor is it dependent upon, statute or custom or any of the terms of the contract; it has its origin in general principles of equity and in the nature of the insurance contract as one of indemnity. The right of subrogation rests not upon a contract, but upon the principles of natural justice." Wimberly v. Am. Cas. Co., 584 S.W.2d 200, 203 (Tenn. 1979) (citations and internal quotations omitted), cited in Parker, supra note 143.

184. Baron, Subrogation on Medical Expense Claims, supra note 179, at 583; see also Mahler, 957 P.2d at 641; Frost v. Porter Leasing Corp., 436 N.E.2d 387 (Mass. 1982).


188. Those policies not covered by ERISA are governed by state law. See Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006) (holding suit by health insurer of federal employees for
As a result of the well-established recognition of contractual subrogation, most health insurance contracts now provide for subrogation and reimbursement. But this “well-settled” common law rule permitting contractual subrogation has come under assault by courts and legislatures restricting the subrogation rights of the insurers in favor of the insured’s right of full compensation in tort actions. Courts have not uniformly held that federal legislation preempts these subrogation restrictions. This jurisdictional split is even more stark when federal law does not preempt the insurance contract’s subrogation provisions, such as when an insurance plan covers state governmental units.

Most jurisdictions permit both subrogation and application of the collateral source rule. In these jurisdictions, the jury issues a verdict and awards the reimbursement from state tort action governed by state law and not preempted by Federal Employees Health Benefits Act; d’Arcambal, supra note 180.

plaintiff damages that exclude collateral source payments. However, the subrogated insurer is able to recover its subrogated interests directly from the plaintiff’s damage award. Consistent with traditional policy rationales of the collateral source rule, these jurisdictions allow the plaintiff to receive cumulative recovery if the insurer fails or is unable to exercise subrogation. However, in a few jurisdictions, the court withholds a final judgment until it determines a subrogor’s rights.


196. Wershbale, supra note 98, at 351 (citing HAW. REV. STAT. § 663-10 (West 1993); ME. REV. STAT. ANN. tit. 24, § 2906 (West 2000); MICH. COMP. LAWS ANN. § 600.6303 (West 2000); UTAH CODE ANN. § 78-14-4.5 (West 2008)).
Some states choose to prohibit subrogation and leave the collateral source rule in place. In such jurisdictions, if the antisubrogation laws are not pre-empted, plaintiffs receive cumulative damages from the defendant for any collateral insurance payments, and the insurer is unable to recoup these payments. Post-verdict reductions based on collateral sources do not occur since subrogation is prohibited.

Conversely, there are some jurisdictions where state law prohibits subrogation and has abrogated the collateral source rule. In these jurisdictions, the plaintiff’s collateral benefits reduce the defendant’s liability. In addition, absent preemption, the plaintiff’s insurer in these jurisdictions is prohibited from seeking indemnity though subrogation. These jurisdictions clearly allow the defendant (or the defendant’s liability insurer) to profit from the plaintiff’s collateral-insurance benefits. For example, the Supreme Court of New Jersey found that, in abrogating the collateral source rule, the legislature favored liability carriers over subrogating health insurers.

Finally, a number of jurisdictions permit subrogation but prohibit the collateral source rule in determining the verdict. In these jurisdictions, abrogating the collateral source rule can take two forms. In one jurisdiction, the collateral source rule has been abrogated completely, including during the trial itself. In


198. See, e.g., Hines, 788 F.2d at 1018.


200. See Kiss, 650 A.2d at 338-40.

201. See id.

202. Id.


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this jurisdiction, the jury will issue a verdict taking into consideration the collateral sources and thus the final verdict will reflect a reduction in these collateral sources. In Alabama, the plaintiff's insurer, however, would be able to exercise its subrogation rights against the defendant and receive an award from the defendant directly rather than through the post-verdict reduction procedure found in other jurisdictions.

Correspondingly, in the remaining jurisdictions, the collateral source rule remains in effect during the trial as a rule of evidence, but is abrogated during a post-verdict calculation of damages. In these jurisdictions, the jury or the judge only considers and reduces the verdict based on the collateral benefits received by the plaintiff after issuing an initial verdict without considering such sources. In other words, the collateral source rule is abrogated only in the post-verdict stage of the trial. These jurisdictions do not allow the plaintiff to receive cumulative recovery even if the insurer fails or is unable to exercise subrogation.

This survey of the application of the collateral source rule and subrogation shows that, outside of medical malpractice actions, only one jurisdiction has completely abrogated the collateral source rule in the damages determination process when taking into account subrogation rights. Most states retain the rule and allow subrogation to mitigate any double-recovery concerns. In states that have abrogated the rule for the purposes of determining a final damages award,
the rule operates to exclude evidence of collateral sources during the trial. Thus, the vast majority of jurisdictions continue to use the rule in some form in determining tort damages.

B. The Continuing Role of the Collateral Source Rule in Pre-Verdict Trial Proceedings and Subrogation in Post-Trial Proceedings

Despite the predictions that subrogation would supplant or obviate the collateral source rule, in most jurisdictions, it implicates the collateral source rule. Similarly, tort reform legislation that sought to abolish the collateral source rule did not remove the rule from the trial process, but only abrogated it post-verdict.

The way in which a subrogor exercises its rights can affect the collateral source rule. If the insurer has full subrogation rights, there are two approaches available to the insurer to exercise those rights. First, the insurer could wait until after the court enters the judgment and the jury has determined total liability to the plaintiff’s economic and noneconomic damages (or a settlement on these damages reached by the parties). The insurer could then exercise its subrogation rights and be reimbursed out of this judgment (or settlement), thereby reducing the plaintiff’s total award. In such a situation, the collateral source rule would still be pertinent in restricting the jury’s access to information regarding the plaintiff’s insurance coverage since this information might lower the jury’s damage award, confuse the jury, and make the calculation of damages more difficult.

Second, the insurer could bring an action directly against the tortfeasor either before or after the insured brings an action, or could intervene in the plaintiff’s action. In these circumstances, the insurer pursues a separate derivative action against the defendant for subrogated damages in the form of expenses paid to the plaintiff under the insurance policy. In this situation, the collateral source rule

214. See supra note 207.
216. The insurer’s rights of subrogation to recoup medical expenses paid to its insured are generally governed by the terms of the company’s contract with its insured. See 2 STEIN, supra note 38, § 7:34; 16 RUSS & SEGALLA, supra note 168, § 225:152.
218. See Wershbale, supra note 98, at 354.
219. See supra note 86 and accompanying text.
would indeed lose its pertinence; the nature of the claim the insurer brings would defeat the rule and would not insulate the jury from evidence of the collateral source. It is only when insurers exercise their subrogation rights directly against the defendant, rather than through reimbursement, that the collateral source rule loses much of its purpose and warrants abrogation of the rule. However, insurers typically do not bring direct actions, because insurers have no cause of action against a tortfeasor for recovering future benefits; thus, insurers depend on the insured to pursue claims for future economic damages.

When an insurer exercises its subrogation rights after a jury determines liability, the collateral source rule continues to play a vital function in the appropriate determination of the jury’s award. Indeed, in the majority of jurisdictions that allow subrogation, defendants may seek a post-verdict collateral source reduction. At a post-verdict hearing, both parties may present evidence of the plaintiff’s collateral benefits, subrogation or reimbursement rights by third parties, and any payments by the plaintiff to secure the collateral benefits. Prior to this post-verdict hearing, the collateral source rule remains in effect.

Under the post-verdict reduction procedure, courts can impose and work into the calculations of final damages for the insured and third-party insurer make-whole rules limiting subrogation claims. The make-whole doctrine requires the insurer to wait until the insured has fully recovered for all losses not covered by the insurance; then the insurer is entitled to recover from the plaintiff-insured under its subrogation rights any amount paid by the defendant beyond those other damages. This process provides an important role for the collateral source rule as well. Since the jury needs to determine all of a plaintiff’s damages, both economic and noneconomic, the jury benefits from applying the collateral source rule in determining the full measure of damages. Indeed, both the plaintiff and the insurer benefit from the collateral source rule in this situation because both the plaintiff and insurer seek to maximize the plaintiff’s award.

222. See, e.g., Excellus Health Plan, Inc. v. Fed. Express Corp., 784 N.Y.S.2d 284 (App. Div. 2003). If collateral benefits are introduced at trial, then the source of those benefits such as an insurer, may not recover their subrogation rights against the plaintiff. See Schap & Feeley, (Much) More, supra note 110.


226. See Crossgrove, 2010 WL 2521744; see also Wershbale, supra note 98, at 353–54.

227. See, e.g., Fortis Benefits v. Cantu, 234 S.W.3d 642 (Tex. 2007); see also Parker, supra note 143, at 737–76; d’Arcambal, supra note 180.

228. Parker, supra note 143, at 737; Greenblatt, supra note 174, at 1339–40.

229. See supra notes 85–88 and accompanying text (discussing retention of the collateral source rule as a way to curb jury confusion as they consider a multitude of factors in determining damages).

230. As indicated earlier, abrogation of the collateral source rule would likely cause the jury to award lower damages. See supra note 86 (citing sources advocating use of the rule to prevent jury confusion).
Since a majority of jurisdictions have implemented make-whole doctrines that restrict full subrogation and encourage post-claim reduction of jury verdicts, the collateral source rule will continue to play a vital role as a rule of evidence and in calculating the initial verdict. Rather than leading to the demise of the collateral source rule, subrogation and laws relating to its restrictions and administration permit the collateral source rule to endure at the pre-verdict stage of a torts trial.

Under the current patchwork of multipayer insurance plans and fragmented markets, uniformly applying post-verdict reduction of collateral source benefits under subrogation can result in greater coherency in injury compensation. Within post-verdict reduction jurisdictions, the collateral source rule remains in effect in the pre-verdict stage as a rule of evidence and allows the jury to determine a verdict for damages that excludes considering plaintiff’s collateral benefits. This approach, used by a number of jurisdictions, permits the judge in the post-verdict reduction stage of a torts trial to consider the exact subrogation rights permitted under the parties’ insurance contract, any equitable subrogation rights permitted by law, and any make-whole limitations. A uniform pre-verdict application of the collateral source rule would provide significant normative benefits for the torts and insurance claim processes, providing coherence to an inefficient and fragmented injury compensation process. Wholesale attacks on the collateral source rule and movements to abrogate the rule are, thus, misguided.

VI. CONCLUSION

Despite the prognostications of a number of scholars concerning the dissolution of the collateral source rule, the doctrine remains alive. It does so even in the face of the tort reform movement which sought to abolish it, recent legislation such as the Affordable Care Act, which undercut important instrumentalist rationales supporting it, and the rise of subrogation, which weakened the rule’s effect. While the cumulative recovery traditionally permitted by the collateral source rule has been significantly scaled back by changes in the law brought about by tort reform and subrogation, the rule otherwise endures.

The collateral source rule plays an important normative function in tort law, particularly in determining medical care damages. Some scholars, however, predicted this function would diminish in the face of changes to healthcare insurance in the United States and the increase in subrogation. In addition, changes to federal

231. Wickert supra note 16, § 2.08; see also Hourihan & Zeitounzian, supra note 16, at 23.
232. See supra note 208 and accompanying text (providing the mechanics of post-verdict application of the collateral source rule).
234. See Goldsmith, supra note 2 (arguing that the “disparate application of the collateral source rule” is particularly troublesome, and there should be some “uniformity in the application of the rule”).
law relating to health insurance weakened some of the justifications for the collateral source rule.

Nevertheless, the continued fragmentation and incoherence found under the multipayer approach to national healthcare legislation leaves a continuing role for the collateral source rule in most jurisdictions. The current multipayer system, which allows the choice of policies available to insurance purchasers, supports retaining the collateral source rule under contract-based and instrumentalist rationales.

Ironically, the rise of subrogation has contributed to the continuing vitality of the collateral source rule as a rule of evidence, while diminishing the rule’s cumulative benefits for plaintiffs. While the rise of subrogation formed the basis of predictions of the collateral source rule’s demise, subrogation rules found in many jurisdictions retain the collateral source rule for important administrative and equitable purposes in the pre-verdict trial process. Only where an insurer exercises its subrogation rights directly against the defendant does the collateral source rule lose its purpose and abrogation would appear appropriate. Direct actions by insurers to enforce their subrogation rights, however, are not the norm and are not compatible with make-whole doctrines that many jurisdictions embrace. Post-judgment reductions of the plaintiff’s verdict are the more common and advantageous mechanism for determining damages in a tort action.

The collateral source rule, while advancing important normative policies in individual cases, does little to improve the coherence of the tort system as a whole. The conflicting approaches to the collateral source rule found across jurisdictions reflect the incoherence and fragmentation found in the health insurance markets in the United States. In the absence of a more unified healthcare insurance system, however, the collateral source rule will continue to play important instrumental and administrative functions in the tort system. If applied purposefully, particularly in the pre-verdict part of a torts trial, the collateral source rule improves the torts process.

The prognostications of the demise of the collateral source rule will not be fulfilled in the near future and will only come about if the healthcare insurance system becomes more cohesive and consistent through a single-payer system or a similar uniformity-creating mechanism. A more unified and less fragmented system has the potential to not only provide coherence and efficiencies in the healthcare insurance system, but also provide greater coherence to the tort process in general and the collateral source rule in particular. Until a more unified healthcare insurance system comes about, the collateral source rule will endure.