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ARTICLE: Rhetoric, Reality, and the Wrongful Abrogation of the Collateral Source Rule in Personal Injury Cases

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LEXISNEXIS SUMMARY:
... In the absence of contrary legislation, many states consider this negotiated rate differential a collateral source benefit and apply the common-law collateral source rule, allowing the plaintiff to recover the amount billed by the health care provider without regard to what the plaintiff's health insurer actually paid. ... In November 2009, Ohio House Bill 361 was introduced in an attempt to overrule an Ohio Supreme Court decision from earlier that year holding that the admission into evidence of payment amounts from health insurers to health care providers did not violate Ohio's statutory collateral source rule because such write-offs were not collateral source benefits at all. ... Increasingly, legislatures are abrogating the application of the collateral source rule in personal injury cases, and this trend is being influenced by the rhetorical themes that health care providers' bills are illusory, having no consequences in reality, and that a plaintiff's recovery of those billed costs would be a windfall gain. ... As demonstrated above, the labels illusory and windfall are tools skillfully used by defendant tortfeasors and insurance liability carriers to paint injured plaintiffs' medical bills and economic damages with a coat of objectionable connotations.

TEXT:
[*99]

I. Introduction

"A lie told enough times becomes the truth."

Vladimir Lenin

There are few certainties in litigation, but one that any injured plaintiff with health care insurance can rely on is that a defendant tortfeasor will argue that the plaintiff's health care bills are illusory, and that the plaintiff will recover a windfall if he is allowed to recover the full amount of those bills as economic damages. This strategy is repeated so often, it's a cliche:

Ms. Lopez slipped and fell at a grocery store, suffering various injuries. n1 Her medical bills totaled [*100] $ 59,700. n2 Ms. Lopez's health care providers were contractually bound to accept significantly reduced amounts by her health care insurer as full payment and satisfaction for those bills. n3 Accordingly, the health care providers wrote off

approximately $ 42,000 and the health care insurer paid the remaining balance of $ 16,837. n4 Before trial, the defendant tortfeasor moved in limine to prohibit Ms. Lopez from presenting evidence of the amount of the medical bills above what was actually paid by her health care insurer and accepted by the healthcare providers in satisfaction of billings. n5 The defendant tortfeasor argued that Ms. Lopez should only be able to present evidence of the $ 16,837, because the medical bills reflecting $ 59,700 "had nothing to do with anything because they were largely illusory or phantom," since neither she nor her medical insurer actually had to pay them. n6 The defendant tortfeasor argued that recovery of the $ 59,700 would be a windfall gain to Ms. Lopez. n7

Like many states without legislation on point, the court in Lopez reasoned that the negotiated rate differential - the difference between the billed rate for medical care and the actual amount paid by the insurer as negotiated between the medical provider and the insurer - was a collateral source benefit and applied the common-law collateral source rule. n8 Specifically, the Arizona Court of Appeals [*101] reasoned that the collateral source rule was well established, and without legislative modification, it was bound to apply the doctrine. n9 In doing so, the court permitted Ms. Lopez to recover the entire amount billed to her by her health care providers as economic damages, n10 despite the defendant tortfeasor's characterization of the medical bills as "illusory" n11 and the plaintiff's recovery of that amount as a "windfall." n12 While the Arizona court did not adopt the defendant's characterizations of the plaintiff's medical bills as illusory or the plaintiff's recovery of that amount as a windfall, the skillful rhetoric, through repetition to courts and legislatures, is transforming these inaccurate labels into facts in many other states.

Nearly every state has addressed the issue of whether the negotiated rate differential should be considered a collateral source benefit and thus an injured plaintiff should be allowed to collect that entire amount as economic damages, or whether a plaintiff should be limited to recover only the amount the medical provider actually accepted from the plaintiff's health insurer in full satisfaction of the bills. n13 Nevertheless, there is considerable disparity among the states [*102] regarding the application of the collateral source rule in these situations. The one consistency is the rhetorical theme advanced by defendants that the health care providers' bills are illusory - having no consequences in reality - and that the plaintiff's recovery of those billed costs would be a windfall gain.

Like Arizona, some jurisdictions consider the negotiated rate differential a collateral source benefit and apply the common-law collateral source rule. In some of these states the legislature has confirmed the applicability of the collateral source rule to these medical bills that were satisfied by write-offs and payments by plaintiff's private health insurance in personal injury cases. In other states, however, Ms. Lopez would have been limited to recovery of only $ 16,837 as economic damages. In these states, the legislatures have passed tort reform n14 legislation that has modified or abolished the collateral source rule in personal injury cases and has limited economic damages to the amount the medical care provider accepted from the plaintiff's health care insurer as satisfaction for the medical bills. A review of these legislative hearings reveals a recurring effort by liability insurance carriers to influence legislatures to consider actual medical bills as misleading assessments of a plaintiff's damages, and to recognize economic recovery in excess of a health care insurer's payment as a windfall. While persuasion through skillful choice of language is a routine and revered tool in the practice of law, n15 when, because of use and repetition, misleading [*103] rhetoric is relied upon by courts and legislatures as fact, the resulting rule of law is flawed.

Part I of this Article explores the unsavory legal and social implications of the terms windfall and illusory and the persuasive nature of these labels on courts, legislatures, and society. I then survey state appellate court decisions that address the issue of whether the negotiated rate differential is a collateral source benefit that should offset a plaintiff's recovery in personal injury cases, highlighting evidence of the rhetorical themes of labeling the plaintiff's medical bills as illusory or the plaintiff's recovery as a windfall to demonstrate that this pronounced strategy is commonly embedded in appellate court opinions. I also examine legislative notes and hearings to demonstrate that this same rhetoric is influencing how legislators think about the issue and respond to rulings of the judiciary applying the collateral source rule to personal injury recovery.

In Part II of this Article, I examine the logical fallacies of using the terms illusory and windfall to frame an injured plaintiff's health care bills and the recovery of that amount to support abolition of the collateral source rule in personal injury cases. I argue that despite this repeated rhetoric, medical care provider's bills are not illusory; those bills are real and a plaintiff's recovery of the amount billed by a health care provider is not a windfall, but rather it is a return on a prudent investment obtained through foresight and diligence by the plaintiff, one that society should want to encourage.

Part III of this Article examines the tension between the legislature and the judiciary regarding the application of the collateral source rule to a plaintiff's recovery of the negotiated rate differential in personal injury cases. What emerges is evidence that a body of law is being created based in part on the implications of [*104] these labels, rather than reality. This rhetoric is influencing courts and legislatures to wrongly abrogate the collateral source rule as it applies in personal

injury cases. I conclude that the negotiated rate differential is a collateral source benefit to a privately insured plaintiff and, applying the collateral source rule, economic damages, including the reasonable value of medical services, should be calculated by the amount charged by the health care provider. Neither the judiciary nor the legislature should abolish the collateral source rule in this context based on false notions that the medical bills are illusory or that plaintiffs will be recovering windfalls. This conclusion acknowledges the need for legislative and judicial safeguards to ensure that health care providers are not engaging in fraudulent pricing schemes aimed at gouging liability insurers and appreciates the realities of personal injury recovery. This conclusion also recognizes that persuasion though skillful word choice is a common and respected practice among lawyers. Nevertheless, when inflammatory labels are repeated so regularly that they gain a legitimacy that is relied upon by courts and legislatures, the terminology should be reexamined to ensure that rules of law are not, as here, being supported on rhetoric alone.

II. Rhetoric Directed at the Application of the Collateral Source Rule in Personal Injury Cases

As part of a plaintiff's economic damages in a personal injury case, an injured plaintiff is generally entitled to recover for the "reasonable value" of the medical services incurred by the plaintiff due to the defendant's tortious conduct. n16 There is considerable disparity, however, among jurisdictions regarding how to calculate the reasonable value of medical services when a private health care insurer satisfies a plaintiff's medical bills by negotiating discounts and then paying the medical care provider only a small fraction of the actual billed cost. n17 In the absence of contrary legislation, many [*105] states consider this negotiated rate differential a collateral source benefit and apply the common-law collateral source rule, allowing the plaintiff to recover the amount billed by the health care provider without regard to what the plaintiff's health insurer actually paid. n18 A few states applying the common-law collateral source rule do not consider the negotiated rate differential to be a collateral source benefit. n19 In those jurisdictions, although the collateral source rule is still technically intact, a plaintiff is only able to recover the amount paid by his health insurer to satisfy the medical bills. n20 Other states have legislatively modified the collateral source rule or abolished it all together. n21 The states that have modified the collateral source rule have done so in a myriad of ways, resulting in numerous [*106] versions of its practical application. n22 For example, in some jurisdictions the collateral source doctrine has been altered exclusively in cases of medical malpractice. n23 Some states have modified the doctrine in all civil actions, n24 and others have modified or abolished it specifically in actions for personal injury. n25 And [*107] while some jurisdictions limit the admissibility of the medical bills, n26 others permit the bills into evidence but compel a post-trial set-off against an award of compensatory damages for the collateral source payment. n27 Still others allow both the amount paid and the amount billed into evidence, allowing a jury to decide the reasonable value of medical services. n28 With all these variations, the one unifying theme advanced by defendants and insurance liability carriers in nearly every jurisdiction that has addressed this issue - either through judicial application of the common law or legislative modification - is the rhetoric of the illusory nature of medical bills and windfall gains by plaintiffs and when a plaintiff has private health insurance.

Advancing the labels illusory and windfall to frame plaintiffs' medical bills and economic damages is a pronounced rhetorical device directed at the collateral source rule as applied to recovery of the negotiated rate differential in personal injury cases. I begin by exploring the unsavory legal and social implications of the terms windfall and illusory and the persuasive nature of these labels on courts, legislatures, and society. I then highlight examples of these rhetorical themes to demonstrate that this defense strategy is commonly embedded in appellate court opinions. Finally, I detail exemplars of legislative notes and hearings that show how this rhetoric is currently influencing legislators to respond to policies set by the judiciary when it applies the collateral source rule to a plaintiff's economic damages satisfied by private health care insurance.

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A. Illusions and Windfalls

"See, in my line of work you got to keep repeating things over and over and over again for the truth to sink in, to kind of catapult the propaganda."

President George W. Bush, Rochester, N.Y., May 24, 2005 n29

Panic over perceived frivolous lawsuits reached a fever pitch in the 1980s and spawned tort reform legislation nationwide in various forms, including limits on punitive damages, caps on attorneys' fees, non-economic damages, and even economic damages. n30 Much of this legislation was directed at medical malpractice cases and was fueled by society's concern regarding increasing health care costs and an out-of-control legal system with a perceived proliferation of "frivolous" litigation and accompanying mega-jury awards that were driving doctors from the practice of medicine in certain "problem states." n31 The push for tort reform was primarily advanced by insurance liability carriers seeking to

limit their financial exposure to liability. n32 In retrospect, many studies [*109] have demonstrated that the rhetoric was unfounded. n33 Such legislation has saved insurance carriers billions of dollars, arguably little of which has been passed along to the public. n34

A more recent trend has been to expand tort reform to include the abrogation of the collateral source rule in personal injury cases. As shown below, the labels windfall and illusory are powerful, and when attached to a financial recovery, offer strong negative connotations that influence courts and legislatures. Defendant tortfeasors and the insurance liability carriers paying the damages advance this rhetoric to take advantage of an injured plaintiff's foresight and prudence in carrying private health insurance and insert themselves as the beneficiary of plaintiff's private contractual relationship with a third party, the plaintiff's health insurance company.

A windfall is defined as receipt of financial gain that was not expected and not the result of something the recipient did. n35 Finding a $ 100 bill while walking down the street would be a classic [*110] example. In contrast, a marketplace gain by freely negotiating parties is typically not a windfall, as the term is properly used. n36 The label however can be attached to any financial gain, thereby evoking negative connotations. Indeed, labeling a financial gain as a windfall is inflammatory; it paints the pecuniary interest as undeserved and undesirable, evoking feelings of envy and greed. n37 Moreover, the societal assumption is that if one party is receiving a windfall, another party is suffering an unjust financial loss and, therefore, the windfall should be duly abolished. n38 A benefit from a legitimate and useful investment, particularly one such as private medical insurance that society wants to encourage citizens to purchase, should not be arbitrarily termed a windfall because of these negative connotations.

The implications of misusing this label in legal discourse are significant because windfall gains are disfavored in our legal system. n39 When laws are not in place to prevent perceived windfalls, regulators often step in to "correct this loophole by promulgating new laws tailored to the situation that produced the unlawful windfall." n40 Thus, classifying any financial recovery as a windfall, [*111] even when it is not, will prompt the legislature to respond. n41 For example, a "windfall profit" is "a profit that occurs suddenly as a result of an event not controlled by the company or person realizing the gain from the event." n42 This type of profit, often the result of unforeseen circumstances in the market, has prompted legislators to enact laws to tax these profits at a higher rate, or confiscate them all together. n43 Similarly, punitive damages are sometimes termed a windfall gain, n44 and while they are accepted in tort law as a necessary consequence for deterrence and punishment, n45 many states have enacted legislation to cap these types of damages. n46

One source of society's "outrage, indignation, and envy" n47 associated with a windfall that prompts a legislative response is the notion that windfalls are a zero-sum game - if one party is receiving a windfall then another party must be assuming an excess loss. n48 This perception that a windfall is a zero-sum calculation is particularly biting when society is perceived to be on the paying end. n49 Thus, regardless of the arguable economic efficacy of the [*112] collateral source rule, n50 where the party assuming the excess loss is - or is perceived to be - the consuming public, the outcry for a legislative response is particularly strong. n51

Defense litigants and lobbyists advocating for abolition of the collateral source rule in personal injury actions also often characterize the amount billed to a plaintiff by a medical care provider as illusory, n52 calling them "phantom" or "fantasy" n53 bills. [*113] The obvious connotation is that these medical bills are fictional and have no consequences in reality, except seemingly to gouge the liability carriers. The term assumes that health care providers' contracts with patients - the contract every patient signs while they sit in the doctors waiting room, prior to seeing the doctor, confirming that the patients will be personally responsible for all bills, regardless of insurance - are unenforceable and simply a front for a fraud on liability carriers in case of litigation involving the patient and a tortfeasor. Using this term to characterize a plaintiff's health care bill takes advantage of society's acute outrage over medical care costs and exploits society's mistrust of health care costs and billing. n54

In general usage, the term illusory means "deceptive, based on a false impression." n55 In legal discourse, it is often used to describe an unenforceable or unlawful action based on deceit or fraud. n56 For example, an illusory promise is one that courts will not enforce under contract principles, n57 and an illusory contract is one with no consideration. n58 The illusory-transfer doctrine is a property principle which provides that an inter vivos gift is unenforceable under the law if the donor retains so much control that there is no good-faith intent to relinquish the transferred property during the [*114] conveyor's lifetime. n59 In insurance law, the doctrine of illusory coverage requires an insurance policy to be interpreted so that it is not merely a illusion to the insured. n60 An illusory trust refers to an arrangement that giving the outward impression of being a trust but is not in fact a trust because of the powers retained by the settlor. n61 In all these contexts, the illusory label connotes a transaction that is not real and should not be upheld by the law.

B. Evidence of Rhetorical Themes in Case Law and Legislative Notes Addressing Recovery of the Negotiated Rate Differential

With certain exceptions, benefits received by a plaintiff from a source wholly independent of the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. n62 This common-law doctrine, known as the collateral source rule, is largely meant to "encourage citizens to purchase and maintain insurance for personal injuries and for other eventualities." n63 Further, "courts consider insurance a form of investment, the benefits of which become payable without respect to any other possible source of funds." n64 The doctrine further ensures that the defendant tortfeasor will bear the full economic burden of the injury he causes and serves [*115] as an efficient deterrent for similar behavior in the future. n65 As a practical matter, the collateral source doctrine serves as both a rule of evidence, prohibiting introduction at trial of any evidence of payments by a collateral source, and also a rule of damages, permitting an injured party to recover full compensatory damages from a tortfeasor irrespective of the payment of those damages by a collateral source, not the tortfeasor. n66

The Restatement (Second) of Torts reflects this doctrine, providing that payments made by a collateral source to an injured party are not credited against a tortfeasor's liability. n67 This rule [*116] applies to benefits including insurance policy payments, employment benefits, gratuities, and social legislation benefits. n68 Comment b to Section 920A suggests that given the choice between a "double recovery" for the plaintiff and a windfall to the defendant, the benefit should be afforded to the injured plaintiff. n69 The comment provides:

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. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is 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. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. n70

This common-law doctrine can, of course, be altered by statute, n71 and many states have chosen to do so with respect to its application to personal injury recovery. n72 Regardless of whether a state has legislatively modified the collateral source rule or applies it [*117] in its common-law form, the rhetorical themes of illusory medical bills and windfall recoveries are often aimed at the collateral source rule, sometimes with persuasive effect. The result is that while courts generally apply the common-law collateral source rule absent statutory modification, the inaccurate rhetoric is embedded in those judicial opinions and then repeated to the legislatures as a cry for a statutory response. The rhetoric then influences the legislatures to wrongfully abrogate the collateral-source rule in personal injury cases.

C. Rhetorical Themes of Illusory Medical Bills and Windfall Gains in States Without Legislation Modifying or Abolishing the Collateral Source Rule in Personal Injury Cases

Most state courts applying the common-law collateral source rule hold that the negotiated rate differential is a collateral source benefit and allow injured plaintiffs to recover the full amount of reasonable medical expenses billed, including amounts written off from the bills pursuant to contractual rate reductions. n73 As illustrated [*118] below, court opinions often evince that during litigation when arguing about the amount of recoverable compensatory damages, the defendant alluded to policy concerns regarding the illusory nature of medical bills or a windfall recovery to plaintiff. Interestingly, plaintiffs often do not challenge the term windfall, but rather respond that a windfall is permissible in the particular situation. n74 Plaintiffs often cite to the Restatement (Second) of Torts to support their argument, even though the Restatement (Second) of Torts does not use the term windfall to refer to plaintiff's economic gain at all, but rather uses that term to refer only to defendant's gain if the collateral source rule were not applied. n75 Courts rarely effectively analyze this terminology either. Instead, the rhetoric is apparently set forth by the defendants, n76 and simply noted by the courts. n77

In some cases, courts adopt an apologetic tone in rejecting defendants' arguments regarding the illusory nature of the plaintiff's medical bills and the windfall that will benefit plaintiffs. For example, an appellate court in Arizona noted the defendant's concerns regarding illusory medical bills and plaintiff's windfall [*119] recovery, but held that while "the legislature is free to limit or abandon the collateral source rule in various areas, as it did in the medical malpractice arena ... absent any such limiting statute or supreme court authority suggesting that the collateral source rule does not

control in a [personal injury situation] ... it [is] applicable." n78 In Lopez, the court even quoted portions of the defendant tortfeasor's motion to exclude the plaintiff's actual medical bills and oral argument describing the "illusory" and "phantom" nature of plaintiff's medical bills. n79 The court did not adopt the terminology in its holding, but, seemingly powerless to do anything otherwise, it permitted plaintiff's windfall, using that term when it stated, "because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer." n80

Like Arizona, the state of California also has no legislation altering the common-law collateral source rule in all personal injury cases n81 and, until recently, there were seemingly conflicting opinions from the California appellate courts on this issue. n82 The California Court of Appeals in Howell v. Hamilton Meats & Provisions, Inc. n83 [*120] was the first California case to analyze these negotiated rate differentials under the collateral source rule. n84 In Howell, the California Court of Appeals departed from a line of California state precedent that had limited recovery of medical expenses by plaintiffs in personal injury cases to the amount actually paid by the plaintiff's health insurance carrier, rejecting previous rulings that the negotiated rate differential was not a collateral benefit in personal injury cases. n85 California plaintiffs were permitted to present evidence of the amount originally billed by medical providers, and post-trial, the court would reduce any medical expense award reflecting that billed amount, so long as the defendant was able to prove that the medical provider actually accepted that reduced amount. n86 In Howell, the plaintiff's automobile was hit by defendant's truck when the truck driver made an illegal turn. n87 At trial, the plaintiff was awarded $ 189,978.63 in compensatory damages, the full amount billed by her medical care providers. n88 The defendant argued that the award should be reduced to $ 59,691.73 because that was the amount the plaintiff's medical insurer actually paid. n89 The medical care providers wrote off the remaining $ 130,286.90 pursuant to a negotiated contract between the medical care provider and plaintiff's [*121] medical insurer. n90 The trial court agreed and reduced Howell's jury award to $ 59,691.73. n91 The appellate court reversed, finding that Howell was entitled to the full-billed amount of $ 189,978.63. n92 The Court of Appeals ruled that the amount of medical expenses written off by the medical providers was to be awarded to the plaintiff, affirming that the write-off was a "collateral benefit" of plaintiff's insurance policy. n93 The court reasoned that the amount of financial obligation for a plaintiff insured under a health care plan remains the total amount charged by the provider under its usual and customary rates, not merely the discounted amount actually paid. n94

The California Supreme Court granted review of this case in March 2011. n95 In an amicus brief to the appellate court in support of the defendant, Hamilton Meat Company, the rhetoric of illusory medical bills and windfall gains was advanced again. The brief began by framing plaintiff's claim for recovery as a windfall:

In this appeal, plaintiff complains that she did not receive a sufficient windfall recovery for medical expenses that she never paid and never will pay ... . Plaintiff seeks to use a tort injury as a profit making proposition ... by arbitraging the actual cost of medical services versus a "list" price that is never paid. n96

The brief continued, characterizing plaintiff's medical bills as illusory, irrelevant evidence:

The plaintiff should never have been allowed to introduce irrelevant evidence of inflated "prices" for medical services that were never paid or charged to [*122] her ... . Plaintiff's evidence of illusory medical charges - charges never paid or to be paid by plaintiff nor anyone on her behalf - should never have been admitted in the first place. n97

Howell responded that healthcare providers were not only entitled to, but did collect their usual and customary rates saying "the demonstrable and much publicized reality [was] that healthcare providers hounded patients to the gates of financial Hell, including bankruptcy, for unpaid charges." n98 Howell did not let the windfall label slip by either; it reminded the court that the benefits of write-offs and pre-negotiated rates did not "fall from the sky" but rather were contracted and paid for by the plaintiff. n99

Despite the heavy rhetoric found in the briefings, the California Supreme Court reversed the Court of Appeals, finding the plaintiff was not entitled to recover the amount billed for medical care if the plaintiff's health insurance paid for those bills. n100 The court refused to permit the plaintiff to recover the higher billed amount of medical expenses "for the simple reason that the injured plaintiff did not suffer any economic loss in that amount." n101 Indeed, the California Supreme Court dismissed the collateral source rule as wholly inapplicable, stating, "having never incurred the full bill, plaintiff could not recover it in damages for economic loss ... ." Certainly, the collateral source rule should not

extend so far as to permit recovery for sums neither the plaintiff nor any collateral source will ever be obligated to pay.'" n102

Illinois also applies the common-law collateral source rule, extending liability to the entire amount billed by the plaintiff's health care providers, but the rhetoric is nevertheless noted in this jurisdiction as well. For example, in Arthur v. Catour, the plaintiff [*123] sustained an injury to her leg while attending an auction at a farm. n103 She incurred over $ 19,000 in medical bills for treatment of her injuries, but because of her health insurer's contractual agreements with her healthcare provider, only about $ 13,500 was required to pay off the medical bills. n104 The appeals court noted that "the purpose of compensatory tort damages is to compensate the plaintiff for [her] injuries, not to punish defendants or bestow a windfall upon plaintiffs," but then rejected the defendant's argument "that because plaintiff was never obligated to pay the full amount billed, the amount paid by her insurer is the true measure of her damages," concluding that the plaintiff was not limited to recover only the amount paid by her insurer. n105 In doing so, the court squarely addressed the issue of whether "difference between the amount charged and the amount paid [was] "illusory.'" n106 The court noted:

Although "discounting" of medical bills is a common practice in modern healthcare ... it is a consequence of the power wielded by those entities, such as insurance companies, employers and governmental bodies, who pay the bills. While large "consumers" of healthcare such as insurance companies can negotiate favorable rates, those who are uninsured are often charged the full, undiscounted price. In other words, simply because medical bills are often discounted does not mean that the plaintiff is not obligated to pay the billed amount. n107

At least one state applying the common-law collateral source rule has recently ruled that it does not always entitle a personal [*124] injury victim to receive medical expenses already paid by the plaintiff's private health insurer. In Fischer v. Steffen, a Wisconsin plaintiff sustained injuries in a car accident. n108 The plaintiff's insurance policy paid the policy limit of $ 10,000 to the plaintiff for medical expenses and waived its right to subrogation. n109 At trial, the plaintiff was awarded $ 21,000 for pain and suffering, as well as $ 12,157 for reasonable medical expenses, which the court reduced by $ 10,000, the amount the plaintiff previously received from his insurer. n110 The Wisconsin Supreme Court began by noting that the plaintiff would recover a windfall if the collateral source rule were applied, stating the policies that grounded the collateral source rule: "(1) to deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor, and (2) to allow the injured party, not the tortfeasor, to benefit from a windfall that may arise as a consequence of an outside payment." n111 The plaintiff argued that because the defendant paid $ 10,000 less than the full damages the defendant caused, the defendant should not benefit from the plaintiffs' insurance policy. n112 The plaintiff also contended that its insurer's subrogation claim should revert to them, not the defendant. n113 Defendant countered that the plaintiff's insurer's waiver of its right to subrogation created a windfall recovery for plaintiff. n114 Noting concern that ruling for the plaintiff would allow an injured party to receive a windfall, the court affirmed the court of appeals holding that the collateral source rule did not apply. n115

D. Rhetorical Themes of Illusory Medical Bills and Windfall Gains in States with Legislation Modifying or Abolishing the Collateral Source Rule in Personal Injury Cases

Absent statutory modification, application of the collateral source rule is usually assured. As shown in the previous section, courts often repeat the labels set forth by the defendant [*125] characterizing the medical bills as illusory and the plaintiff's financial gain as a windfall with little acknowledgment of those labels as mere rhetoric. n116 However, there has been an increasing trend among states to legislatively limit an injured plaintiff's recovery to the actual amount of medical expenses paid by the plaintiff's health insurer. n117 Many legislatures' recent actions appear to be direct responses to the judicial opinions, suggesting that the courts' references to this rhetoric are restrained calls to the legislatures to act. While some legislative action has been unsuccessful, and other bills are still pending or are postponed, legislative notes evince the fact that the rhetoric directed at this issue is being inherited from the judiciary.

For example, the Colorado legislature partially negated the collateral source rule by requiring a trial court, following a damages verdict, to adjust the plaintiff's award by deducting compensation or benefits that the plaintiff received from collateral sources other than the tortfeasor. n118 One part of the statute, however, provides for a "contract exception" and retains the collateral source rule for certain benefits. n119 In allowing the application of the collateral source in cases where benefits were provided to the plaintiff due to a contract, the Colorado statute provides that "the verdict shall not be reduced by the amount by which [the injured plaintiff] 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 [the plaintiff]." n120 The Colorado Supreme Court applied this statute in a 2010 personal injury case in which the plaintiff's

medical bills were [*126] satisfied by discounts and payments made by the plaintiff's health insurance company, holding "the common-law collateral source rule remains in full force and effect" and the tortfeasor was not entitled to offset proceeds resulting from the plaintiff's insurance. n121 Addressing the reality of the medical bills, the court noted:

While large "consumers" of healthcare such as insurance companies can negotiate favorable rates, those who are uninsured are often charged the full, undiscounted price. In other words, simply because medical bills are often discounted does not mean that the plaintiff is not obligated to pay the billed amount. Defendants may, if they choose, dispute the amount billed as unreasonable, but it does not become so merely because plaintiff's insurance company was able to negotiate a lesser charge. n122

The court further justified plaintiff's windfall by reasoning:

If either party is to receive a windfall, the rule awards it to the injured plaintiff who was wise enough or fortunate enough to secure compensation from an independent source, and not to the tortfeasor, who has done nothing to provide the compensation and seeks only to take advantage of third-party benefits obtained by the plaintiff. n123

In response to this ruling, the Colorado legislature attempted to completely abrogate the collateral source rule. n124 A bill was introduced in early 2011 which stated that the legislation was [*127] necessary because, "according to the holding in Volunteers of America v. Gardenswartz, Colorado's contract exception under the collateral source rule allows an injured party to receive compensatory damages above the amount paid by his or her insurance." n125 The bill specifically proposed that "in an action by a person or a legal representative to recover economic damages, the recoverable damages for reasonable and necessary medical or health care, treatment, or services shall include only those amounts actually paid by or on behalf of the injured person to the providers." n126 While the bill is currently "postponed indefinitely," n127 the rhetorical devices directed at the legislature are noteworthy. Ms. Heather Salg, a lawyer from the Colorado Defense Lawyers' Association, an amicus in Gardenswartz, n128 testified in support of the bill. n129 Her testimony included a discussion of "the history of medical expense recovery in Colorado ... the current jury instructions in personal injury cases ... [and] her opinion that actual damages, rather than [*128] the amount billed, should be recoverable." n130 To make her point, Ms. Salg distributed a chart showing examples of "phantom damages" from recent Colorado lawsuits. n131 The chart detailed information from nine recent cases indicating the amount billed by providers for health care, the amount paid by health insurance to satisfy all charges, and the "phantom damages" - the difference never paid or owed. n132

Indiana also has modified the collateral source rule by statute. n133 *Indiana Code § 34-44-1-2* permits a defendant to introduce evidence of write-offs or lowered payments made to satisfy medical bills in a personal injury action. n134 In Stanley v. Walker, the Indiana Supreme Court held that the plaintiff's medical bills could be introduced to prove the amount of medical expenses when there was no substantial issue that the medical expenses were reasonable, but the collateral source rule, as codified in § 34-44-1-2, did not bar evidence of discounted amounts in order to determine the reasonable value of medical services. n135 The court reasoned that because the defendant sought to submit evidence to the jury concerning the amount accepted in satisfaction of the medical charges without referencing insurance, the evidence was admissible. n136 In response to this judicial decision, the Indiana General Assembly attempted to overturn the Supreme Court's opinion by introducing Indiana House Bill 1255, which would have restored the collateral source rule and prohibited a court from admitting into evidence a write-off, discount or other deduction associated with a collateral source payment in a personal injury or wrongful death action. n137 Representatives from the Defense Trial [*129] Counsel of Indiana, Insurance Institute of Indiana, Indiana Department of Insurance, State Farm Insurance, Indiana State Medical Association, Indiana Hospital Association, Indiana Chamber of Commerce and Indiana Manufacturers Association spoke in opposition to the legislation and in support of the Stanley decision. n138 The Indiana Manufacturer's Association explained that the legislation is necessary due to "phantom damages [that] amount to a windfall profit for the plaintiff and especially for the personal injury attorney." n139 The Bill failed in the Senate Judiciary Committee. n140

In November 2009, Ohio House Bill 361 was introduced n141 in an attempt to overrule an Ohio Supreme Court decision from earlier that year holding that the admission into evidence of payment amounts from health insurers to health care providers did not violate Ohio's statutory collateral source rule because such write-offs were not collateral source benefits at all. n142 Ohio House Bill 361 sought to [*130] prohibit defendants in personal injury and wrongful death cases from introducing evidence of medical charges or fees that were written off, negotiated, or waived by the

plaintiff's medical service provider or hospital. n143 An insurance defense lawyer representing the Ohio Association of Civil Trial Attorneys (OACTA) testified before the Ohio House Civil and Commercial Law Committee in opposition to House Bill 361, framing the issue as "[a] plaintiff's perceived entitlement to a windfall for phantom damages." n144 He further insisted that "the amounts that are written off are simply amounts that disappear" and that "if the ... proposed legislation is enacted, those amounts will be revived in the form of a windfall for plaintiffs." n145

The Connecticut General Assembly modified the collateral source rule by permitting the admissibility of evidence of collateral source payments and providing for awards to be offset by the amount paid by collateral sources less any amount paid by the claimant to secure the benefit. n146 In an attempt to repeal this statute, Connecticut House Bill 6492 was introduced in 2011. n147 Lobbyist Susan Giaccalone testified on behalf of the Insurance Association of Connecticut opposing the bill:

Many times doctor's bills are cut because of insurance, because of a deal they've cut with the plaintiff... . This [bill] would allow them to get a windfall, sending up charges, driving up settlement [*131] amounts. It should be for the jury to decide why the bill was what it is. They should hear the full evidence of what was actually paid and not what the phantom charges were, which is current practice. n148

When the Insurance Association of Connecticut issued a statement to the Judiciary Committee, urging rejection of this Bill, the rhetoric was repeated. n149

In 2003, the Texas Legislature passed House Bill 4 that abrogated the collateral source rule. n150 Bill 4 amended a section of a Texas statute that previously provided: "In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." n151 Subject to great confusion among practitioners and judges, the statute prevented a plaintiff from recovering medical bills that were discounted or written off by medical providers pursuant to an agreement with the plaintiff's health care insurers. n152 In 2007, Texas House Bill 3281 proposed repealing this statute. n153 The bill proposed requiring defendants to pay the amount of plaintiffs' medical bills regardless of discounts or [*132] other write-offs as economic damages. n154 Governor Rick Perry vetoed the bill, stating that "the purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant's actions," and that they "should not be used to artificially inflate the recovery amount by claiming economic damages that were never paid and never required to be paid." n155

Increasingly, legislatures are abrogating the application of the collateral source rule in personal injury cases, and this trend is being influenced by the rhetorical themes that health care providers' bills are illusory, having no consequences in reality, and that a plaintiff's recovery of those billed costs would be a windfall gain. As demonstrated in the next section, these labels are inaccurate and a body of new legislation is being propped up by rhetoric rather than reality.

[*133]

III. The Power of a Windfall and the Illusion of Illusory Medical Bills

In the name of "tort reform," there has been a steady attempt to avoid what many consider to be the [collateral source] rule's greatest evil: a windfall to the plaintiff ... . n156 As demonstrated above, the labels windfall and illusory have powerful legal and social implications, and these labels are commonly attached to an injured plaintiff's recovery of her medical bills when those bills have been discounted and then satisfied by reduced payments from the plaintiff's private health insurance. The labels are noted in judicial opinions and repeated to legislators responding to this issue. In this section, I argue that the labels are inaccurate, but with repetition they are becoming more legitimate pieces of the conversation each time the issue is addressed.

As a precursor to this discussion, it must be noted that rhetoric has been synonymous with law for centuries: "The ancient rhetorician Gorgias (in Plato's dialogue of that name) defined rhetoric as the art of persuading the people about matters of justice and injustice in the public places of the state ... ." n157 Rhetoric has generally been accepted in the practice of law because "legal storytellers use stories rhetorically in an attempt to persuade others to accept their version of what happened," n158 which is one of the main goals of lawyers in litigation. Because "law always operates through speakers located in particular times and places speaking to actual audiences about real people ... all these things mark it as a rhetorical system." n159 This is conducive with the dictionary definition of the word rhetoric as "a skill in the effective use of speech." n160 Indeed, advocacy through skillful choice of language is a [*134] routine and revered

practice in litigation. n161 Even judges have emphasized that the use of rhetoric is allowed in their courtrooms. n162 Nevertheless, the rhetoric becomes dangerous when a body of law is propped up by the unsavory implications associated with certain labels, rather than reality.

As discussed above, the label windfall connotes a fear that the whole of society will pay for plaintiffs' excess recovery. n163 In personal injury cases, defendants underscore this concern that citizens will pay for plaintiffs' underserved financial gain through higher insurance premiums if the collateral source rule is applied since insurance liability carriers are the entities paying these damages. For example, an amicus brief filed on behalf of Association of Southern California Defense Counsel in support of the defendants in Howell v. Hamilton Meat Co., argued:

What if this Court effects a sea change in the law and remakes the collateral source rule, will that be a fair, just and good outcome? Well, the result will be that plaintiffs will recover windfall "compensatory" damages that, in fact, are not compensation for anything that anyone has paid to someone else. That money will not come out of nowhere. It will come from defendants and their insurers. The result will be that defendants will have to increase the prices that they charge to the public at large for goods and services that they sell and insurers will have to raise premiums charged to the public at large. Thus, the [*135] public at large will ultimately bear the burden of providing windfall profits to a select group - tort litigation plaintiffs. That's neither fair, just, nor good public policy. n164

However, economic studies have shown that liability judgments have little, if any, effect on liability insurance premiums and there is no correlation between tort reform and liability insurance rates. n165 In California, for example, where there is no legislation on point and courts have been bound by stare decisis since 2001 to permit recovery in personal injury cases for only the amount actually paid by a plaintiff's health care provider, n166 liability insurance premiums have not decreased. n167 Indeed, The American Insurance Association (AIA) and representatives of the American Tort Reform Association (ATRA) readily acknowledge this in a statement by the AIA: "The insurance industry never promised that tort reform would achieve specific premium savings." n168

Remarkably, rather than responding to the misleading nature of the terminology, plaintiffs often argue that the windfall is permitted in certain circumstances. n169 But recognizing the plaintiff's [*136] recovery as a type of windfall that the legal system permits propagates the false idea that the recovery is a windfall at all. Even the Restatements seem to support the characterization of plaintiff's recovery in these situations as a type of permissible windfall, n170 and one court has stated, "to the extent that such a result provides a windfall to the injured party, we have previously recognized that consequence and concluded that the victim of the wrong rather than the wrongdoer should receive the windfall." n171 While such logic may be appealing to plaintiffs in the midst of litigation, it reinforces to the courts, the legislatures that may later respond, and the citizens reading news reports that plaintiffs are reaping an unjustified gain at the expense of society.

Labeling the recovery of the negotiated rate differential as a windfall in personal injury cases also defies basic contract principles because tortfeasors receive a discount on their liability due to a third party contract to which they were neither a party nor an intended beneficiary. n172 A person generally obtains health insurance by entering into a contract with a health insurer and maintains that insurance by paying premiums to the insurer. n173 As part of the contract, the insured typically must obtain care from a health care provider that is pre-selected by her insurer, and as part of the contract between the health care provider and the insurer, the health [*137] care provider discounts its medical bills to the insured. n174 The insurer also negotiates alternative rate contracts with the medical care providers. n175 These discounted rates and write-offs are some of the benefits that an insured receives as part of the contract with the health insurers. n176 The discounts are shown on the benefit statements that an insured receives from his health care provider, which detail the original charges, the payments by the insurer, and the write-off taken by the health care provider. n177 Health care providers are willing to provide steep discounts off their customary and regular medical charges to the insurers in return for a steady stream of patients referred to the health care provider by the insurer, as well as other contract benefits such as an expedited payment, pre-approvals, marketing, and advertising. n178

Another piece of this contractual relationship between the health care insurer and the insured, an injured plaintiff, is that insurers often have a contractual right to subrogation from the plaintiff. This entitles the insurer to a lien and the right to reimbursement for damages the plaintiff receives in a personal injury case attributable to payments made by the insurer. n179 A right of subrogation extends only to amounts paid by the insurer and [*138] therefore the right to subrogation does not allow a health care insurer to recover the amount of the contractual write-off. n180 The write-off can be significant n181 and with no right to subrogation by the insurer, if the plaintiff recovers this amount from the defendant tortfeasor, it is her gain that she has thoughtfully contracted for, and it is not meant to benefit the tortfeasor.

n182 Indeed, the tortfeasor and his liability carrier are not intended beneficiaries in any of these contractual relationships.

When subrogation is at issue, a plaintiff's recovery of the actual amount that his health insurer billed may actually benefit the health insurer because it may encourage subrogation. For example, if a medical care provider bills a plaintiff $ 20,000 and then writes off $ 15,000 due to the contractual agreement with the insurer, the health care provider is paid only $ 5,000. If the insurance company is subrogated, the insurer can claim back $ 5,000 from the plaintiff when the plaintiff settles the case or obtains a verdict. If the plaintiff recovers $ 20,000 from the defendant tortfeasor, the insurer will likely be able to claim back the entire $ 5,000, the entire amount it paid out. The health insurer then has recovered all of what it paid out. If a plaintiff can only recover the $ 5,000 in medical expenses from the defendant tortfeasor, a plaintiff's attorney may attempt to [*139] negotiate that bill down further so that the insurer recovers less than the amount it could have otherwise claimed back. Health insurers may be willing to engage in these negotiations because they are aware that litigation costs and fees, including a percentage paid to the attorney under most contingency fee agreements, eat up much of the plaintiff's recovery; to encourage settlement and claim back any amount, a health insurer may agree to lower its subrogation claim.

Defendant tortfeasors and the liability insurance companies advancing the misleading rhetoric are the ones with a true windfall when the collateral source rule is not applied. Fewer lawsuits may be brought where abrogation of the collateral source rule renders some legitimate personal injury litigation futile since receipt of collateral benefits defined in the statute makes pursuit of a claim not worth the time and expense involved. n183 Abolition of the collateral source rule in personal injury cases will likely result in many personal injury claims either going unfiled or settling early, n184 a victory to liability insurance companies paying the tortfeasors defense costs and judgments, but a serious policy concern with respect to injured citizens' access to courts and the deterrent value of tort law. Moreover, personal injury lawyers paid on a contingency basis may necessarily make decisions regarding which cases to accept based on the potential recovery, and where recovery is limited because of collateral source payments, those prudent plaintiffs with the foresight to purchase health insurance become the least desirable [*140] clients. Where the plaintiff's primary loss is pecuniary and has already been paid through her private health insurance, there is no financial benefit to the plaintiff or a lawyer working on a contingency basis to file a lawsuit. The tortfeasors and liability carriers then have a lighter litigation load.

Finally, bills sent by medical care providers are not a sham for gouging liability carriers. They are real obligations that, but for a plaintiff's private health care insurance, the patient would be responsible for satisfying. n185 While the billed amount may not reflect the cost to the medical care provider for actually providing the service, the patient's responsibility for the bill is real, and but for insurance, the patient would be responsible for satisfying that amount. n186 That is, a privately insured patient actually incurs the medical provider's full charges and only by virtue of this private contract that he entered into in advance is he spared from paying the full amount. n187 While medical care providers often discount bills for uninsured patients, there is no legal obligation for them to do so. n188 If a plaintiff does not have medical insurance coverage, he may seek to negotiate the bill himself, but he is liable for the entire amount billed, and harsh collection tactics are often directed at these patients. n189

When a medical care provider treats a patient, it has an enforceable claim for payment for its services, regardless of the patient's insurance status. n190 Indeed, this enforceability is illustrated [*141] by the number of personal bankruptcy filings in the United States due to debt resulting from medical bills. n191

The labels illusory and windfall are misleading when used to characterize an injured plaintiff's medical bills and the recovery of that amount as economic damages. An injured plaintiff's medical bills are not illusory; those bills are real and a plaintiff's recovery of the amount billed by a health care provider is not a windfall, but rather is a return on a prudent investment obtained through foresight and diligence by the plaintiff that society should want to encourage.

IV. A Proposal to Maintain Application of the Collateral Source Rule

"How many legs does a dog have if you call the tail a leg? Four. Calling a tail a leg doesn't make it a leg." n192

As demonstrated above, the labels illusory and windfall are tools skillfully used by defendant tortfeasors and insurance liability carriers to paint injured plaintiffs' medical bills and economic damages with a coat of objectionable connotations. The use of this rhetorical device is a prominent legal strategy directed at the collateral source rule as applied to recovery of the negotiated rate differential in personal injury cases. Despite the inaccuracy of this

terminology, with repetition, a body of law is being created based in part on the implications associated with these labels, rather than reality.

[*142] Economic damages to an injured plaintiff, including the reasonable value of medical services, should be calculated by the amount charged by the health care provider. The negotiated rate differential is a collateral source benefit to an insured plaintiff, and neither the judiciary nor the legislature should abolish the common-law collateral source rule in this context based on the inaccurate notion that the medical care providers' bills are illusory or that plaintiff will be recovering a windfall.

The tension between the legislature and the judiciary is demonstrated by the judiciary's near universal application of the doctrine and the legislative response to those decisions. Without direction from the legislature regarding application of the collateral source rule in a personal injury case, the judiciary should not interfere with the private contractual relationship between a plaintiff and his health care insurer. n193 Certainly, if abrogation of the collateral source rule is warranted in any circumstances, it is properly left to the legislature. But when the legislature steps into the arena of medical insurance benefits, the influences on the legislature should be based on reality rather than rhetoric. There is no foundation in law to legislatively redistribute an economic gain earned via a legitimate financial investment and freely-negotiated contract between third parties to the tortfeasor that caused the injury or that tortfeasor's insurer.

Even where legislatures have stepped into the arena of calculating compensatory damages for the "reasonable value of medical services," in cases where the negotiated rate differential is high, the layers of complexity and the time and expense necessary to fairly litigate the process is, as a practical matter, almost overwhelming. n194 For example, where evidence of discounts and [*143] write-offs are admissible, plaintiffs and defendants are required to expend considerable resources to gather and present evidence and witnesses to support the reasonable value of medical services. Because the discount procured by a health care provider arises out of a contractual relationship with health insurers and reflects a number of factors, both parties have to produce documents and witnesses to testify to this information. This necessarily prolongs trials and increases the costs associated with litigation, generally benefitting the defendant.

As a matter of fairness, legislation modifying the collateral source rule would have to require that a court set off the amount the person paid in obtaining the health insurance benefits. Thus, evidence of the amount of insurance premiums paid by the plaintiff to keep her health care insurance in force should also be admissible. This amount should, at minimum, be reimbursed to the plaintiff for her out-of-pocket financial expenses. Therefore, plaintiffs would have to prove the total amount in medical insurance premiums that they paid for years. This calculation is particularly complex when insurance is provided, in whole or part, as a piece of the plaintiff's compensation package by an employer. The issue of how far back the plaintiff should be reimbursed for maintaining the health insurance would also necessarily arise. Surely, at some point, the costs associated with plaintiff's maintenance of her health care insurance would exceed the amount of the discount or write-off that the defendant is attempting to avoid paying. Thus, legislation must also account for the situation in which the plaintiff's insurance premiums are higher than the negotiated rate differential.

A reality of personal injury litigation is the behind-the-scenes negotiation that often occurs when a plaintiff does not have health care insurance. Most uninsured plaintiffs negotiate their health care bills, and therefore, legislation that fails to account for this possibility ends up providing a greater award to the uninsured plaintiff than the insured one. The "usual and customary" charges for medical care are paid in full by very few uninsured patients or health care insurers, and abolition of the collateral source rule will [*144] not account for the uninsured plaintiff's private negotiations with a health care provider, which may result in the uninsured plaintiff actually pocketing a larger recovery than the insured plaintiff. n195 For example, if a medical bill is $ 5,000, but the plaintiff's insurance company bargains the bill down to $ 1,000, with abrogation of the collateral source rule, the insured plaintiff would only recover the amount paid by the insurance company - the $ 1,000. If the insurance company has a right of subrogation, the recovery for the medical bills is sent to the health care provider, and the plaintiff pockets nothing. The more fortunate uninsured plaintiff can recover the full $ 5,000 that was billed to him by the health care insurer. The uninsured plaintiff may still negotiate the bill down, satisfy the bills with a significantly lower payment, and pocket the difference. Thus, the responsible plaintiff with the foresight to buy insurance and pay premiums over the course of many years may recover less than her uninsured counterparts. In this instance, application of the collateral source rule would encourage people to acquire insurance. Certainly, the fact that they have done so should not benefit the people who injure them, and, at the very least, an uninsured plaintiff should not end up with a greater recovery than an insured plaintiff.

While outside of the scope of this Article, these concerns acknowledge that safeguards are necessary to ensure that health care providers are not perpetrating fraudulent pricing schemes for the sole purpose of inflating personal injury recoveries. n196 Nevertheless, the proper remedy for truly illusory medical bills - ones that are actually fictional, phantom, fantastical, fraudulent, and meant only to gouge liability carriers and rightfully not upheld under the law - is to [*145] ensure legal consequences for those medical care providers that are responsible for health care billing fraud. The

judicial and legislative responses should not be to assume that medical bills have no consequences to an insured plaintiff and redirect to the defendant tortfeasor the legitimate financial benefit that the plaintiff contracted for with the health care insurer.

V. Conclusion

Despite its inaccuracy, framing an insured plaintiff's medical bills as illusory and a plaintiff's recovery of that amount as a windfall gain has become a pervasive rhetorical device advanced by defendant tortfeasors - and insurance liability carriers - to influence courts and legislatures to abolish the collateral source rule in personal injury cases. With such use and repetition, these labels have taken on credence and have become a part of the conversation each time the issue is addressed. While application of the collateral source rule is still mostly assured in the absence of legislation directing the judiciary otherwise, the unsavory social and legal implications of the labels windfall and illusory are embedded in many court opinions. States' legislatures are influenced by this same rhetoric to pass legislation abrogating the collateral source rule in personal injury cases, often responding directly to the policy concerns of illusory medical bills and windfall gains that are highlighted in court opinions. The result is that a body of tort legislation that wrongfully abrogates the collateral source rule is being created based on the implications associated with these labels, rather than reality.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsGeneral OverviewTortsDamagesCollateral Source RuleInsurance PaymentsTortsDamagesCompensatory DamagesMedical Expenses

FOOTNOTES:

n1. *Lopez v. Safeway Stores, Inc., 129 P.3d 487, 488 (Ariz. Ct. App. 2006).*

n2. Id.

n3. Id.

n4. Id.

n5. Id.

n6. *Id. at 491.*

n7. *Id. at 495.*

n8. *Id. at 496;* Restatement (Second) of Torts: Apportionment of Liability § 920A (1979) (stating that the collateral source rule provides that "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 a part of the harm for which the tortfeasor is liable"). See infra Part II.B. (outlining the use of the collateral source rule).

n9. *Lopez, 129 P.3d at 497.*

n10. Id.

n11. *Id. at 491.*

n12. *Id. at 495.*

n13. Some, but not all, states distinguish policy reasons for applying the collateral source rule to the negotiated rate differential in circumstances where the plaintiff's insurance was private health care insurance as opposed to Medicaid or a state welfare-type insurance. See generally *77 A.L.R. 3d 366 (1977)* (discussing effect of receiving public relief or gratuity on collateral source rule). This Article is limited to analyzing the application of the collateral source rule to cases where the injured plaintiff's medical bills were satisfied by private health insurance paid for by the plaintiff or by a third party on behalf of the plaintiff, rather than the tortfeasor, thus making the plaintiff personally liable via contract for her healthcare provider's charges. In particular, this Article only addresses the calculation of that portion of a plaintiff's economic damages that are covered by plaintiff's private health insurance. This Article does not address instances where, because Medicaid or another government-provided insurance satisfied the plaintiff's health care bills, a plaintiff incurs no personal liability for charges to the health care plan. For a discussion regarding policy implications involved in application of the collateral source rule where plaintiff is insured by Medicaid or state welfare insurance, see generally Guillermo Gabriel Zorogastua, Comment, Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs, *55 U. Kan. L. Rev. 463 (2007)* (discussing policy implications involved in applying collateral source rule where plaintiff is insured by Medicaid or other state welfare insurance).

n14. The term tort reform itself has been subject to debate. See, e.g., Joshua D. Kelner, Anatomy of an Image: Unpacking the Case for Tort Reform, *31 U. Dayton L. Rev. 243, 305 (2006)* (arguing the term tort reform is a misnomer). See also Tort Deform, The Civil Justice Def. Blog (May 10, 2007), http://www.tortdeform.com (purporting to be a blog that "confronts and transcends the arguments put forth by the tort "reform' movement, and advocates for access to justice and the civil justice system for all Americans").

n15. See generally Bryan A. Garner, The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts (3d ed. 1999) (containing an entire section specifically covering word choice); Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 113 (2008) (urging the reader to "banish jargon, hackneyed expressions, and needless Latin"); James E. Murray, Understanding Law as Metaphor, 34 J. of Legal Educ. 714 (1984) (discussing importance of metaphorical thinking in law); Kristen K. Robbins-Tiscione, A Call To Combine Rhetorical Theory and Practice in the Legal Writing Classroom, *50 Washburn L.J. 319 (2011)* (advocating incorporation of rhetorical theory in legal writing courses); Kathryn M. Stanchi, The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader, *89 Or. L. Rev. 305, 308 (2010)* (noting that priming makes certain words more immediate and accessible to the brain); Deborah Zalesne & David Nadvorney, Integrating Academic Skills into First Year Curricula: Using Wood v. Lucy, Lady Duff-Gordon to Teach the Role of Facts in Legal Reasoning, *28 Pace L. Rev. 271, 288 (2008)* (discussing the effective use of word choice in legal writing).

n16. See *22 Am. Jur. 2d Damages § 396* (2003) (stating a plaintiff is entitled to recover both economic and non-economic damages).

n17. There are several compilations of states' limitations on damages. See, e.g., Bruce A. Menk, A Review of State Law Concerning Paid vs. Billed Medical Expenses and the Collateral Source Rule, ALFA Int'l, Issue 4, 2009, at 17 (analyzing billed versus paid medical expenses and the collateral source rule state-by-state); Collateral Source Rule Reform, Am. Tort Reform Ass'n, http://www.atra.org/issues/index.php?issue=7344 (last visited Oct. 17, 2011) (listing all states' collateral source rule reforms); LexisNexis, Charts with Analysis: Torts, Tort Reform (follow "Legal" link, then "50 State Multi-Jurisdictional Surveys" then "Torts Multi-Jurisdictional Surveys with Analysis," and then "Tort Reform" link) (listing state-by-state limitations on and structure of damages).

n18. See Menk, supra note 17, at 18-25 (listing several states that do not allow evidence of actual payments to reduce damage awards).

n19. See, e.g., *Fischer v. Steffen, 797 N.W.2d 501, 513 (Wis. 2011)* (holding that plaintiff was not entitled to recover the value of his insurer's subrogation claim after his insurer paid the policy limits for medical expenses and subsequently pursued and lost its subrogation claim in arbitration); *Paulson v. Allstate Ins. Co., 665 N.W.2d 744, 754-55 (Wis. 2003)* (holding that a motorist, who had already received the amount of the total car repair bill, was not entitled to the difference between the amount his insurer paid for car repairs and the amount it ultimately settled for in its agreement with the other driver's insurer).

n20. *Fischer, 797 N.W.2d at 513* (ruling that plaintiff was not able to recover total amount billed by insurer, but rather only amount actually paid by insurer and accepted by health care provider as satisfaction of medical bills).

n21. See Bryce Benjet, A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards, *76 Def. Couns. J. 210, 213-46 (2009)* (noting that the legislatures of twenty-eight states have either abolished or modified the collateral source rule in some context). The states that have modified the rule are: Alabama, Arizona, California, Florida, Hawaii, Illinois, Kentucky, Maine, Missouri, Montana, New Jersey, New Mexico, Oklahoma, Pennsylvania, and West Virginia. Id. The thirteen states that have completely abolished the rule are: Alaska, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, New York, North Dakota, Ohio, and Oregon. Id.

n22. See, e.g., *Alaska Stat. § 09.17.070* (2006) (modifying common-law collateral source rule by allowing court to reduce injured party's jury award to reflect un-subrogated collateral source payments in certain situations, thereby limiting the circumstances in which victim can receive double recovery while enhancing chances that tortfeasor may not be held fully accountable); *N.Y. C.P.L.R. § 4545(a)*-(c) (2011) (requiring verdict to be reduced in all personal injury or wrongful death cases where any collateral source payments have been made and specifically excluding payments from only life insurance, Medicare, and collateral sources entitled by law to lien against plaintiff's recovery); *N.J. Stat. Ann. § 2A:15-97* (West 2010) (permitting court to deduct any "duplicative award" from plaintiff's recovery).

n23. *Ala. Code § 6-5-545* (2008); *Ariz. Rev. Stat. Ann. § 12-565* (2007); *Cal. Civ. Code § 3333.1* (West 2011); *Del. Code Ann. tit. 18, § 6862* (2008); *Mass. Gen. Laws ch. 231, § 60* (2008); *Me. Rev. Stat. Ann. tit. 24, § 2906* (2007); *Neb. Rev. Stat. § 44-2819* (2007); *Okla. Stat. tit. 63, § 1-1708.1D* (2007); *40 Pa. Cons. Stat. § 1303.508* (2007); *R.I. Gen. Laws § 9-19-34.1* (2007); *S.D. Codified Laws § 21-3-12* (2008); *Utah Code Ann. 78B-3-405* (West 2007); *Wis. Stat. § 893.55* (2007). See James J. Watson, Annotation, Validity and Construction of State Statute Abrogating Collateral Source Rule as to Medical Malpractice Actions, *74 A.L.R. 4th 32 (1989)* (collecting and analyzing state and federal cases that discuss construction and validity of state statutes which abrogate collateral source rule in medical malpractice lawsuits).

n24. Alaska Stat. § 9.17.070 (2000); *Minn. Stat. § 548.251* (2000); *N.D. Cent. Code § 32-03.2-06* (2001).

n25. *Colo. Rev. Stat. 13-21-111.6* (1997); *Conn. Gen. Stat. 52-225a* (1991); *Fla. Stat. Ann. 768.76* (West 1994); *Idaho Code 6-1606* (Michie 1998); *Ind. Code 34-44-1-2* (1998); *Iowa Code 668.14* (1998); *Mich. Comp. Laws 600.6303* (2000); *Mont. Code Ann. 27-1-308* (2009); *N.J. Stat. Ann. 2A:15-97* (West 2000); *N.Y. C.P.L.R. 4545(a)*. See also Jamie L. Wershbale, Tort Reform in America: Abrogating the Collateral Source Rule Across the States, *75 Def. Couns. J. 346, 355-56 (2008)* ("While current modifications to the collateral source rule vary nationwide, the reforms so far apply primarily to medical malpractice actions. Yet, the underlying rationale for reforming the collateral source rule - preventing plaintiff windfalls and decreasing insurance rates - applies in all personal injury actions. As the rationale is valid in all tort actions, it is difficult to understand why legislatures and courts across the nation have yet to abolish application of the collateral source rule across the board... . Given the current state of the law and insurance rates, it appears that the ultimate logical conclusion is complete abrogation of the collateral source rule in all tort actions.").

n26. *Neb. Rev. Stat. Ann. § 44-2819* (West 1976) (stating that evidence of collateral source payments are not admissible in personal injury action, but such payments may be taken as credit against any judgment rendered).

n27. See, e.g., *Goble v. Frohman, 901 So. 2d 830, 832-33 (Fla. 2005)* (finding that amounts of contractual discount should be set off against award of compensatory damages); *Slack v. Kelleher, 104 P.3d 958, 967 (Idaho 2004)* (reducing district court judgment to account for Medicare write-off as collateral source).

n28. See, e.g., *Robinson v. Bates, 857 N.E.2d 1195, 1200-01 (Ohio 2006)* (holding that jury may determine that reasonable value of medical services is amount originally billed, amount accepted as payment, or some amount in between).

n29. President Participates in Social Security Conversation in New York, White House Office of the Press Secretary (May 24, 2005, 10:48 AM), http://georgewbush-whitehouse.archives.gov/news/releases/2005/05/20050524-3.html.

n30. See Geoff Boehm, Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform", *5 Yale J. Health Pol'y L. & Ethics 357, 357-58 (2005)* (addressing unfounded rhetoric of lobbyists in medical malpractice tort reform legislation and arguing that "tort reform lobbyists seeking to limit the rights of victims of medical malpractice through caps on damages often string together various concerns about health care in the United States that are unrelated to, or would not be addressed by, the reforms they seek[;] in particular, the insurance industry and other tort reform proponents rely on misinformation and largely anecdotal evidence that the civil justice system is "out of control' and needs to be scaled back. However, the facts reveal a different picture.").

n31. *Id. at 360.* See also Am. Ass'n for Justice, Medical Negligence: The Role of America's Civil Justice System in Protecting Patients' Rights 11 (2011), http://www.justice.org/resources/medical-negligence-primer.pdf (discussing five myths surrounding medical negligence).

n32. See *Am. Ass'n for Justice, supra* note 31, at 16 (arguing that most malpractice suits are legitimate and that medical negligence litigation does not directly affect number of physicians practicing in a certain state); Boehm, supra note 30, at 357-62 (discussing unfounded rhetoric of tort reform lobbyists).

n33. Boehm, supra note 30, at 357-63. E.g., Budget Office, U.S. Congress, Limiting Tort Liability for Medical Malpractice 1 (2004); Office of Tech. Assessment, U.S. Congress, Defensive Medicine and Medical Malpractice 1 (1994).

n34. Boehm, supra note 30, at 365 (demonstrating that tort reform in medical malpractice arena has failed to bring down insurance rates and that insurance companies themselves never promised any savings would be passed along to the public) (citing J. Robert Hunter & Joanne Doroshow, Ctr. for Just. & Democracy, Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Prices 19 (2002), http://insurance-reform.org/PremiumDeceit.pdf). See also Katherine Baicker and Amitabh Chandra, Defensive Medicine and Disappearing Doctors, 28 Regulation 24, 28-31 (2005) (finding that "when the number or size of malpractice payments rises, there is very little accompanying increase in the malpractice premiums paid by physicians" and stating that "[a] closer look at available data suggests that some of the rhetoric surrounding this debate may be misleading. First, increases in malpractice premiums do not seem to be the driving force behind increases in premiums.").

n35. The New American Webster Dictionary (3d ed. 1995). See also Eric Kades, Windfalls, *108 Yale L.J. 1489, 1491 (1999)* ("In common usage, a windfall is a "casual or unexpected acquisition or advantage,' or an "unexpectedly large or unforeseen profit.'"). Kades also notes the word's origin stems from medieval England "when commoners were forbidden to chop down trees for fuel. However, if a strong wind broke off branches or

blew down trees, the debris was a lucky and legitimate find" (citing William Morris & Mary Morris, Morris Dictionary of Word and Phrase Origins 605 (1977)).

n36. See Christine Hurt, The Windfall Myth, *8 Geo. J.L. & Pub. Pol'y 339, 350-52, 354 (2010)* (identifying various categories where this term is used in both legal discourse and popular culture, including "Illegal Windfalls" - "willful increases to wealth that violate either criminal or civil laws"; "Wrongful Windfalls" - "those not earned by either the provision of capital or services, or warranted to compensate for a loss or harm" or "void under contract doctrines such as fraudulent misrepresentation, mistake, or unconscionability"; "Classic Windfalls" - "benefits that [are] not earned, but not prohibited by law, such as treasures falling from the sky"; "Gratuitous Windfalls" - those arising where "payor intends a benefit upon the recipient, although the recipient did not provide any type of consideration"; and "Earned Windfalls" - "economic benefits that [are] the returns on some action by the beneficiary"). Professor Hurt argues that an "Earned Windfall," is not a windfall at all, but rather flows from contract and property rights. *Id. at 350-51.* Due to popular contempt, however, the word is mischaracterized as an "illegal" or "wrongful" windfall. Id.

n37. *Id. at 341.*

n38. See *id. at 342* (comically noting that "once an economic gain is spotted that seems suspiciously large or too easily earned, then like the "pod people' in Invasion of the Body Snatchers, the observer must point and alert the public that this "windfall' gain deviates from an acceptable baseline").

n39. Id. See also Kades, supra note 35, at 1493, 1504 (exploring how courts have "used and abused the windfall label" since "courts frequently find a windfall where none exists by overlooking important ways in which parties make plans").

n40. Hurt, supra note 36, at 342.

n41. Id. at 343.

n42. Windfall Profit Law & Legal Definition, USLegal.com, http://definitions.uslegal.com/w/windfall-profit%20/ (last visited Oct. 17, 2011).

n43. Hurt, supra note 36, at 342.

n44. See Catherine M. Sharkey, Punitive Damages as Societal Damages, *113 Yale L. J. 347, 352 (2003)* (discussing existing conceptions of punitive damages and plaintiffs' windfall gains).

n45. *Id. at 370.*

n46. See, e.g., *Alaska Stat. § 09.17.020(f)* (Michie 2002) (limiting punitive damages to the larger of either three times the compensatory damages or $ 500,000); *Ind. Code Ann. § 34-51-3-4* (Michie 1998) (imposing a punitive damages cap of the greater of three times compensatory damages or $ 50,000). See also Daniel Kahneman, David Schkade & Cass R. Sunstein, Assessing Punitive Damages, *107 Yale L.J. 2071, 2094 (1998)* (noting that many states are considering more conventional reforms which would impose caps); Punitive Damages Reform, Am. Tort Reform Ass'n, http://www.atra.org/show/7343 (last visited Oct. 3, 2011) (providing explanation of states' punitive damage limits).

n47. Abstract, Christine Hurt, The Windfall Myth, *8 Geo. J.L. & Pub. Pol'y 339 (2010),* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id-=1456466.

n48. Hurt, supra note 36, at 380.

n49. Furthering the perception that society at large is paying for unjustifiable financial gains that could be reduced with the abolition of the collateral source rule, some financial studies support this view. See Manfred H. Ledford, A Suggested Role for Collateral Sources of Indemnification in Tort Reform Legislation, 2 Bus. Law Brief 27, 28 (2005) (proposing micro-economic model that demonstrates that collateral source rules are economically inefficient, with "claimants receiving windfalls at the expense of the rest of society"). Professor Manfred Ledford's model analyzes un-subrogated collateral source benefits, specifically life insurance policies paid to surviving claimants in wrongful death cases, and suggests that permitting these benefits to offset a claimant's award would result in "a more equitable and economically efficient solution." Id. at 32. See also id. at 31 (suggesting that plaintiff should not even be permitted to recover expenses incurred to obtain benefits, such as policy premiums). While acknowledging the apparent inequity since "had the premiums not been paid, there would have been more disposable income available to the plaintiff ... [and] by not recognizing this type of expense, decedent/plaintiff would appear to be penalized for the responsible act of providing such protection," he concludes that it does "just the opposite in producing a less than equitable solution for society in general." Id. at 31. He argues a benefit is inured to plaintiff simply by the "sense of security [in] owning the benefit." Id. But see Dan B. Dobbs, Law of Remedies § 8.6(3) (2d ed. 1993) ("If the collateral source rule were abolished, the plaintiff would have paid for security and not for the opportunity for double recovery. He has paid for more only because the law, by allowing for double recovery, in effect requires him to pay for more.").

n50. Conflicting studies further the debate regarding whether the collateral source rule is rational from an economic perspective. Compare Kevin S. Marshall & Patrick W. Fitzgerald, The Collateral Source Rule and its Abolition: An Economic Perspective, *15 Kan. J.L. & Pub. Pol'y 57, 57 (2005)* (arguing that the collateral source rule is rational from both economic and legal perspectives), with Ledford, supra note 49, at 32 (concluding that, from a strictly financial perspective, "collateral source rules that prohibit the consideration of loss mitigating payments by third parties cause both net [financial] gains ... and, in all likelihood, a net loss of real capital creation for society in entirety.").

n51. Hurt, supra note 36, at 381.

n52. See e.g., *Lopez, 129 P.3d at 487, 491 (Ariz. Ct. App. 2006)* (noting that at oral argument, defendant Safeway contended that medical bills reflecting higher amount had "nothing to do with anything" because they were largely illusory or "phantom").

n53. *Leitinger v. Dbart, Inc., 736 N.W.2d 1, 17 (Wis. 2007)* (noting defendant's argument that "the amounts billed by health care providers are "fantasy,' "arbitrary,' and "random' figures that have no correlation to the reasonable value of the medical services actually provided"); Remsza v. Acuity A Mut. Ins. Co., No. 2005*AP2701, 2006 WL 2136003, at 1* (Wis. Ct. App. Aug. 2, 2006) (noting defendant's contention "that the billed amounts were "fantasy billings" and therefore amount actually paid was admissible to allow jury to determine reasonable value of the medical services).

n54. Doug Masson, HB 1255 - Collateral Source Payments, Masson's Blog, A Citizen's Guide of Indiana Law (Feb. 3, 2010), http://www.masson.us/blog/?p=6192 (explaining that "the sticker price on a medical bill is often as reliable an indicator of its actual price as the sticker price on a car").

n55. Black's Law Dictionary 816 (9th ed. 2009).

n56. See *United States v. Horton, 334 F.2d 153, 155 (2d Cir. 1964)* (explaining that if prosecutor induces a guilty plea by illusory promise, the conviction would not stand because it would have been procured by deceit); *Lynch v. State, 2 So. 3d 47, 61 (Fla. 2008)* (stating in dicta that consent induced through fraud or deceit is illusory as a matter of law).

n57. See *Johnston v. Kruse, 261 S.W.3d 895, 898* (Tex. App. - Dallas 2008, no pet.) (emphasizing that an illusory promise in contract renders the contract unenforceable because the promisor retains the option to stop performance without notice).

n58. See Black's Law Dictionary 370 (9th ed. 2009) (defining illusory contract as "an agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation").

n59. See *Newman v. Dore, 9 N.E.2d 966, 969 (N.Y. 1937)* (holding that deceased's trust conveyance was not valid because it was illusory, that deceased never intended to divest himself of his property, and evidence illustrated that he was unwilling to divest himself of his property even when he was near death).

n60. See *Jostens, Inc. v. Northfield Ins. Co., 527 N.W.2d 116, 118 (Minn. Ct. App. 1995)* (opining that the concept of illusory coverage is independent means to avoid unreasonable result when literal reading of insurance policy unfairly denies coverage).

n61. *Coosa River Water, Sewer & Fire Prot. Auth. v. S. Trust Bank, 611 So. 2d 1058, 1062-63 (Ala. 1993)* ("[A] settlor may retain powers over the administration of the trust, but ... , except in a declaratory trust, [the settlor] must give up control of the res or trust property itself.").

n62. Dag E. Ytreberg, Annotation, Collateral Source Rule: Injured Person's Hospitalization or Medical Insurance as Affecting Damages Recoverable, *77 A.L.R. 3d 415, 420 (2011);* Dag E. Ytreberg, Collateral Source Rule: Receipt of Public Relief or Gratuity as Affecting Recovery in Personal Injury Action, *77 A.L.R. 3d 366 (2009).*

n63. *Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 66 (Cal. 1970).*

n64. Id.

n65. Richard A. Posner, Economic Analysis of Law 186-87 (6th ed. 2003).

n66. *Arthur v. Catour, 883 N.E.2d 847, 852 (Ill. 2005)* (citing James M. Fischer, Understanding Remedies § 12(a) 77 (1999)).

n67. *Restatement (Second) of Torts § 920A* (1979) (stating that the collateral source rule provides, "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 a part of the harm for which the tortfeasor is liable."). But see *Restatement (Second) of Torts § 911* (1979) (seemingly limiting plaintiff's medical damages claim to amount the health care insurer actually paid, but only in a limited context - where plaintiff "sues for the value of his services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages" - and is generally not applicable to a plaintiff's recovery in a personal injury action). Comment h to Section 911, entitled "Value of services rendered," advises:

The measure of recovery of a person who sues for the value of his services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages, is the reasonable exchange value of the services at the time and place. This may be distinct from and may be either greater or less than an amount that would be given for harm resulting from the loss of time by the injured person ...

...

When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him. A person can recover even for an exorbitant amount that he was reasonable in paying in order to avert further harm.

§ 911 cmt. h (emphasis added).

n68. *Restatement (Second) of Torts § 920A* cmt. c.

n69. Id. at § 920A cmt. b. See also *Am. Jur. 2d Damages § 396*, at 358 (2003) (noting that "a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of medical and nursing services reasonably required by the injury," and "recovery is not necessarily limited to expenditures actually made or obligations incurred for medical care").

n70. *Restatement (Second) of Torts § 920A* cmt. b (emphasis added).

n71. Id. at § 920A cmt. d.

n72. See, e.g., *Cal. Civ. Code § 3333.1* (2011) (authorizing defendant to introduce evidence of "amounts payable as a benefit to the plaintiff as a result of the personal injury" by independent sources in personal injuries against health care providers); *Fla. Stat. Ann. § 768.76* (2011) ("The court shall reduce the amount of [its] reward 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."); *Tenn. Code Ann. § 29-26-119* (2010) (authorizing damages for malpractice liability "only to the extent that such costs are not paid or payable" by independent sources).

n73. Statutory modification of the collateral source rule in personal injury cases is absent or has been held unconstitutional in the following jurisdictions: Arizona: *Lopez v. Safeway Stores, Inc., 129 P.3d 487, 496 (Ariz. 2006);* Arkansas: *Shipp v. Franklin, 258 S.W.2d 744, 747 (Ark. 2007);* California: *Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d at 66-67;* Delaware: *Lomax v. Nationwide Mut. Ins. Co., 964 F.2d 1343, 1348 (3d Cir. 1992);* Georgia: *Ins. Co. of North America v. Fowler, 251 S.E.2d 594, 595 (Ga. 1978); Candler Hosp. v. Dent, 491 S.E.2d 868, 870 (Ga. 1997);* Illinois: *Label Printers v. Pflug, 616 N.E.2d 706, 709 (Ill. 1993);* Kansas: *Thompson v. KFB Ins. Co., 850 P.2d 773, 775 (Kan. 1993);* Kentucky: *O'Bryan v. Hedgespeth, 892 S.W.2d 571, 577 (Ky. 1995);* Louisiana: *Bozeman v. State, 879 So. 2d 692, 700 (La. 2004);* Maine: *Werner v. Lane, 393 A.2d 1329, 1335 (Me. 1978);* Maryland: *Brice v. National R.R. Passenger Corp., 664 F. Supp. 220, 221 (D. Md. 1987),* Massachusetts: *Brown v. Leighton, 434 N.E.2d 176, 181-82 (Mass. 1982),* Mississippi: *Coker v. Five-Two Taxi Service, 52 So. 2d 835, 836 (Miss. 1951);* Missouri: *Overton v. United States, 619 F.2d 1299, 1305-06 (Mo. 1980);* Nevada: *Proctor v. Castelletti, 911 P.2d 853, 854 (Nev. 1996);* New Hampshire: *Dumas v. State Farm Mut. Auto. Ins. Co., 274 A.2d 781, 782-83 (N.H. 1971);* North Carolina: *Kaminsky v. Sebile, 535 S.E.2d 109, 115 (N.C. 2000);* Oklahoma: *Nitzel v. Jackson, 879 P.2d 1222, 1223 (Okla. 1994);* Pennsylvania: *Littman v. Bell Tel. Co. of Pennsylvania, 172 A. 687, 692 (Pa. 1934);* Rhode Island: *Soucy v. Martin, 402 A.2d 1167, 1170-71 (R.I. 1979);* South Carolina: *Parker v. Spartanburg Sanitary Sewer Dist., 607 S.E.2d 711, 717-18 (S.C. 2005);* South Dakota: *Cruz v. Groth, 763 N.W.2d 810, 811 (S.D. 2009);* Tennessee: *Shelton v. Milam, 492 S.W.2d 917, 918 (Tenn. App. 1972);* Utah: *Phillips v. Bennett, 439 P.2d 457, 458 (Utah 1968);* Vermont: *Hall v. Miller, 465 A.2d 222, 227 (Vt. 1983);* Virginia: *Johnson v. Kellam, 175 S.E. 634, 637 (Va. 1934);* Washington: *Ciminski v. SCI Corp., 585 P.2d 1182, 1184-85 (Wash. 1978);* Wisconsin; *Leitinger v. DBart, Inc., 736 N.W.2d 1, 3-4 (Wis. 2007);* Wyoming: *Banks v. Crowner, 694 P.2d 101, 105 (Wyo. 1985).*

n74. See, e.g., *Acuar v. Letorneau, 531 S.E.2d 316, 323 (Va. 2000)* ("To the extent that such a result provides a windfall to the injured party, we have previously recognized that consequence and concluded that the victim of the wrong rather than the wrongdoer should receive the windfall."); *Schickling v. Aspinall, 369 S.E.2d 172, 174 (Va. 1988)* (explaining that there are two types of windfalls - a plaintiff who receives double recovery for a single tort and a defendant who escapes liability for his wrong - and stating that since the law must sanction one windfall and deny the other, that the law favors the victim and not the wrongdoer).

n75. *Restatement (Second) of Torts § 920A* cmt. c. (providing that given the choice between a "double recovery" for the plaintiff and a windfall to the defendant, the "benefit" should be afforded to the injured plaintiff).

n76. See, e.g., *Rose v. Via Christi Health Sys. Inc., 113 P.3d 241, 245 (Kan. 2005)* (using the term windfall).

n77. See, e.g., *Moorhead v. Crozier Chester Med. Ctr., 765 A.2d 786, 791 (Pa. 2001)* (noting, but not analyzing, that a portion of plaintiff's medical bills that were written off were "illusory" and recovery of that amount would provide plaintiff with a "windfall").

n78. *Lopez v. Safeway Stores, Inc., 129 P.3d 487, 496-97 (Ariz. Ct. App. 2006).*

n79. *Id. at 491 n.1.*

n80. *Id. at 496* (citing *Acuar, 531 S.E.2d at 323).*

n81. *Cal. Civ. Code § 3333.1(a)* modifies the collateral source rule in actions against medical providers by allowing the defendant to introduce evidence of a collateral source such as health or disability insurance benefits, but this statute does not apply to recovery in all personal injury cases.

n82. See Cabrera v. E. Rojas Props. Inc., *122 Cal. Rptr. 3d 390, 396 (Cal. Ct. App. 2011)* (holding that collateral source rule does not preclude reduction from amount billed by medical provider to amount actually paid by insurer); *Hanif v. Hous. Auth., 246 Cal. Rptr. 192, 195 (Cal. Ct. App. 1988)* (holding that "reasonable value" measure of recovery does not mean that injured plaintiff may recover from tortfeasor more than actual amount he paid or for which he incurred liability for poor medical care and services). But see Greer v. Buzghelia, *46 Cal. Rptr. 3d 780, 784 (Cal. Ct. App. 2006)* (noting that it is error for plaintiff to recover medical expenses in excess of the paid or incurred, but that evidence of reasonable cost of medical care may be admitted); *Nishihama v. San Francisco, 112 Cal. Rptr. 2d 861, 866 (Cal. Ct. App. 2001)* ("A plaintiff in a personal injury action is entitled to recover from the defendant tortfeasor the reasonable value of medical services rendered to the plaintiff, including the amount paid by a collateral sources, such as an insurer.").

n83. *101 Cal. Rptr. 3d 805 (Cal. Ct. App. 2009).*

n84. Previously, the California Court of Appeals had addressed the issue without reference to the collateral source doctrine and ruled that the proper measure of damages is the amount actually paid for medical services pursuant to a contractually agreed-upon rate, rather than the face amount of original billings. See *Hanif, 246 Cal. Rptr. at 195* (noting that "an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation"). But see Dan B. Dobbs, The Law of Torts § 380, at 134 n.23 (Supp. 2005) ("If confined to [its] facts, [Hanif] could be interpreted narrowly. Hanif involved a Medi-Cal (Medicaid) public assistance plaintiff and might be limited to such cases.").

n85. Howell, *101 Cal. Rptr. 3d at 807-08* (distinguishing Hanif, noting that plaintiff in Hanif was Medicare beneficiary and, as such, had no legal obligation to pay amount originally billed by medical provider).

n86. See Greer, *46 Cal. Rptr. 3d at 781* (affirming trial court's refusal to grant motion to reduce award because defendant did not request jury instruction that differentiated medical expenses from other economic damages). See also Cabrera v. E. Rojas Props., Inc., *122 Cal. Rptr. 3d 390, 396 (Cal. Ct. App. 2011)* (holding that the collateral source rule does not bar reduction of plaintiff's recovery to amount paid by plaintiff's insurance provider rather than allowing recovery for full amount originally billed by her medical provider).

n87. Howell, *101 Cal. Rptr. 3d at 808.*

n88. Id.

n89. *Id. at 809-10.*

n90. *Id. at 810.*

n91. *Id. at 811.*

n92. *Id. at 825.*

n93. *Id. at 815.*

n94. *Id. at 816.*

n95. *Howell v. Hamilton Meats & Provisions, Inc., 227 P.3d 342 (Cal. 2010).*

n96. Proposed Amicus Curiae Brief on Behalf of Ass'n of S. Cal. Def. Counsel in Support of Defendant and Respondent Hamilton Meats & Provisions Co. at 1, Howell v. Hamilton Meats & Provisions, Inc., *101 Cal. Rptr. 3d 805 (Cal. Ct. App. 2009) (No. D053620).*

n97. Id.

n98. Appellant's Brief in Response to the Eight Amici Curiae Briefs Filed in *Support of Respondent at 10, Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130 (Cal. 2011) (No. S179115)* (citation omitted).

n99. Id. at 26.

n100. *Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130, 1133 (Cal. 2011).*

n101. Id.

n102. *Id. at 1143* (citing Michael K. Beard, The Impact of Changes in Health Care Provider Reimbursement Systems on the Recovery of Damages for Medical Expenses in Personal Injury Suits, *21 Am. J. Trial Advoc. 453, 489 (1988)).*

n103. *833 N.E.2d 847, 849 (Ill. 2005).* See also Natalie J. Kussart, Casenote, Paid Bills v. Charged Bills: Insurance and the Collateral Source Rule, *31 S. Ill. U. L.J. 151 (2006)* (indicating that Illinois General Assembly

passed legislation in 2005 to cap non-economic damages in medical malpractice cases in response to medical malpractice "crisis").

n104. *Arthur, 833 N.E.2d at 850.*

n105. *Arthur v. Catour, 803 N.E.2d 647, 649 (Ill. App. Ct. 2004)* (citing *Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 530 (Ill. 1989)).*

n106. Id. at 649.

n107. Id. (emphasis added) (citations omitted).

n108. *797 N.W.2d 501, 502-03 (Wis. 2011).*

n109. *Id. at 519.*

n110. *Id. at 503.*

n111. *Id. at 506.*

n112. *Id. at 503.*

n113. *Id. at 508.*

n114. Id.

n115. *Id. at 527.*

n116. See supra Part II.C. (highlighting cases in which courts have repeated the labels set forth by defendants).

n117. See Benjet, supra note 21, at 213-46 (noting that the legislatures of twenty-eight states have either abolished or modified the collateral source rule in some context). The states that have modified the rule are: Alabama, Arizona, California, Florida, Hawaii, Illinois, Kentucky, Maine, Missouri, Montana, New Jersey, New Mexico, Oklahoma, Pennsylvania, and West Virginia. Id. The thirteen states that have completely abolished the rule are: Alaska, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, New York, North Dakota, Ohio, and Oregon. Id.

n118. *Colo. Rev. Stat. Ann. § 13-21-111.6* (West 2005).

n119. Id. See also *Colo. Permanente Med. Group v. Evans, 926 P.2d 1218, 1230 (Colo. 1996)* (noting "contract exception" and holding that plaintiff's medical expenses should not be deducted from jury award).

n120. *Colo. Rev. Stat. Ann. § 13-21-111.6* (West 2005).

n121. *Volunteers of Am. v. Gardenswartz, 242 P.3d 1080, 1084 (Colo. 2010).*

n122. *Id. at 1087* (quoting *Arthur v. Catour, 803 N.E.2d 647, 649 (Ill. App. 2004))* (emphasis added).

n123. Id. at 1083.

n124. The 68th General Assembly of Colorado proposed amending *Colo. Rev. Stat. § 13-21-111.6* to read: "In any action by any person or a legal representative to recover economic damages, recoverable damages for reasonable and necessary medical or health care, treatment or services, shall include only those amounts actually paid by or on behalf of the injured person to the health care services providers who rendered care, treatment or services ... ." H.B. 11-1106, 68th Gen. Assemb., 1st Reg. Sess. § 1(3) (Colo. 2011).

n125. H.B. 11-1106, Bill Summary. The bill summary states:

The purpose of this bill is to restate and reaffirm the general assembly's intent that the common-law collateral source rule is abrogated and to indicate that a recent decision of the Colorado Supreme Court (Volunteers of America v. Gardenswartz) interpreting the statute on reduction of damages for payments from collateral sources is contrary to the general assembly's intent to prevent compensatory damage awards for medical expenses from exceeding the amount accepted by the health care service provider for treating the injured party.

Id.

n126. Id. § 1(2).

n127. Summarized History for Bill Number HB11-1106, Colo. Gen. Assemb., http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont/ F42E64852 EF8E56D87257810060407E?Open&target=/clics/clics2011a/csl.n sf/billsummary/4B0CBC339B367F90872577DE0055C12E?opendocument (last visited Oct. 3, 2011).

n128. *Brief for Colorado Defense Lawyers Ass'n as Amici Curiae Supporting Petitioner, Tucker v. Volunteers of Am. Colo. Branch, 211 P.3d 708 (Colo. 2008)* (No. 09 SC.20).

n129. Testimony from Heather Salg in Final Bill Summary for HB11-1106, Colo. Gen. Assemb. (Mar. 3, 2011), http://www.leg.state.co.us/clics/clics2011A/- commsumm.nsf/b4a3962433b52fa787256e5f00670a71/36d1c35e97653a0b8 725784800726334?opendocument.

n130. Id.

n131. Id.

n132. Id.

n133. *Ind. Code § 34-44-1-2* (1998).

n134. Id.

n135. *906 N.E.2d 852, 858-59 (Ind. 2009).*

n136. *Id. at 859.*

n137. Indiana H.B. 1255, 116th Gen. Assemb., 2d Regular Sess. (Ind. 2010), available at http://www.in.gov/legislative/bills/2010/HB/HB1255.1.html. The bill provides as follows:

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 for which the plaintiff or members of the plaintiff's family have paid for directly; (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; or (D) a write-off, discount, or other deduction associated with a collateral source payment. (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.

Id. It should be noted that these legislative actions fall outside of this Article's survey period.

n138. Update on Civil Law, The Legis. Update (Jan. 22, 2010), http://indianacourts.us/blogs/legislative/?m=2010&w=3.

n139. See ATRA Legislative Watch, Am. Trucking Ass'n (Feb. 4, 2010), http://www.truckline.com/communities/insurancetaskforce/documen ts/atra%20leg-

islative%20watch%20-%20volume%2023%20-%20No%203.pdf (stating that H.B. 1225 would allow injured party to collect for expenses he or she had no obligation to pay).

n140. Update on Civil Law, The Legis. Update (Feb. 19, 2010), http://indianacourts.us/blogs/legislative/?m=2010&w=7.

n141. Ohio H.R. J., 128th Gen. Assemb., Reg. Sess., at 2025 (Nov. 10, 2009), available at http://www.legislature.state.oh.us/JournalText128/HJ-11-10-09.pdf (last visited Oct. 3, 2011).

n142. *Jaques v. Manton, 928 N.E.2d 434, 436 (Ohio 2010)* (holding that evidence of write-offs is admissible to show the reasonable value of medical expenses).

n143. Jamey Pregon, Testimony of the Ohio Association of Civil Trial Attorneys to the House Civil and Commercial Law Committee, HB 361 - Medical Bills and Evidence (Jan. 19, 2010), available at http://dinklerpregon.com/ news/2010/1/1.1/3.pdf.

n144. Id.

n145. Id. The final report of the Ohio Legislative Service Commission (OLSC), issued on May 2, 2011 shows that House Bill 361 was pending in the Ohio House Civil and Commercial Law Committee, but did not pass third consideration. Ohio Legis. Serv. Comm'n, Final Status Report of Legislation - 128th GA (2011), available at http://www.lsc.state.oh.us/ status128/srl128.pdf.

n146. *Conn. Gen. Stat. Ann. § 52.225a* (West 2005 & Supp. 2011).

n147. See H.B. 6492, 2011 Gen. Assemb., Jan. Sess. (Conn. 2011) ("Statement of Purpose: To provide that evidence that a health care provider accepted, or an insurer paid, a reduced amount of reimbursement for medical care shall not be admissible for the purpose of determining economic damages in civil actions.").

n148. H.B. 6492: An Act Concerning the Admissibility of Medical Bills in Civil Actions, Hearing Before the Judiciary Comm., 2011 Gen. Assemb., Jan. Sess, (Conn. March 9, 2011) (testimony of Susan Giaccalone).

n149. See H.B. 6492: An Act Concerning the Admissibility of Medical Bills in Civil Actions, Hearing Before the Judiciary Comm., 2011 Gen. Assemb., Jan. Sess, (Conn. March 9, 2011) (statement of the Ins. Ass'n of Conn.), available at http://www.cga.ct.gov/2011/juddata/tmy/2011hb-06492-r000309insurance%20association%20of%20connecticut-tmy.pdf (arguing that "prohibiting the introduction of evidence to show that medical expenses received were less than what was billed permits recovery for "phantom damages"' and "allowing the recovery of such phantom charges creates an unearned windfall for claimants by forcing defendants to pay inflated economic damages based on inflated medical expenses").

n150. *Mills v. Fletcher, 229 S.W.3d 765, 769* (Tex. App. - San Antonio 2007, no pet.).

n151. *Tex. Civ. Prac. & Rem. Code Ann. § 41.0105* (West 2011).

n152. See *Matbon v. Gries, 288 S.W.3d 471, 481* (Tex. App. - Eastland 2009, no pet.) (concluding that "amounts that a health care provider subsequently writes off its bill do not constitute amounts actually incurred"); *Mills, 229 S.W.3d at 769* (holding "that section 41.0105 limits a plaintiff from recovering medical or health care expenses that have been adjusted or "written off"').

n153. H.B. 3281, 80th Leg., Reg. Sess. (Tex. 2007).

n154. H.R. 80R-16121 at 1, 80th Leg., Reg. Sess., at 1 (Tex. 2007). The Bill Analysis section of the House Committee Report provides background on the purpose of Texas House Bill 3281:

The 78th Legislature passed legislation which added *Section 41.0105 to the Civil Practices and Remedy Code*. This section states that a plaintiff in a law suit may only recover those medical or healthcare expenses which they had already paid or incurred, but does not allow for any future costs that the claimant may incur ... . C.S.H.B. 3281 would amend this part of the statute in order to clarify that claimants may recover medical or health care expenses incurred actually paid or incurred by or on behalf of the claimant.

Id., available at http://www.legis.state.tx.us/tlodocs/80R/analysis/pdf/HB03281H-.pdf#navpanes=0 (last visited Oct. 3, 2011).

n155. Governor Rick Perry, Veto Statement (June 15, 2007), available at http://www.capitol.state.tx.us/billlookup/BillSummary.aspx?LegS ess=80R&Bill=HB3281.

n156. Nora J. Pasman-Green & Ronald D. Richards, Jr., Who Is Winning the Collateral Source Rule War? The Battleground in the Sixth Circuit States, 31 Tol. L. Rev. 425, 426 (1999).

n157. James Boyd White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, *52 U. Chi. L. Rev. 684, 684-85 (1985).*

n158. Christine Metteer Lorillard, Retelling the Stories of Indian Families: Judicial Narratives that Determine the Placement of Indian Children Under the Indian Child Welfare Act, 8 Whittier J. Child & Fam. Advoc. 191, 192 (2009).

n159. White, supra note 157, at 692.

n160. Merriam Webster's Collegiate Dictionary 619 (11th ed. 2004).

n161. See supra note 15 (citing several books and articles on legal writing stressing the importance of careful word choice in advocacy). See also Richard C. Waites & David A. Giles, Are Jurors Equipped to Decide the Outcome of Complex Cases?, *29 Am. J. Trial Advoc. 19, 62 (2005)* ("Careful word choice and cautious use of analogies accentuate the perception of being prepared in the minds of the jurors.").

n162. See Hernandez v. Green, No. 05*CV5291, 2007 WL 433396, at 10* (E.D.N.Y. Feb. 8, 2007) (emphasizing that certain irrefutable evidence fell within bounds of allowable rhetoric); *State v. Lewellyn, No. 100,640, 2009 WL 3018073, at 8* (Kan. App. Sept. 18, 2009) (explaining that "[a] certain level of rhetoric is allowed in discussing the evidence and the defendant's version of events").

n163. See supra text accompanying notes 47-51 (discussing how society's negative perception of the term windfall as a "zero-sum game" has prompted legislative responses aimed at preventing the consuming public from bearing the cost of "fictional" excess medical bills).

n164. Proposed Amicus Curiae Brief on Behalf of the Ass'n of S. Cal. Def. Couns. in Support of Defendant and Respondent Hamilton Meats & Provisions, Inc. at 10, Howell v. Hamilton Meat & Provisions, Inc., *101 Cal. Rptr. 3d 805* (emphasis added).

n165. Ams. for Ins. Reform, Medical Malpractice Insurance: Stable Losses/Unstable Rates 3 (2007), available at http://www.centerjd.org/air/ StableLosses2007.pdf. See, e.g., Bernard Black et al., Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002, *2 J. Empirical Legal Stud. 207, 209-10 (2005)* (concluding that data collected from fifteen years of closed medical malpractice reports of the Texas Department of Insurance suggests a weak connection between claims-related costs and short or medium-term fluctuations in liability insurance premiums).

n166. See *Nishihama v. San Francisco, 112 Cal. Rptr. 2d 861, 867 (Cal. Ct. App. 2001)* (holding that injured pedestrian was not entitled to damages for medical care since the amount that a hospital is entitled to receive as payment "turns on any agreement it has with the injured person or the injured person's insurer").

n167. Ams. for Ins. Reform, supra note 165, at 3 (quoting March 13, 2002 statement).

n168. Id. at 3.

n169. See, e.g., *Fischer v. Steffen, 797 N.W.2d 501, 510 (Wis. 2011)* (finding that "plaintiffs seem to be arguing that [the insurance company] has waived its subrogation claim and that under the collateral source rule a windfall created by a waived subrogation claim should inure to the plaintiffs, not to the defendant"); *Koffman v. Leichtfuss, 630 N.W.2d 201, 209 (Wis. 2001)* ("The rule is grounded in the long-standing policy decision that should a windfall arise as a consequence of an outside payment, the party to profit from that collateral source is the person who has been injured, not the one whose wrongful acts caused the injury." (citations omitted)).

n170. See *Restatement (Second) of Torts § 920A* cmt. b (1979) (explaining that a benefit from collateral sources directed to the injured party should not be shifted to the tortfeasor as a windfall).

n171. *Acuar v. Letorneau, 531 S.E.2d 316, 323 (Va. 2000).*

n172. See Marshall & Fitzgerald, supra note 50, at 59 ("The full payment of damages by a tortfeasor clearly should have no effect on the wager made pursuant to a legally enforceable contract duly supported by valuable consideration to which the tortfeasor is not a party.").

n173. See Beard, supra note 102, at 467-70 (discussing contractual nature of such agreements); Mark A. Hall & Carl E. Schneider, Patients as Consumers: Courts, Contracts, and the New Medical Marketplace, *106 Mich. L. Rev. 643, 643 (2008)* (explaining that insurers bargain for discounted rates for their customers, but uninsured people must contract to pay "prices that are several times insurers' prices and providers' actual costs").

n174. Beard, supra note 102, at 467.

n175. Id. at 456.

n176. Id. at 467.

n177. Id. at 482.

n178. Health care providers gain significant administrative and marketing advantages from health insurers in return for discounting their rate. William O. Cleverley & Andrew E. Cameron, Essentials of Health Care Finance 301 (6th ed. 2006) (suggesting that a health care provider's willingness to accept a discount from its present price structure attracts new blocks of patients referred to the provider by insurance companies); Shahram Heshmat, Framework for Market-Based Hospital Pricing Decisions 10 (1993) ("In return for obtaining preferred status (which is designed to increase the volume of business), providers make their services more attractive to payers through means such as discounting ... ."); Lawrence F. Wolper, Health Care Administration: Planning, Implementing, and Managing Organized Delivery Systems 553 (4th ed. 2004) (describing advantages such as "a large volume of business, rapid payment, ease of collection, and occasionally advance deposits").

n179. 44 Am. Jur. Insurance § 1768, 1774, 1777 (2007). See also Black's Law Dictionary 1427 (6th ed. 1990) (defining subrogation as "the substitution of one person in the place of another with reference to a lawful claim ... . The right of one who has paid an obligation which another should have paid to be indemnified by the other").

n180. See *Aetna Ins. Co. v. United Fruit Co., 304 U.S. 430, 436 (1938)* (holding that insurer was entitled by way of subrogation to no more than amount paid on the policy).

n181. See, e.g., *Goble v. Frohman, 901 So. 2d 830, 831 (Fla. 2005)* (holding that contractual discounts negotiated by HMO were subject to write-off, thus excluding $ 428,583.55 from subrogation by insurer).

n182. See Kades, supra note 35, at 1524-25. Kades states:

Failure to consider subrogation has led numerous courts to object to the collateral benefits rule as a windfall ... [though] problems arise when administrative and transactional costs make it infeasible for insurers to include or apply subrogation clauses. Then a plaintiff collecting from both an insurer and the defendant does reap a windfall. Often, however, it is an efficient windfall. Denying insured plaintiffs recovery from tortfeasors when subrogation fails would mean that some tortfeasors will never pay for the damage they do. That will lead potential injurers to take suboptimal precautions and thus to cause an excessive number of torts. Allowing double recoveries is particularly attractive when there is minimal concern that victims are inducing harms in order to reap supercompensatory windfalls.

Id. (internal citations omitted).

n183. See *Sorrell v. Thevenir, 633 N.E.2d 504, 513 (Ohio 1994)* (finding Ohio statute abolishing collateral source rule unconstitutional, and noting "certain tort victims will realize that R.C. 2317.45 could render their trip to court futile ... . For these tort victims, like plaintiffs herein, R.C. 2317.45 undermines the right to a jury trial, a meaningful remedy and open courts").

n184. Michael B. Kelly, What Makes the Collateral Source Rule Different?, *39 Akron L. R. 1171, 1179-80 (2006).* Kelly states:

Reforms to the collateral source rule could eliminate plaintiff's recovery, however, if they undermine a plaintiff's willingness to sue. By reducing, perhaps severely, the most easily proven aspect of damages, reforms to the collateral source rule may make a lawsuit seem like more hassle than it is worth... . [A] plaintiff whose primary loss is pecuniary and who has recovered most of it via insurance may decide to waive the rest of the claim or to settle it quickly. Id.

n185. See *Arthur v. Catour, 803 N.E.2d 647, 650 (Ill. App. Ct. 2004)* (noting that the bill sent by Medicaid detailed real Medicaid expenses for which plaintiff must pay).

n186. See id. (demonstrating that the bills are for Medicaid costs that plaintiff has paid or will have to pay).

n187. See id. (noting that the plaintiff receives the benefit of his bargain with the insurance company).

n188. See George A. Nation III, Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured, *94 Ky. L.J. 101, 102-04 (2005)* (noting that the fact that medical bills do not reflect actual costs is result of third party reimbursement system).

n189. See Lucette Lagnado, Hospitals Try Extreme Measures to Collect Their Overdue Debts, Wall St. J., Oct. 30, 2003, at A1 (detailing tactics to collect bills from the uninsured including body attachments and civil arrest warrants).

n190. See Mark Hall & Carl Schneider, Patients as Consumers: Courts, Contracts, and the New Medical Marketplace, *106 Mich. L. Rev. 643, 669 (2008)* (discussing courts' tendency to enforce medical contracts).

n191. See Lucette Lagnado, Taming Hospital Billing, Wall St. J., June 10, 2003, at B1 (noting that healthcare providers' requirement that uninsured pay higher rates often leads to bankruptcy); David Himmelstein, et al., MarketWatch: Illness and Injury as Contributors to Bankruptcy, Health Affairs (Feb. 2, 2005), available at http://content.healthaffairs.org/content/suppl/2005/01/28/hltha ff.-w5.63.DC1 (noting that half of interviewed American bankrupt families in 2001 cited medical causes for their financial distress).

n192. This riddle was attributed to Abraham Lincoln and referenced by the respondent, Howell, in his responsive brief to the California Supreme Court in Howell in responding to the argument that appellant's medical bills were not real. Appellant's Brief in Response to the Eight Amici Curiae Briefs Filed in *Support of Respondent at 27, Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130 (Cal. 2011) (No. S179115)* (citation omitted).

n193. See *Bynum v. Magno, 101 P.3d 1149, 1158-59 (Haw. 2004)* (holding that contractual allowances or discounts are collateral benefits which belong to plaintiff and cannot inure to the benefit of a defendant absent specific statutory modification of the collateral source rule). See also Application of Consumer Attorneys of Cal. for Leave to File Amicus Curiae in *Support of Plaintiffs and Respondents Codner at 7, Codner v. Wills, No. B198675, 2009 WL 4915839,* (Cal. Jan 26, 2009) ("As a matter of contract law, the collateral source rule, and in

deference to legislative prerogative, a court should not question the sufficiency of contractual consideration between plaintiff's health insurers and medical providers in order to reduce a defendant's liability.").

n194. See Danielle A. Daigle, The Collateral Source Rule in Alabama: A Practical Approach to Future Application of the Statutes Abrogating the Doctrine, *53 Ala. L. Rev. 1249, 1249-50 (2002)* (addressing inherent ambiguity in statutes abrogating collateral source rule in civil actions, and discussing constructional difficulty posed by Alabama legislature's abrogation of the rule).

n195. See Lesley Alderman, Bargaining Down the Medical Bills, N.Y. Times, Mar. 13, 2009, at B6, available at http://www.nytimes.com/2009/03/14/health/-14patient.html?_r=2&ref=business (noting that financially distressed patients often negotiate lower medical bills).

n196. Such reassurances, while outside the scope of this Article, are ripe for development though several checks that already exist. The Federal Bureau of Investigation (FBI) and the Office of the Inspector General (OIG) each have special agents dedicated to health-fraud projects. See Health Care Fraud, FBI, http://www.fbi.gov/about-us/investigate/white_collar/health-care-fraud (last visited Oct. 12, 2011) (describing the FBI's healthcare unit and its role in healthcare fraud investigations); Medicaid Fraud Control Units - MFCUs, Office of the Inspector General, U.S. Dep't of Health & Human Servs., http://oig.hhs.gov/fraud/Medicaid-fraud-control-units-mfcu/index.asp (last visited Oct. 12, 2011) (describing the OIG's healthcare fraud units and their role in investigating Medicaid fraud).