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Daena A. Goldsmith

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A SURVEY OF THE COLLATERAL SOURCE RULE: 
THE EFFECTS OF TORT REFORM AND IMPACT 
ON MULTISTATE LITIGATION

DAENA A. GOLDSMITH

I. INTRODUCTION

IN 1854 THE SUPREME COURT first announced what is commonly known now as the "collateral source rule". Under this rule, a defendant must bear the full cost of the injury he caused the plaintiff, regardless of any compensation the plaintiff receives from an independent or "collateral" source. Where the rule applies, a defendant cannot introduce evidence at trial that a collateral source reimbursed the plaintiff for the damages sought by the plaintiff. Thus, under the collateral source rule, the jury will not receive any evidence that some source paid the plaintiff for the damages incurred.

A "collateral source" is any source that provides benefits to a plaintiff in connection with the injury for which the plaintiff sued and is wholly independent of the wrongdoer. The most typical example of a collateral source is one which provides health insurance benefits, either paid for by the plaintiff or the plaintiff’s employer. Other collateral sources often include Medicare and Medicaid ben-

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1 The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152, 15 L. Ed. 68 (1854). The term "collateral source" has been in use since 1871. Harding v. Townsend, 43 Vt. 536, 538 (1871).
2 RESTATEMENT (SECOND) OF TORTS § 920A (2) (1979).
benefits,5 disability and unemployment benefits,6 wage loss benefits,7 Social Security benefits,8 and gratuitous benefits or services.9 According to the rule, a plaintiff is not only entitled to the benefits received from a "collateral" source, but also benefits from the defendant who caused the injury. While almost every state10 has retained the collateral source rule in some form,11 the rule has many critics12 and a number of courts and legislatures across the country have partially or completely abrogated the collateral source rule.13 This comment will serve to clarify the state of the rule across the country, the attempts to reform of the rule and the impact of reform on multistate litigation.

A. Justification for the Collateral Source Rule

Those who support the collateral source rule generally believe it is a justifiable double recovery for plaintiffs. The prevailing theory in the states that support the collateral source rule is that the defendant, by virtue of having caused the plaintiff’s injury, should not receive the benefit of the plaintiff’s thrift and foresight in purchasing health, disability, or property insurance.14 Many courts charac-

7 See, e.g., UTAH CODE ANN. § 78-14-4.5 (2)(d) (Replacement 1987); FLA. STAT. ANN. ch. 110 § 2-1205 (Smith-Hurd Supp. 1986).
8 See, e.g., Smith v. United States, 587 F.2d 1013, 1016 (3rd Cir. 1978); Steckler v. United States, 549 F.2d 1372, 1379 (10th Cir. 1977).
9 See, e.g., Johnson v. Baker, 11 Kan. App. 2d 274, 719 P.2d 752, 756 (1986); Werner v. Lane, 393 A.2d 1329, 1336 (Me. 1978). Gratuitous services are services provided without cost to the plaintiff and without any obligation on the part of the provider.
10 Any reference to “state” or “states” includes the District of Columbia.
11 See infra note 52 and accompanying text.
12 See infra notes 31-35 and accompanying text.
13 See infra notes 52-203 and accompanying text.
terize the benefit the defendant would receive, if evidence of collateral sources were admissible, as a windfall to the defendant.\textsuperscript{15} Supporters of the rule emphasize that a defendant should be forced to bear full responsibility for his wrongdoing and that the windfall should go to the injured party.\textsuperscript{16} As one court states it, the purpose of the collateral source rule is "to deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor."\textsuperscript{17}

Many courts justify the imposition of the collateral source rule because they believe that such evidence confuses juries. In addressing this issue, the Supreme Court held that the likelihood of misuse by, and prejudicial impact on, the jury of evidence of collateral sources outweighs the value of admitting such evidence.\textsuperscript{18} Courts express a common concern that admitting evidence of collateral sources at trial unnecessarily prolongs the trial\textsuperscript{19} and confuses the jury.\textsuperscript{20} Even when defendants attempt to introduce evidence of collateral sources for purposes other than to show that a collateral source reimbursed the plaintiff,\textsuperscript{21} most courts hold that jurors would be confused even as to the limited purpose of the evidence.\textsuperscript{22} The

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\textsuperscript{17} American Standard Ins. Co. v. Cleveland, 124 Wis. 2d 258, 369 N.W.2d 168, 172 (1985).

\textsuperscript{18} Eichel v. N.Y. Cent. R.R., 375 U.S. 253, 255 (1963) (in an action brought under the Federal Employer's Liability Act, the Court refused to allow the defendant to bring in evidence of collateral sources for the purpose of showing that the plaintiff had no incentive to return to work). The Supreme Court did not expand on its conclusion that the potential misuse by the jury outweighs the value of such evidence.


\textsuperscript{21} The defendant may try to show, for example, that the plaintiff has not returned to work, not because he is still injured, but because the collateral benefits he is receiving are higher than his salary. The courts typically refer to this as a "malingering" defense. See, e.g., McMiddleton v. Otis Elevator Co., 139 Mich. App. 418, 362 N.W.2d 812, 817 (1984).

\textsuperscript{22} See, e.g., the discussion of the general rule in Corsetti, 396 Mass. at 1, 483
courts, therefore, generally refuse to allow the evidence in at all.\textsuperscript{23} Judges fear a jury will improperly reduce an award by the amount of the collateral benefits received in order to prevent the plaintiff from receiving what the jury perceives as a double recovery.\textsuperscript{24}

A final justification for continued use of the collateral source rule centers on contingent fee arrangements between a personal injury plaintiff and her attorney. The theory is that once a plaintiff pays her attorneys’ fees she is left under compensated.\textsuperscript{25} Once a plaintiff pays a large portion of her award to her attorney, she is left with less than the full award the jury decided she deserved.\textsuperscript{26} Assuming the jury does not realize that part of the plaintiff’s award will go to the plaintiff’s attorney,\textsuperscript{27} the collateral source rule allows the plaintiff to pay her attorney and still recover enough to adequately compensate her for her injuries.\textsuperscript{28} Under this logic, the plaintiff is not receiving a double recovery.\textsuperscript{29} This theory, of course, is premised on the belief that the defendant should pay for the plaintiff’s attorneys’ fees if the plaintiff is successful in her suit against the defendant. If there was no collateral source rule, should the defendant, if she loses, have to pay the plaintiff’s attorneys’ fees? If the answer is yes, then the theory that no double recovery exists is valid.

B. Criticism of the Collateral Source Rule

Even before the 1980’s era of tort reform legislation

\textsuperscript{23} Corsetti, 396 Mass. at 1, 483 N.E.2d at 802.
\textsuperscript{24} Id. As the court stated, “jurors might be led by the irrelevancy to consider plaintiffs’ claims unimportant or trivial or to refuse plaintiffs’ verdicts or reduce them, believing that otherwise there would be unjust double recovery.” \textit{Id.}
\textsuperscript{25} Helfend, 84 Cal. Rptr. at 180, 465 P.2d at 68.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.; see also McDowell, \textit{The Collateral Source Rule — The American Medical Association and Tort Reform}, 24 \textit{Washburn L.J.} 205, 213 (1985).
and the concern over the insurance crisis,\textsuperscript{30} scholars leveled much criticism at the collateral source rule.\textsuperscript{31} As will be discussed, criticism of the rule has continued, resulting in numerous changes in the rule across the United States.\textsuperscript{32} Much of the criticism focuses on the double recovery aspect of the rule: that the plaintiff receives compensation for a loss she did not suffer.\textsuperscript{33} The concern is not so much for the defendant, or the insurance company that provides the collateral source, but for the overall effect on the legal system and insurance premiums.\textsuperscript{34} For example, in a case where the only damages the plaintiff suffered are those in which a collateral source reimbursed the plaintiff,\textsuperscript{35} the collateral source rule encourages a plaintiff to litigate rather than to accept what he already received as payment.\textsuperscript{36} With such litigation comes the attendant legal costs, the use of judicial resources, and the time of witnesses, litigants, and jurors.\textsuperscript{37}

One concern over the continued use of this rule centers on the number of public funds available to injured plaintiffs to which the plaintiff did not specifically contribute.\textsuperscript{38} Unlike benefits from sources for which the plaintiff paid a premium, benefits from such public sources are not attrib-
utable to a plaintiff's thrift or foresight. Some courts continue, however, to apply the collateral source rule to these benefits. Allowing plaintiffs to recover for damages not suffered is considered the judiciary's way of imposing punitive damages in cases where punitive damages are not otherwise available. Under such theory, though, the collateral source rule treats negligent defendants on the same level with defendants who have acted intentionally and those who are strictly liable for their conduct. This theory of punishing defendants, as well as the deterrence theory, is premised on the ability of the collateral source rule to deter negligent conduct. Negligent conduct, by definition, occurs without thought on the part of the wrongdoer. One should question whether imposing the collateral source rule effectively deters such conduct.

When the collateral source rule was adopted in the late 19th century, few persons carried any type of insurance. At that time, courts undoubtedly were not concerned that juries would speculate as to other benefits the plaintiff received in compensation for her injury. In comparison, the majority of jurors today know that most people are covered by some form of insurance. Critics raise a concern that the collateral source rule leads a jury to speculate as

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40 See infra note 53 and accompanying text.
41 Comment, Unreason in the Law of Damages: The Collateral Source Rule, 77 HARV. L. REV. 741, 748-49 (1964). At least one court admitted that its use of the collateral source rule is indeed punitive. Hubbard Broadcasting v. Loescher, 291 N.W.2d 216, 222 (Minn. Ct. App. 1980) ("Because its purpose is punitive, [the collateral source] doctrine has generally been applied only to tort cases." (emphasis supplied)).
42 Comment, supra note 41, at 748-49.
43 See American Standard Ins. Co., 124 Wis.2d at 258, 369 N.W. 2d at 172. The courts espousing the deterrence theory support the collateral source rule as a deterrent to negligent conduct. See id.
44 This is particularly true when the average person is unaware that such a rule exists. If a person is unaware that a penalty exists, can the penalty actually deter conduct?
45 McDowell, supra note 29, at 215.
46 Id.
to whether a plaintiff has insurance to cover his injury.\textsuperscript{47} An uninsured plaintiff, therefore, is prejudiced if the jury believes she has insurance.\textsuperscript{48} When a court allows the jury to receive evidence of insurance benefits, the jury will then have reliable evidence on which to base its award, rather than speculating on the plaintiff’s possible insurance coverage.\textsuperscript{49}

The argument that the collateral source rule exists to enable the plaintiff to pay his attorney’s fees and still be adequately compensated serves to defeat what is known as the “American Rule.” Under this rule, the losing party, absent a statute to the contrary, is not obligated to pay the successful litigant’s attorney’s fees.\textsuperscript{50} Under the collateral source rule, therefore, certain plaintiffs are able to recover twice for their injury, effectively circumventing the American Rule and obtaining a recovery for their attorney’s fees.

The collateral source rule may in actuality be used as a vehicle for increasing an award for a plaintiff who is inadequately compensated. This justification, however, fails to account for those plaintiffs who may suffer from severe trauma or disfigurement, but who did not incur substantial medical expenses. Because the plaintiff recovers twice for any damages already reimbursed by a collateral source, some plaintiffs are rewarded for accumulating massive medical bills. The collateral source rule, thus, discriminates among the plaintiffs who will benefit by the advantages of the rule. Finally, the concern is to ensure adequate compensation for all injured plaintiffs. The courts, therefore, should apply the rule uniformly, a situation not existing among the jurisdictions today.\textsuperscript{51}

Criticism of this rule has resulted in changes across the

\textsuperscript{47} Id. For example, jurors may, consciously or unconsciously, assume that a plaintiff is covered by medical insurance and react accordingly when determining the amount the jury should award the plaintiff for damages.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} See Colombrito v. Kelly, 764 F.2d 122, 134 (2d Cir. 1985).

\textsuperscript{51} See infra notes 52-62 and accompanying text.
country. Many states have either completely abrogated the rule, restricted it to certain types of lawsuits, or restricted the rule to only certain types of collateral sources. As discussed in the following sections the result is an inconsistent application of the rule among the states. The dual underlying premise of the rule, to ensure plaintiffs adequate compensation and to force defendants to assume the full costs of any wrongdoing, disappear when only certain plaintiffs benefit from the rule. The same defendant being sued in various states over identical conduct will likely pay some plaintiffs for damages not suffered while paying other plaintiffs only for their actual losses. In any multistate litigation, the inequity in the application of the collateral source rule will likely result in a scenario where similarly situated plaintiffs receive dramatically different awards. For example, several plaintiffs may bring suit in several states for one tortious act. Under the disparate application of the collateral source rule existing today, some plaintiffs could be subject to varying reductions in an award while others will not realize any decrease. A survey of the present state of the collateral source rule will demonstrate the slow erosion and lack of uniformity in the application of the rule among the states.

II. The State of the Collateral Source Rule

Currently forty-five states and the District of Columbia allow claimants to recover some or all benefits already received or to be received from collateral sources. This

52 See infra notes 52-203.

right of recovery, though, is no longer purely pursuant to the common law collateral source rule because many state legislatures have acted to reduce the availability of benefits under the rule. In fact, of the forty-five states that apply the rule, only seventeen states and the District of Columbia apply the collateral source rule in tort actions without any exception.\(^{54}\) The collateral source rule is a

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54 Arkansas, District of Columbia, Idaho, Kentucky, Louisiana, Maine, Mississippi, Missouri, New Hampshire, North Carolina, Oklahoma, Oregon, South Car-

Rentals, Inc., 491 So. 2d 94, 104 (La. Ct. App. 1986); Werner, 393 A.2d at 1336 (Me.); Leizer v. Butler, 226 Md. 171, 172 A.2d 518, 520 (1961); Corsetti, 396 Mass. at 1, 483 N.E.2d at 802-804; McMiddleton v. Otis Elevator Co., 139 Mich. App. 418, 362 N.W.2d 812, 817 (1984); Star Chevrolet Co. v. Green, 473 So. 2d 157, 162 (Miss. 1985); Kickham, 335 S.W.2d at 90 (Mo.) (Missouri's legislature recently affirmed the validity of the collateral source rule by codifying the common law rule. 1987 Mo. Legis. Serv. Vol. 1, H.B. 700, § 38 (Vernon). The defendant may only introduce evidence that he had made payments to the plaintiff, but upon doing so he loses any rights to a credit against the judgment. Id.); Huenink v. Collins, 181 Neb. 195, 147 N.W.2d 508, 509 (1966); Merchants Mut. Ins. Group v. Orthopedic Professional Ass'n., 235 N.H. 648, 480 A.2d 840, 844 (1984); Long v. Landy, 35 N.J. 44, 171 A.2d 1, 7 (1961); Hansen v. Skate Ranch, Inc., 97 N.M. 486, 641 P.2d 517, 521 (1982); Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843, 844 (1982); Keller v. Gama, 378 N.W.2d 867, 868 (N.D. 1985); Burk Royalty Co. v. Jacobs, 387 P.2d 638, 640 (Okla. 1963); Reinan, 270 Or. at 208, 527 P.2d at 722; Beechwoods Flying Serv., Inc. v. Al Hamilton Contracting Corp., 504 Pa. 618, 476 A.2d 350 (1971); Soucy v. Martin, 121 R.I. 651, 402 A.2d 1167, 1170 (1979); Joiner, 226 S.C. at 249, 84 S.E.2d at 722; Degen v. Bayman, 90 S.D. 400, 241 N.W.2d 703, 708 (1976); Donnell v. Donnell, 220 Tenn. 169, 415 S.W.2d 127, 135 (1967); Russell v. Dunn Equip., Inc., 712 S.W.2d 542, 547 (Tex. Ct. App. 1986); DuBois v. Nye, 584 P.2d 823, 825 (Utah 1978); My Sister's Place, 139 Vt. at 602, 433 A.2d at 281; Burks, 199 Va. at 296, 99 S.E.2d at 686; Goodell v. ITT - Federal Support Serv., Inc., 89 Wash. 2d 488, 573 P.2d 1292, 1294 (1978); Orr v. Crowder, 315 S.E.2d 593, 609-10 (W. Va. 1983), cert. denied, 469 U.S. 981 (1984); Merz v. Old Republic Ins. Co., 53 Wis. 2d 47, 191 N.W.2d 876, 879 (1971); Wheatland Irrigation Dist. v. McGuire, 562 P.2d 287, 302 (Wyo. 1977). COLO. REV. STATE. § 13-21-111.6 (Supp. 1986); IND. CODE ANN. § 34-4-36-2 (Burns 1986); Mich. Comp. Laws § 600.6303 (West 1987); MONT. CODE ANN. § 27-1-307, 308 (1987); VA. CODE ANN. § 8.02-35 (1984). No Nevada court has specifically held that the collateral source rule exists in that state. However, the Supreme Court of Nevada recently held the following: "In the context of automobile insurance, we have consistently upheld the fundamental principle that an insured is entitled to receive the insurance benefits for which he has paid a premium." Maxwell v. Allstate Ins. Co., 728 P.2d 812, 815 (Nev. 1986). In striking down clauses in insurance contracts which permitted rights of subrogation for medical payments, the court stated that "[p]recluding the subrogation of the insurer does not result in a double recovery for the insured because the insured is merely receiving the benefits for which he has already paid." Id. at 815. This Comment does not address the availability of the collateral source rule with regard to workers' compensation statutes.
common law rule that a legislature can change by statute, and legislatures have so changed the rule in over half of the states. Six state legislatures have completely abrogated the rule. Three states only apply the rule to collateral sources funded directly or constructively by the plaintiff or the plaintiff’s family. At least thirty-one states have eliminated the collateral source rule in at least one of the following types of actions: product liability cases, actions against a public employer, actions against the government, medical malpractice actions, and actions under certain “no-fault” statutes. States that have abolished the collateral source rule are inconsistent in the types of collateral sources defendants may introduce at trial. State legislatures, further, generally disagree as to whether the jury or the court will hear the collateral source evidence. Legislatures that have abolished the rule in some form, however, do agree that where a right of subrogation exists as to collateral benefits received, the collateral source rule will apply because there is no threat of double recovery.


55 Restatement (Second) of Torts § 902A comment d (1979).


57 Colo. Rev. Stat. § 13-21-111.6; Ind. Code Ann. § 34-4-36-2 (Burns 1986); My Sister’s Place, 139 Vt. at 602, 433 A.2d at 281; see infra notes 109-130 and accompanying text.

58 See infra notes 184-186 and accompanying text.

59 See infra notes 187-188 and accompanying text.

60 See infra notes 189-190 and accompanying text.

61 See infra notes 131-171 and accompanying text.

62 See infra notes 172-183 and accompanying text.

63 See, e.g., Heifetz v. Johnson, 61 Wis. 2d 111, 211 N.W.2d 834, 841 (1973). The plaintiff will not receive compensation twice because she must pay the collateral source from her award. Id. The plaintiff must be allowed to recover the full amount of damages free from the subrogation claim of the insurer. Id.; see also statues cited at notes 63-125.
A. Legislative Revisions of the Common Law Collateral Source Rule as Applied to All Tort Actions

Eleven states took the common law collateral source rule and replaced it with a statutory scheme that, wholly or partially, eliminates the rule itself or eliminates the benefits of the rule.\textsuperscript{64} This legislation represents a legislative response to public reaction to tort reform efforts. In one state, Vermont, the Supreme Court limited the application of the rule without legislative intervention.\textsuperscript{65} The following discussion summarizes the types of legislation passed in each state and the particulars of that legislation.

In 1986, the Alaska legislature amended its Code of Civil Procedure by adding a new chapter entitled “Limitations on Civil Liability.”\textsuperscript{66} Among the many limitations the legislature placed on a claimant’s recovery, it effectively abolished the collateral source rule.\textsuperscript{67} Evidence that the claimant received compensation from collateral sources for the same injury is introduced after the fact-finder renders an award and after the court awards costs and attorneys’ fees.\textsuperscript{68} The court deducts the amount of the collateral benefits received by the claimant from the award.\textsuperscript{69} The claimant may, however, in order to mitigate the reduction, introduce evidence that his attorneys’ fees actually exceed the amount awarded by the court.\textsuperscript{70} The

\textsuperscript{64} Alaska, Colorado, Connecticut, Florida, Illinois, Indiana, Michigan, Minnesota, New York, Ohio, and Vermont.

\textsuperscript{65} See My Sister’s Place, 139 Vt. at 602, 433 A.2d at 281.

\textsuperscript{66} ALASKA STAT. §§ 09.17.011-09.17.900 (Supp. 1987).

\textsuperscript{67} ALASKA STAT. § 09.17.070 (Supp. 1986). The statute reads as follows:

Collateral benefits. (a) After the facts finder has rendered an award to a claimant, and after the court has awarded costs and attorneys fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract.

\textsuperscript{68} Id. § 09.17.070(a). The obvious result of this is that the attorney takes a percentage of the larger award which is then paid by the plaintiff from the smaller award.

\textsuperscript{69} Id. § 09.17.070(c).

\textsuperscript{70} Id. § 09.17.170(b).
claimant may also introduce evidence of the amount she paid or contributed to secure insurance benefits. 71 This amount will affect the amount deducted by the court from the award. 72 The defendant may not introduce evidence of benefits available under federal law that a court cannot reduce or offset, a deceased's life insurance policy, or gratuitous benefits provided to the claimant. 73

In recent revisions of their statutes governing civil actions, Connecticut eliminated the effects of the common law collateral source rule. 74 Where a claimant seeks recovery for personal injury or wrongful death in a tort or contract action, that claimant cannot recover for amounts paid by collateral sources. 75 However, the jury never considers evidence of the claimant's receipt of collateral sources because the court will reduce the claimant's award. 76 Further, the successful claimant is entitled to an offset of the reduction equal to the amounts paid to secure those collateral sources. 77 The history of the statute indicates that it began as a limitation on medical malpractice recoveries and was later changed to include all civil actions seeking compensation for personal injury or wrongful death. 78

Colorado only recently joined the tort reform movement by partially abrogating the effects of the collateral source rule. 79 In that state, the court will reduce a claimant's recovery by the amount for which he "has been or will be wholly or partially indemnified or compensated." 80 The claimant's recovery is not reduced by benefits paid as a result of a contract entered into and paid for by or on

71 Id. § 09.17.070(b)(2).
72 Id. § 09.17.070(c).
73 Id. § 09.17.070(d).
74 CONN. GEN. STAT. § 52-225a (1987).
75 Id. "Collateral sources" are separately defined under § 52-225b.
76 Id.
77 Id.
78 Id. (see Comment, § 52-225a).
79 COLO. REV. STAT. § 13-21-111.6 (Supp. 1986).
80 Id. The statute applies solely to tort actions "resulting in death or injury to person or property." Id.
behalf of the claimant.\footnote{Id.} The statute has the effect, therefore, of reducing a successful plaintiff’s recovery by the amount of benefits received for which the plaintiff did not contract.

Using a different approach, Illinois amended its Code of Civil Procedure to accomplish a partial abrogation of the collateral source rule.\footnote{ILL. ANN. STAT. ch. 110, ¶ 2-1205.1 (Smith-Hurd Supp. 1987).} In all negligence and strict product liability actions, the court will reduce a successful plaintiff’s recovery by the amount of collateral sources received which exceed $25,000.\footnote{Id. The reduction does not apply if there is a right of subrogation. Id. ¶ 2-1205.1(2).} The defendant, though, must apply to the court within thirty days of the judgment to have the judgment reduced.\footnote{Id. ¶ 2-1205.1(3).} The reduction in the judgment cannot exceed more than fifty percent of the total award.\footnote{Id. ¶ 2-1205.1(4).} Finally, the court will increase the judgment by the amount of premiums or direct costs the plaintiff paid two years before the injury and the amount he will pay in the future.\footnote{Id.}

A claimant in Michigan seeking recovery for economic losses in a personal injury action will not recover any amounts paid or payable by collateral sources.\footnote{MICH. COMP. LAWS ANN. § 600.6303(1) (West 1987).} The court will determine the amount of a plaintiff’s expenses covered by a collateral source, but the court will not reduce the judgment by more than the amount of the award for economic loss.\footnote{Id. § 600.6303(2).} The plaintiff receives credit for premiums paid by or for the benefit of the plaintiff.\footnote{Id. § 600.6303(4).} A “collateral source” under Michigan’s law does not include life insurance benefits or any benefit paid by a person entitled to a lien against the plaintiff’s recovery.\footnote{Id. § 600.6303(1).} Finally, a collateral source is not considered payable or recoverable un-
less that source has a previously existing contractual or statutory obligation to pay the benefits.\textsuperscript{91}

In 1986, Minnesota followed the tort reform crusade by also enacting a statute abolishing the effects of the common law collateral source rule.\textsuperscript{92} As with the other states, Minnesota law now permits a court to reduce a plaintiff’s award by the amount of collateral benefits paid or otherwise available to the plaintiff.\textsuperscript{93} The realization is offset by the amounts paid, contributed, or forfeited in the two years preceding the award to secure the collateral benefits.\textsuperscript{94} If the successful plaintiff is liable to her attorney for a percentage based upon the adjusted award,\textsuperscript{95} the statute specifically provides that the jury will not know that collateral sources exist or that future benefits are available to the plaintiff.\textsuperscript{96} The legislation provides a broad definition of collateral sources, including worker’s compensation benefits and wage loss benefits.\textsuperscript{97} As with other statutes, life insurance benefits are not included.\textsuperscript{98} Unlike other statutes, this legislation applies to contract and tort actions.\textsuperscript{99}

In 1986, the Florida legislature also effectively abolished the collateral source rule in all tort actions by enacting the Tort Reform and Insurance Act of 1986.\textsuperscript{100} Under this statute, after the trier of fact renders its award, the court will deduct all nonsubrogated benefits received by the plaintiff, or benefits “available” to him, from all collat-

\textsuperscript{91} Id. § 600.6303(5). Whether such an obligation exists is determined by the court. Id.
\textsuperscript{93} Id. § 548.36 (Subd. 2(1) & Subd. 3(a)) (except by collateral sources to which a right of subrogation exists. Id.).
\textsuperscript{94} Id. § 548.36 (Subd. 2(2) & Subd.3(a)).
\textsuperscript{95} Id. § 548.36 (Subd. 4). “Any subrogated provider of a collateral source not separately represented by counsel shall pay the same percentage of attorneys fees as paid by the plaintiff and shall pay its proportionate share of the costs.” Id.
\textsuperscript{96} Id. § 548.36 (Subd.5).
\textsuperscript{97} Id. § 548.36 (Subd.1).
\textsuperscript{98} Id.
\textsuperscript{99} Id. § 548.36 (Subd. 2).
eral sources. The reduction is offset by any amount the plaintiff or his family paid, contributed, or forfeited to secure the benefits from the collateral sources. Attorneys’ fees which are calculated on a percentage of the plaintiff’s award are determined on the basis of the net award to the plaintiff. While this statute does not consider Medicaid benefits as a collateral source, it does consider other federal, state or local programs as collateral sources.

The New York legislature chose to prevent double recoveries for plaintiffs by statutorily providing that in all actions for personal injury, injury to property or wrongful death, the plaintiff cannot recover for benefits received or due. In all such actions the court will reduce the plaintiff’s award by the amount of past or future collateral benefits the plaintiff received or will receive. The court, though, will mitigate the reduction of the plaintiff’s award by the amount the plaintiff paid to receive collateral benefits. The court will not deduct those collateral sources entitled by law to liens against any recovery.

Under the Indiana Rules of Civil Procedure the collateral source rule is partially abrogated. The defendant is permitted under this rule to introduce evidence to the fact-finder of 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 plaintiffs’ family have paid for directly; or (c) Payments

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101 Id. § 768.76(1).
102 Id.
103 Id. § 768.76(3).
104 Id. § 768.76(2)(b).
106 Id.
107 Id. The mitigation is to the extent of premiums paid by the plaintiff for the two-year period immediately preceding the injury and to the extent of the future costs of maintaining such benefits. Id.
108 Id.
110 Id. tit. 34-4-36-3.
made by the state of Indiana or the United States, or any agency, instrumentality, or subdivision thereof, that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought.\textsuperscript{111}

The plaintiff can introduce evidence of the amount of benefits he received which must be repaid and the cost to the plaintiff, or his family, of securing the collateral benefits.\textsuperscript{112} If the court does not consider benefits received from an insurance policy paid for by an employer as benefits paid for “directly” by the plaintiff under category (b), then the receipt of such benefits would be admissible at trial. The statute does not attempt to list specifically what collateral sources the jury should deduct.

The Montana legislature also decided that plaintiffs' awards needed to be reduced and enacted legislation to accomplish that result. The partial elimination of the impact of the collateral source rule was accomplished by legislation generally following other states' reforms, but with its own variation.\textsuperscript{113} The definition of a collateral source is very broad and includes almost “any source” available to a plaintiff.\textsuperscript{114} The statute, however, does not apply unless the plaintiff’s recovery exceeds $50,000 and the plaintiff is “fully compensated” for his injury.\textsuperscript{115} The plaintiff is entitled to credit for amounts paid on the five years prior to the injury and from the injury to the date of judgment.\textsuperscript{116} The plaintiff is credited with the present value amounts that the plaintiff must pay in order to continue receiving any collateral benefits.\textsuperscript{117} As with most other states, the jury never learns about the plaintiff’s receipt of

\textsuperscript{111} Id. tit. 34-4-36-3(1).
\textsuperscript{112} Id. tit. 34-4-36-3(2)(3).
\textsuperscript{114} Id. § 27-1-307. Section 27-1-307 specifically includes “any other source” within its definition, but expressly excludes life insurance benefits, gratuitous benefits, and assets of the plaintiff or plaintiff’s immediate family which he is obligated to repay. Those collateral sources which have a right of subrogation are not considered in reducing plaintiff’s award. Id. § 17-1-308(1), (3).
\textsuperscript{115} Id. § 27-1-308(1).
\textsuperscript{116} Id. § 27-1-308(2)(a),(b).
\textsuperscript{117} Id. § 27-1-308(2)(c).
Finally, in 1987 Ohio became the most recent state to enact major tort reform legislation. In all tort actions, as with the other states' reforms, the jury will not hear the evidence of the availability of collateral sources. The court will reduce plaintiff's compensatory damage award by the amount of collateral benefits received. The court will deduct the plaintiff's award by the amount of future benefits the plaintiff will receive, but only by the amount the plaintiff will receive within sixty months after entry of judgment. The plaintiff gets credit for his costs in obtaining the benefits although he is only credited for costs incurred within the three years preceding the plaintiff's injury. The definition of collateral benefits is very broad under this statute and includes public as well as private collateral sources.

In My Sister's Place v. Burlington, Vermont implicitly restricted the application of the collateral source rule in a manner similar to the Indiana rule. While Vermont supports the application of the collateral source rule, the Supreme Court of that state appears to have limited its application. According to the court, the rule only applies to compensation from collateral sources where the plaintiff has actually or constructively paid for the benefits received or where the collateral source would be recompensed from the plaintiff's award. Although not ex-

118 Id. § 27-1-308(3).
119 Amended Substitute H.B. 1, 117th Gen. Assembly, 1987, Ohio (enacted but not officially published; subsequent references will refer to this bill by section numbers as they will appear when officially published).
120 The legislature defines tort action as a "cure action for damages for injury, death, or loss to person or property" and includes product liability claims. Id. § 2317.45(A)(1)(c).
121 Id. § 2317.45(B)(3).
122 Id. § 2317.45(B)(2)(c)(i).
123 Id. § 2317.45(B)(2)(a)(i).
124 Id. § 2317.45(B)(2)(b).
125 Id. § 2317.45(A)(1)(a).
126 139 Vt. at 602, 433 A.2d at 281.
127 Id.
128 Id.
pressly stated, by including those sources that are “constructively” paid for by the plaintiff, the court may have included those collateral sources paid for by others for the plaintiffs’ benefit.\textsuperscript{129} The rule would also apply in cases where the collateral source is entitled to reimbursement or has a right of subrogation.\textsuperscript{130}

B. Medical Malpractice Actions

The area in which the state legislatures have most frequently acted to abolish the collateral source rule is with regard to malpractice litigation. At least sixteen state legislatures have enacted various measures aimed at reducing the amount of the award a jury may give a plaintiff in such actions.\textsuperscript{131} Although the legislatures of each state may agree that they should change the collateral source rule, each state approaches the application of the rule differently. Some legislatures were willing to go all the way in eliminating the collateral source rule in medical malpractice actions while others have only abolished the rule as to certain collateral sources. The inconsistencies reflect the diverging views on the validity of the collateral source rule. They express the differing concerns involving the effect on a jury given information that collateral

\textsuperscript{129} For example, insurance plans paid for by an employer.

\textsuperscript{130} My Sister’s Place, 139 Vt. at 602, 433 A.2d at 827.

benefits exist. Further, the various statutes react differently to the issue of whether or not the plaintiff should receive the benefit of an insurance policy actually or constructively paid by him.

Even those sixteen states which have enacted measures to reduce generally disagree on the definition of a collateral source, which collateral benefits the legislatures should include in reducing the plaintiffs award, and who should receive the evidence. Four states only allow the defendant to introduce evidence regarding benefits from collateral sources not funded by the plaintiff or the plaintiff's immediate family.132 Only seven states even attempt to specifically describe what the term "collateral source" includes.133 For example, in Washington a collateral source is "any source except the assets of the [plaintiff], his representative, or his immediate family, or insurance purchased with such assets." In Utah, the statute encompasses "all collateral sources." In Nebraska, the phrase "nonrefundable medical reimbursement insurance benefits" is used in place of collateral sources. Ten states either specifically exclude life insurance benefits from the definition of a collateral source or exclude such

132 Del. Code Ann. tit. 18, § 6862 (Supp. 1986) ("This section shall not be applicable to the insurance or private collateral sources of compensation."); S.D. Codified Laws Ann. § 21-3-12 (Benefits received from insurance purchased privately by the plaintiff, or an immediate family member, or paid for by state or federal government programs not entitled to subrogation are not admissible to reduce the plaintiff's award.); Tenn. Code Ann. § 29-26-119 (1980) (The damage award includes only actual economic losses not replaced or indemnified by any source except plaintiff's own assets or insurance purchased privately and individually); see also McDaniel v. General Care Corp., 627 S.W.2d 129, 132-33 (Tenn. Ct. App. 1981); Wash. Rev. Code Ann. § 7.70.080 (Supp. 1987) (any party may introduce evidence that the plaintiff was compensated for the injury complained of from any source, except where he was compensated from his own assets, or those of his representative or immediate family, or from insurance purchased with such assets. Insurance provided through an employer is considered insurance purchased with an asset of the employee).

133 Arizona, California, Florida, Illinois, Massachusetts, New York and Rhode Island.


benefits by the terms of the statute.\textsuperscript{137} A few states have added variations on the general scheme to reduce awards by the amount of collateral sources. Only Utah and Washington refuse to reduce a plaintiff's award by the amount of future benefits available to the plaintiff.\textsuperscript{138} There is one exception in Utah to this prohibition; the defendant can introduce the availability of benefits from government programs and the court or jury may consider such in determining the amount of damages awarded for future expenses.\textsuperscript{139} Massachusetts law allows the defendant to pay the plaintiff's insurance premiums in order to keep an insurance policy in force during the pendency of the action.\textsuperscript{140} In Florida, the plaintiff's attorney can only base his contingent fee on the plaintiff's net award.\textsuperscript{141} The courts in Alaska may consider the value of the claimant's rights to coverage which the plaintiff exhausted or depleted by the payment benefits.\textsuperscript{142}

Many of the statutes permit the plaintiff to introduce evidence as to any credits she is due before the court or jury deducts from her award. Of the twelve states which allow the court or jury to consider evidence of collateral sources funded by the plaintiff in reducing the plaintiff's award, nine permit the plaintiff to introduce evidence of premiums paid by the plaintiff, or by his immediate family, to secure the collateral benefits.\textsuperscript{143} When such evidence is

\textsuperscript{137} Alaska, California, Delaware, Florida, Illinois, Iowa, Kansas, New York, Rhode Island and Utah.

\textsuperscript{138} Utah Code Ann. § 78-14-4.5 (1987); Wash. Rev. Code Ann. § 7.70.080 (Supp. 1987) (the Washington statute states that "evidence . . . that the patient has already been compensated" is admissible.)

\textsuperscript{139} Utah Code Ann. § 78-14-4.5(4) (1987).


\textsuperscript{141} Fla. Stat. Ann. § 768.50(3) (West 1986).

\textsuperscript{142} Alaska Stat. § 09.55.548(b) (1983). The court may add back into the claimant's award a reasonable estimate of the probable value of those benefits. It may hold for possible periodic payment the amount of the award that the court would otherwise deduct to see if an impairment of the claimant's rights actually takes place. \textit{Id.}

admissable, the court or jury increases the award by that amount.\textsuperscript{144} Nine states provide that, under certain circumstances, a plaintiff’s award will not be reduced if the collateral source has a right of subrogation or recoupment.\textsuperscript{145} Usually, the reduction is allowed only if the right of subrogation is provided by law.\textsuperscript{146} Under Alaska and Massachusetts law, for example, the court will not reduce the plaintiff’s award by the amount of collateral benefits received only if those collateral sources have a right of subrogation under federal law.\textsuperscript{147} Otherwise, the collateral source is precluded from proceeding against the plaintiff or the defendant.\textsuperscript{148} Two states’ laws, California and Rhode Island, insist that a provider of a collateral source cannot seek reimbursement against the plaintiff, nor is that provider subrogated to the rights of the plaintiff.\textsuperscript{149}

\textsuperscript{144} See supra note 143.

\textsuperscript{145} ARIZ. REV. STAT. ANN. § 12-565(c) (Supp. 1986) (Under this provision, if a collateral source has a right of subrogation by statute, the jury cannot reduce a plaintiff’s award by the amount received from that source. Otherwise, the collateral source is not subrogated to the rights of the plaintiff.); FLA. STAT. ANN. § 768.50 (West 1986) (The provider of collateral sources is entitled to subrogation rights by law.); ILL. ANN. STAT. ch. 110, ¶ 2-1205(4) (Smith-Hurd 1987) (The court will not reduce the plaintiff’s award by the amount of collateral benefits received if there is a right of recoupment; the statute does not specify that this right must only be provided by law.); KAN. STAT. ANN. § 60-3403(b) (1986); MASS. ANN. LAWS ch.231, § 60G(c) (Law Co-op 1987); NEV. REV. STAT. § 44-2819(1) (1984) (The statute provides that the court will reduce the plaintiff’s award only by “nonrefundable” insurance proceeds.); NY. CIV. PRAC. L. & R. § 4545(a) (McKinney Supp. 1987) (As to worker’s compensation or employee benefit programs, the court will not deduct from the plaintiff’s award if the sources are entitled to a lien against the plaintiff’s recovery by law.); S.D. CODIFIED LAWS ANN. § 21-3-12 (Supp. 1987) (Those collateral sources received by the plaintiff that fall under the provisions of the statute and are not subject to subrogation, are deductible from the plaintiff’s award.); UTAH CODE ANN. § 10-19-9.5 (Supp. 1987) (There is no reduction for collateral sources for which a subrogation right exists.); WASH REV. CODE ANN. § 770.080 (The plaintiff may introduce evidence of an obligation to repay the collateral source for benefits received).

\textsuperscript{146} See supra note 145.

\textsuperscript{147} ALASKA STAT. § 09.55.548 (1983); MASS. ANN. LAWS ch. 231, § 60G(c) (Supp. 1987).

\textsuperscript{148} Id.

\textsuperscript{149} CAL. CIV. CODE § 3333.1(b) (West Supp. 1987) (“No source of collateral
The state legislatures also do not agree on who should consider evidence that a collateral source reimbursed the plaintiff for his injury. The states are almost evenly split on whether the court or the jury will hear evidence that the plaintiff received collateral benefits.\textsuperscript{150} If the court hears the evidence after the jury has rendered an award, the legislature may have solved the problem of overcompensation, but it did not solve the problem of jury speculation as to whether or not the plaintiff was insured. The jury still does not hear evidence of whether or not the plaintiff had insurance to cover some of her damages.\textsuperscript{151} Arizona takes a unique approach by allowing the trier of fact to give plaintiff’s receipt of collateral benefits whatever weight it chooses.\textsuperscript{152}

The Illinois legislature designed a very different scheme with regard to deducting collateral benefits from a plaintiff’s recovery. Only half of the benefits received by the plaintiff for lost wages or private or governmental disability income programs is deductible from the judgment.\textsuperscript{153} All of the benefits received for medical or caretaking expenses are deductible.\textsuperscript{154} The court only deducts from the plaintiff’s award in negligence actions; the court will not make any deductions if the defendant committed an

\textsuperscript{150} Alaska, Florida, Illinois, Massachusetts, Nebraska, New York and Utah only allow the defendant to introduce evidence of collateral sources to the court after an award has been rendered. Arizona, California, Delaware, Kansas, Rhode Island, South Dakota, Tennessee, and Washington allow the jury to hear such evidence. Iowa is not explicit as to who will hear this evidence but it appears that the plaintiff simply cannot ask for such damages. The statute states that the “damages awarded will not include losses replaced by collateral sources.” IOWA CODE ANN. § 147.136 (West Supp. 1986).

\textsuperscript{151} See supra notes 46-47 and accompanying text.

\textsuperscript{152} ARIZ. REV. STAT. ANN. § 12-565(B) (Supp. 1986). This feature of the Arizona Statute, thus, does not guarantee that the plaintiff’s award will actually be reduced. Siverson v. United States, 710 F.2d 557, 559 (9th Cir. 1983). The jury may choose to ignore the plaintiff’s receipt of collateral benefits. \textit{Id.}

\textsuperscript{153} ILL. ANN. STAT. ch. 110, ¶ 2-1205(8) (Smith-Hurd 1987).

\textsuperscript{154} \textit{Id.} ¶ 2-1205 (ii).
intentional tort. Furthermore, the court will only reduce the judgment if the defendant applies to reduce the judgment within a specified period of time.

While a medical malpractice statute still exists on the books in New Hampshire, the supreme court found the entire statute unconstitutional. In deciding upon the constitutionality of certain provisions of the legislation, the court held that the validity of the legislation under constitutional equal protection guarantees, would be subject to "a more rigorous judicial scrutiny than allowed under the rational basis test." The test, therefore, examined whether the legislation was "reasonable, not arbitrary, and [rested] upon some ground of difference having a fair and substantial relation to the object of the legislation." Under this test, the court found a number of provisions unconstitutional, including the provision refusing recovery for compensation received from collateral sources. The court held that the valid portions of the legislation could not be severed from the invalid ones and thus held the entire chapter void. As indicated above, the legislature never repealed the legislation. Similar challenges to the constitutional validity of other medical malpractice statutes in other states were unsuccessful.

155 Id. 156 Id. 157 N.H. REV. STAT. ANN. § 507C:7 (1983); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980). It is for this reason that the New Hampshire statute is excluded from the above discussion of the current medical malpractice statutes.

158 Carson, 120 N.H. at 925, 424 A.2d at 830.
159 Id. at 831 (emphasis in original).
160 Id. at 831-39.
161 Id. at 839.
163 E.g., Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 684-86, 211 Cal. Rptr. 368 (1985); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365, 367 (Fla. 1981) (The Florida Supreme Court, in upholding the constitutionality of the medical malpractice statute, applied a "Rational Basis Test" on the ground that "no suspect class or fundamental right expressly or impliedly protected by the constitution is implicated by [Florida's medical malpractice statute]." Id. at 367. The court found, under the test, that there was a legitimate state interest in protecting health care providers threatened by skyrocketing insurance rates. Id. The court concluded that protecting the health care providers in such a way also protected the public health by insuring the continued availability
The validity of the Ohio medical damage award statute is also questionable.\textsuperscript{164} In 1976, two Courts of Common Pleas in Ohio struck down various provisions of the state's medical malpractice legislation, including the partial abolition of the collateral source rule.\textsuperscript{165} In finding the partial abrogation of the rule invalid, the Graley court relied on an equal protection analysis.\textsuperscript{166} The court held that the statute unconstitutionally conferred benefits on medical malpractice defendants that were unavailable to defendants in other tort actions.\textsuperscript{167} The court found no satisfactory reason for such different treatment.\textsuperscript{168} The authority of the Graley and Simon opinions is questionable since the factual situations the courts considered occurred before passage of the legislation.\textsuperscript{169} In deciding whether to void legislation similar to Ohio's, a United States District Court refused to recognize the authority of either the Graley or Simon opinions.\textsuperscript{170} The court held that the findings in both opinions regarding the constitutionality of the state's medical malpractice statutes were dicta and, of medical services. \textit{Id.} at 367-68.). The Illinois Supreme Court recently addressed this issue in Bernier v. Burris, 113 Ill. 2d 219, 497 N.E.2d 763 (1986). The court in Bernier found no violation of equal protection because the statute bore a rational relationship to a legitimate governmental interest of reducing the costs of malpractice actions by eliminating double recoveries. \textit{Id.;} Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 424 (Iowa 1985); Baker v. Vanderbilt Univ., 616 F. Supp. 330, 333 (M.D. Tenn. 1985). For a discussion of the debate among the states over the constitutionality of the medical malpractice reform statutes, see Note, \textit{Ohio's Attempts to Halt the Medical Malpractice Crisis: Effective or Meaningless?}, 9 U. DAYTON L. REV. 361 (1984).

\textsuperscript{164} See \textsc{Ohio Rev. Code Ann.} \S 2305.27 (Anderson 1981) which relates to damage award reductions. For a further discussion of this statute, see Comment, \textit{Limitation on Recovery of Damages in Medical Malpractice Cases: A Violation of Equal Protection?}, 54 U. CIN. L. REV. 1329 (1986).


\textsuperscript{166} Graley, 74 Ohio Op. 2d at 832, 343 N.E.2d at 836.

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} \textit{Id.} at 837.

\textsuperscript{169} Simon, 3 Ohio Op. 3d at 164, 355 N.E.2d at 909; Graley, 74 Ohio Op. 2d at 832, 343 N.E.2d at 838.

therefore, not authoritative.171

C. No-Fault Actions

States have found other means by which to accomplish the abolition of the collateral source rule. A number of legislatures prohibit double recoveries under their "no-fault" automobile accident statutes. Like the medical malpractice statutes, the purpose of limiting the application of the collateral source rule under no-fault statutes is to prevent duplicate recoveries and reduce insurance premiums.172 Each of the states enacting such legislation apparently believes that the crisis faced by insurance companies outweighs the desire to adequately compensate plaintiffs.

States with no-fault statutes deal with the collateral source rule in various ways. Under the Georgia no-fault statute, a plaintiff does not recover any economic losses from a tortfeasor that are recoverable under the mandatory minimum no-fault coverage or the optional no-fault benefits.173 In any negligence action arising in Minnesota as a result of the operation of a motor vehicle, the claimant's recovery is reduced by the amounts "paid or payable." In North Dakota, the concern for prevent-

171 Id. at 472.
172 The Minnesota legislature has described the purpose of enacting the no-fault statute as follows:

To correct imbalances and abuses in the operation of the automobile accident tort liability system, to provide offsets to avoid duplicate recovery, to require medical examination and disclosure, and to govern the effect of advance payments prior to final settlement of liability.

MINN. STAT. ANN. § 65B.51 (West 1986). The Michigan Supreme Court described the purpose of that state's no-fault act as one to eliminate duplicate benefits, thereby reducing the amount paid out by insurance companies and as such, the amount they charge to the public obtain the insurance. Tebo v. Havlik, 418 Mich. 350, 343 N.W.2d 181, 187 (1984); MICH. COMP. LAWS ANN. §§ 500.3109, 500.3116, 550.3135 (West 1983). The trade-off for plaintiffs who lose the benefit of the collateral source rule is lower insurance premiums. Tebo, 418 Mich. at 350, 343 N.W.2d at 187. The court found a careful legislative intent to limit duplicate recovery where such a limitation would benefit the no-fault insurer and, thus, lower insurance rates. Id.

174 MINN. STAT. ANN. § 65B.51 (subd.1) (West 1986).
ing duplicate payments centers on the plaintiff’s own various insurance policies rather than on duplicate payments by a tortfeasor.\textsuperscript{175} The statute allows the no-fault insurer to require “coordination of benefits” among the plaintiff’s insurers so that the plaintiff receives compensation only once.\textsuperscript{176} This prevents the plaintiff from receiving reimbursement for medical expenses, for example, from his no-fault insurer and his health insurer.\textsuperscript{177} A non-exclusive list of other states which enacted no-fault statutes include: Delaware,\textsuperscript{178} Florida,\textsuperscript{179} Michigan,\textsuperscript{180} New Jersey,\textsuperscript{181} Pennsylvania,\textsuperscript{182} and Utah.\textsuperscript{183}

D. Other Limitations on the Collateral Source Rule

State legislatures in other states elected to eliminate the collateral source rule in other particular areas. In a product liability action, Alabama allows the jury to receive evidence that a collateral source paid the plaintiff’s medical or hospital expenses.\textsuperscript{184} The plaintiff is entitled to reimbursement for the costs of obtaining the insurance.\textsuperscript{185} Illinois and Ohio also reject the concept of double recovery for plaintiffs bringing product liability actions.\textsuperscript{186} In New York, in actions against a public employer by a public employee injured while acting within the scope of her employment, the court will consider evidence that a public employer paid for benefits or provided benefits for eco-

\textsuperscript{176} Id.
\textsuperscript{177} Kiefer v. General Casualty Co., 381 N.W.2d 205, 207 (N.D. 1986) (interpreting the predecessor of the present no-fault act, N.D. CENT. CODE § 26-41-10 (1978); the language of the past and present statutes are identical.).
\textsuperscript{178} DEL. CODE ANN. tit. 21, § 2118(g) (1985).
\textsuperscript{179} FLA. STAT. ANN. § 627.7372 (West 1984).
\textsuperscript{180} MICH. COMP. LAWS ANN. §§ 500.3109, 500.3116, 500.3135 (West 1983).
\textsuperscript{182} 75 PA. CONS. STAT. ANN. §§ 1711-1798 (Purdon 1987). Under section 1754, a claimant’s recovery in a tort action will be set off by any amounts received under the statute. \textit{Id.}
\textsuperscript{183} UTAH CODE ANN. § 31A-22-309 (1986).
\textsuperscript{184} ALA. CODE § 6-5-522 (1986).
\textsuperscript{185} Id.
\textsuperscript{186} ILL. ANN. STAT. ch. 110, § 2-1205.1 (1987); Amended Substitute H.B. 1, 117th Gen Assembly, 1987, Ohio.
nomic losses claimed by the plaintiff. The court, under the statute, must reduce the plaintiff’s award by the amount received, less any amount contributed to receive the benefit. When a plaintiff brings a suit against a local government in Pennsylvania, the plaintiff cannot recover damages if insurance will cover the damages. The court deducts any insurance payments from the plaintiff’s award. Finally, in New Jersey, the collateral source rule does not apply in actions against a public entity. 

Like other legislatures, New Jersey’s legislature found that public policy considerations dictated that plaintiffs should not benefit from duplicate recoveries. Unlike statutes in other states, this statute does not specify how the rule will operate. The provision merely states that benefits from “sources” available to the plaintiff “shall be disclosed to the court.” The statute dictates that such sources are deducted from the claimant’s award, but does not disclose whether the court or the trier of fact will consider this evidence.

Some states, while generally allowing the application of the collateral source rule, allow the defendant to introduce evidence of collateral sources for reasons other than to prove the plaintiff has not suffered a loss. The most common reason in favor of admitting the plaintiff’s receipt of collateral benefits is to prove malingering. A

187 N.Y. Civ. Prac. L. & R. § 4545(b) (McKinney 1987). This provision does not apply to collateral sources which are entitled by law to liens against the plaintiff’s recovery. Id.
188 Id.
189 75 PA. CONS. STAT. ANN. § 8553(d) (Purdon 1982). Under this statute collateral sources do not include life insurance benefits. Id.
190 Id.
192 Id.
193 Id.
194 Id. The statute excludes life insurance benefits and sources with a right of subrogation. Id.
195 See, e.g., Corsetti v. Stone Co., 483 N.E.2d 793, 802 (Mass. 1985). In a “malingering” case the defendant is trying to prove, for example, that the plaintiff is not working only because she receives more money from being disabled than by working. See id.
court may also permit evidence of the availability of collateral benefits to go to the jury if the evidence helps prove an issue in the case.\textsuperscript{196}

Courts in at least four states allow a defendant to introduce evidence of collateral sources to show that the plaintiff is malingering.\textsuperscript{197} When the issue is the severity of the plaintiff’s injury, the District of Columbia allows the defendant to introduce evidence of collateral sources to show that this injury sued for was an aggravation of an earlier injury, or to show that this injury was unconnected to the accident over which the plaintiff has sued.\textsuperscript{198} Indiana courts have admitted evidence of collateral sources if they go to the establishment of a cause of action against the defendant and the liability of the defendant.\textsuperscript{199} An Indiana court allowed a defendant to introduce evidence of the plaintiff’s receipt of collateral benefits to discredit the


\textsuperscript{197} MGMiddleton, 139 Mich. App. at 418, 362 N.W.2d at 817-18 (In the proper case, evidence that the plaintiff received workers' compensation benefits is admissible to show that the plaintiff has little incentive to return to work. The defendant must, however, establish an "extensive" foundation of malingering before he can introduce this evidence. As the court held, "the proposed evidence must refute the fact that plaintiff actually lost the wages or salary claimed."); Corsetti, 396 Mass. at 1, 483 N.E.2d at 802 ("... evidence of collateral source income [in same circumstances] may be admissible, in the discretion of the trial judge" as probative of the credibility of a witness. Such evidence may be relevant, not as a reduction in the plaintiff's damages, but to show a motive for staying out of work. Id. In this case, the court also admitted the evidence to show that the plaintiff was receiving a higher income disabled than before this accident. Id. at 802-03. The evidence directly contradicted the plaintiff's testimony that he had less money after the accident than before the accident. Id. at 803); Ridilla v. Kerns, 155 A.2d 517, 519 (D.C. 1959); Soucy v. Martin, 121 R.I. 651, 402 A.2d 1167, 1170 (1979) ("The collateral source rule... does not operate as a complete bar to the admission of the evidence in every situation." The court may admit evidence that the employer paid the plaintiff during the period of his alleged disability as bearing on the weight of plaintiff's testimony that the injury caused him to miss work. Id. at 1170-71.).

\textsuperscript{198} Ridilla, 155 A.2d at 519.

\textsuperscript{199} Jackson v. Beard, 146 Ind. App. 382, 255 N.E.2d 837, 847 (1970). After this case, Indiana, as discussed above, abrogated the collateral source rule for certain collateral sources. See supra text accompanying notes 109-112. This decision, however, should still apply to those sources covered under the collateral source rule.
plaintiff’s testimony as to lost income. A New Mexico court allowed the admission of collateral sources because the evidence went to the issue of proximate cause.

Still the general rule is that the admission of evidence of collateral sources under any circumstances is too prejudicial to the plaintiff, and the likelihood of misuse by the jury outweighs any value the evidence may have. The states which allow a jury to hear evidence of collateral sources apparently do not have the same concerns over the jury’s inability to utilize this evidence. Again, if one premise of the collateral source rule is that juries are not able to understand the consequence of collateral sources, then this premise begins to erode when some states fail to abide by it in certain circumstances.

III. TORT REFORM AND THE COLLATERAL SOURCE RULE

In 1986, the United States government and the City of New York published two comprehensive government studies on the insurance availability crisis. The United States Attorney General commissioned one report (the “Attorney General’s Report”) and New York Governor Mario Cuomo commissioned the other (the “Governor’s Report”). Not surprisingly, the Attorney General’s Report found a tremendous increase in the number of tort lawsuits and in the level of damage awards. Recognizing that most claims settled before trial, the Attorney General’s Report emphasized that the size of verdicts

\[200\] Jackson v. Beard, 255 N.E.2d at 847. The plaintiff, in effect, waived the collateral source rule by testifying that he had received less income after the accident than before. Id. In doing so, the plaintiff opened up the issue of reduced income and permitted the defendant to cross-examine him on this issue. Id.

\[201\] Selgado, 86 N.M. at 633, 526 P.2d at 434.

\[202\] See, e.g., Eichel, 375 U.S. at 255; see supra notes 18-24 and accompanying text.

\[203\] See supra notes 18-24 and accompanying text.

\[204\] Attorney General’s Report, supra note 34.

\[205\] Governor’s Report, supra note 34.

\[206\] Attorney General’s Report, supra note 34, at 45. For example, the average medical malpractice jury verdict in 1975 was $220,018 while the average in 1985 was $1,017,717. Id. at 35.
awarded affects the dollar amount of settlement offers.\textsuperscript{207} The Report also found uncertainty as to what standard of liability and causation applied in tort actions because of the rapidly and dramatically changing rules of tort liability.\textsuperscript{208} The Report concluded that the major cause of insurance unavailability and high costs was "tort law."\textsuperscript{209}

Both the Attorney General’s Report and the Governor’s Report suggest changes in the collateral source rule as part of an overall effort of tort reform.\textsuperscript{210} The Attorney General’s committee recommended reducing plaintiffs’ awards by the amount of benefits received from collateral sources as compensation for the plaintiff’s injury.\textsuperscript{211} Further, in order to simplify the application of their suggestion, the committee recommended that state legislatures eliminate subrogation rights of collateral sources.\textsuperscript{212} They also suggested that publicly provided sources not be considered when assessing the plaintiff’s damages.\textsuperscript{213} According to the Attorney General’s Report, allowing the plaintiff to recover from public sources forces other citizens to pay twice for plaintiff’s injuries.\textsuperscript{214} Citizens pay first as taxpayers funding the public source and second as consumers paying increased prices for products involved in the litigation.\textsuperscript{215}

The Governor’s Report also recommended the abrogation of the collateral source rule in all tort actions.\textsuperscript{216} The Report found that the rule overcompensated plaintiffs,

\begin{itemize}
\item \textsuperscript{207} Id. at 49.
\item \textsuperscript{208} Id. at 51; see also Governor’s Report, \textit{supra} note 34 at 123.
\item \textsuperscript{209} Attorney General’s Report, \textit{supra} note 34, at 80. Both the Tort Policy Working Group and Governor Cuomo’s committee also blamed insurance companies for the financial crisis in which they find themselves. \textit{Id.} at 16-30; Governor’s Report, \textit{supra} note 34, at 8-12 and 70-79.
\item \textsuperscript{210} Attorney General’s Report, \textit{supra} note 34 at 70-72; Governor’s Report, \textit{supra} note 34, at 71.
\item \textsuperscript{211} Attorney General’s Report, \textit{supra} note 34, at 71.
\item \textsuperscript{212} Id.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Governor’s Report, \textit{supra} note 34, at 136.
\end{itemize}
imposing unnecessary costs on society.\footnote{Id.} As the committee stated, abolishing the rule "serves both goals of fairness and those of cost reduction."\footnote{Id.} The concern over the insurance availability crisis and the consequent interest in reforming many tort liability rules is evident by the number of current attempts by states to reform tort law. In March of 1986, the New York Times published an article on the current state of tort reform.\footnote{Insurance Woes Spur Many States to Amend Law on Liability Suits, N.Y. Times, Mar. 31, 1986, at 1, col. 2. The New York Law Journal has also published an article on the current insurance crisis and its effect on tort reform. Mayesh & Reid, Current State of Tort Reform Ignited by Insurance Crisis, 195 N.Y.L.J., May 20, 1986, at 1, col. 3-4.} In surveying the area of tort reform among the states, the New York Times discovered that over 1,000 pieces of tort reform legislation were pending in state legislatures.\footnote{N.Y. Times at 1. (quoting Constance Heckman, Executive Director of the American Legislative Exchange Council).} Nearly every state legislature that met in 1986 had considered a bill to change the state's civil liability system.\footnote{Id.} The previously discussed legislative changes in the collateral source rule reflect one part of the reform effort. It is likely that the rule will be the subject of consideration and change by legislatures still debating tort reform.\footnote{For example, in its last legislative session the Texas legislature passed a sweeping tort reform measure. 1987 Tex. Sess. Law Serv. Ch. 2, §§ 1.01 - 4.05 (Vernon). The House/Senate joint committee on Liability Insurance and Tort Law and Procedure found that a serious liability insurance crisis existed in Texas. \textit{Id.} § 1.01(a)(2). The Committee proposed the tort reform legislation because of the adverse effects the crisis was having on the availability and affordability of liability insurance "and the economic development and growth of this state and the well-being of its citizens." \textit{Id.} The comprehensive legislation, however made no change in the collateral source rule with regard to any type of tort action.}
rule across the states not only fosters inequitable application of the rule, but creates uncertainty in the choice-of-law area. A court can be faced with deciding whose law to apply when a tort has occurred outside the forum state or when a number of suits are pending in jurisdictions all over the country. In choice-of-law situations, the question becomes whether the fact that one state would apply the rule while another state would not, should affect the court's determination of which law to apply. When multi-state litigation arises over a defendant's conduct, there is a question as to whether it is equitable to prohibit certain plaintiffs from one state from receiving a double recovery while other plaintiffs injured from the same tortious conduct are denied such a recovery.

At least one court focused on the collateral source rule and its availability or non-availability as a basis for deciding which state's law to apply in a choice-of-law conflict. In *American Standard Insurance Co. v. Cleveland*, the Wisconsin Court of Appeals addressed a situation in which two Wisconsin residents were involved in an automobile accident in Minnesota. Wisconsin applies the collateral source rule in all tort actions while Minnesota, under its no-fault statute, abolished the collateral source rule in automobile collision cases. Applying Wisconsin's choice of law rules, the court found that Wisconsin's collateral

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224 *Id.* at 170. The plaintiff and defendant were traveling in separate automobiles when they were involved in the accident in Minnesota. *Id.* Both parties were insured by Wisconsin companies. *Id.*
225 *Id.* at 170-71.
227 Wisconsin has two tests it follows in its choice of law analysis. *American Standard Ins. Co.*, 124 Wis. 2d at 258, 369 N.W.2d at 171. The first test requires a determination as to "whether the contacts of one state to the facts of the case are so obviously limited and minimal that application of that state's law constitutes officious intermeddling." *Id.* If no "officious intermeddling" is involved, the court then applies a "choice — influencing consideration" test. *Id.* The factors for the court to consider are: (1) predictability of results; (2) maintenance of interstate order; (3) simplification of the judicial task; (4) advancement of the forum state's interest; and (5) application of the better rule of law. *Id.* at 171-72.
source rule would govern.\textsuperscript{228} The court held, under Wisconsin's choice-of-law rule, that applying Minnesota's no-fault law would constitute "officious intermeddling".\textsuperscript{229} According to the court, applying the collateral source rule advanced Wisconsin's governmental interests by providing full compensation to persons injured by negligent conduct and by deterring such conduct.\textsuperscript{230} The court concluded that Wisconsin insurers and parties expected the collateral source rule to apply.\textsuperscript{231} The court went further and held that the collateral source rule simply was, in its own opinion, a better rule than Minnesota's no-fault law.\textsuperscript{232} The court focused entirely on the collateral source rule in deciding its choice-of-law question.\textsuperscript{233} The court ignored the first and second factor of its own "choice-influencing consideration" test: predictability of results and maintenance of interstate order.\textsuperscript{234} It also treated the site of the accident as an inconsequential consideration.\textsuperscript{235} This case illustrates that the collateral source rule could potentially become the central focus in a choice-of-law analysis when two interested states have opposing views on the collateral source rule. The importance of other policy reasons for applying one state's law to a lawsuit is diminished and the importance of the collateral source rule as a factor in deciding which state law to apply is increased. The consequences of such a practice are numerous and are, most importantly, unpredictable.

A look at another choice-of-law test illustrates how the

\textsuperscript{228} Id. at 172.
\textsuperscript{229} Id. In so holding, the court found that Minnesota's primary interest in the suit was in regulating highway safety within its borders while Wisconsin's interest was in regulating the economic and social consequences of the tortious conduct. Id. The court placed emphasis on the fact that Minnesota's law was not intended to deter negligent conduct while Wisconsin's law was so intended. Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id. The court therefore seems to be saying that Wisconsin law would follow anybody hurt in another state by virtue of their Wisconsin residency and the fact that they are insured by a Wisconsin corporation.
\textsuperscript{232} Id. at 172-73.
\textsuperscript{233} Id. at 171-73.
\textsuperscript{234} See supra note 227.
\textsuperscript{235} See American Standard Ins. Co., 124 Wis. 2d at 258, 369 N.W. 2d at 172.
collateral source rule could influence a court’s choice-of-law decision. That test is the “most significant relationship test.”\textsuperscript{266} One important factor of the test requires a court to consider the relevant policies of the interested states.\textsuperscript{267} If the court holds that the application of the collateral source rule is a significant policy of a state, there is a potential for that rule becoming the focus of the choice-of-law inquiry. The concern should be whether such a situation is desirable in light of the inconsistent results that are likely to occur.

A court, in applying the most significant relationship test, could simply find application of the collateral source

\textsuperscript{266} The “most significant relationship” test, is a combination of the following two sections under the Restatement (Second) of Conflicts:

\begin{itemize}
  \item § 6. Choice-of-Law Principles
    \begin{itemize}
      \item (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
      \item (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
        \begin{itemize}
          \item (a) the need of the interstate and international systems,
          \item (b) the relevant policies of the forum,
          \item (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
          \item (d) the protection of justified expectations,
          \item (e) the basic policies underlying the particular field of law,
          \item (f) certainty, predictability and uniformity of result, and
          \item (g) ease in the determination and application of the law to be applied.
        \end{itemize}
    \end{itemize}
  \item § 145. The General Principle
    \begin{itemize}
      \item (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
      \item (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
        \begin{itemize}
          \item (a) the place where the injury occurred,
          \item (b) the place where the conduct causing the injury occurred,
          \item (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
          \item (d) the place where the relationship, if any, between the parties is centered.
        \end{itemize}
    \end{itemize}
\end{itemize}

\textsuperscript{267} For an example of an application of this rule, see Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979).

\textsuperscript{267} Restatement (Second) of Conflict of Laws § 6(2) (1969).
rule under the particular facts is a significant, relevant policy. A court, thus, could defeat the policy of its own state by applying another state’s collateral source rule. A choice-of-law situation coupled with multistate litigation (in which a number of cases arising out to the same tortious conduct are pending in more than one jurisdiction) would only serve to exacerbate the problem. The potential for inconsistent application of the collateral source rule is serious because the application of the collateral source rule can significantly affect the amount of a plaintiff’s recoveries. Even where a court decides that one state’s law applies to all actions brought in connection with a tort giving rise to the multi-state litigation, it must then determine if the collateral source rule will affect the decision as to which state’s law will apply. Questions should be raised as to whether the collateral source rule will be inequitably applied among the various jurisdictions. Further, where a number of suits arising out of one tortious incident of tortious conduct are brought in various jurisdictions that apply the collateral source rule differently, some plaintiffs will potentially receive a double recovery while similarly situated plaintiffs will not. The outcome can have a significant impact directly on plaintiffs and defendants, and indirectly on society.

V. Conclusion

The result of complete or partial abrogation of the collateral source rule in less than every jurisdiction serves to undermine the very premise of maintaining the collateral source rule. If only certain types of injuries and only certain plaintiffs benefit from the double recovery aspect of the rule, then courts and legislatures should question the validity of the rule in its present state. While some argument may exist for applying the collateral source rule to sources funded either actually or constructively by the plaintiff, such arguments lose their force when the collateral source is one to which the plaintiff never contributed nor bargained for or when the source consists of wholly
gratuitous services. The disparate application of the rule is particularly troublesome when the rule applies only to a few plaintiffs in related tort actions. The nationwide concern for skyrocketing insurance premiums and jury awards has prompted a much needed closer look at the need for and justification of the collateral source rule. As each state debates the future of the rule in tort actions, the legislatures and courts should give some thought, first, toward bringing about uniformity in the application of the rule either in their own state or with other states. At present, governments, businesses, individuals and insurance companies face only uncertainty as to the extent of their future liabilities. As such, the states cannot view the collateral source rule in the isolated world of one particular lawsuit.

The problem of disparate treatment of the collateral source rule across the United States becomes further apparent when one considers the nature of our highly mobile society and our complex system of interstate commerce. Our society today relies on a commercial system far removed from the one that existed when the collateral source rule first appeared. How one state applies the rule does not affect its citizens in isolation. Citizens of one state travel and are injured in other states. Defective products are manufactured in one state and cause injuries in other states. When an airplane accident occurs in one state, the resulting litigation involves a multitude of state and federal courts, each applying various forms of the collateral source rule. Inconsistency in the availability of the rule has a significant monetary impact on plaintiffs and defendants and creates an air of uncertainty for individuals, businesses and insurance companies as to future liabilities.

The disparate application of the collateral source rule exemplifies the need for each state to carefully review its treatment of the rule. Particularly, the state courts and legislatures must determine whether their application of the rule is affecting similarly situated plaintiffs differently.
This determination should consider not only the intra-state impact of a change or continuation of the rule, but should consider the interstate impact as well. Another important consideration centers on the potential for abuse under choice-of-law rules. Will one court disregard other important elements in a choice of law analysis and focus solely on the availability of the collateral source rule? The states should reexamine the policies supporting the creation of the rule and ask if such policies can still justify the continued use of the rule. While it would be unrealistic to expect a uniform application of the collateral source rule across the country, it is realistic to expect the citizens of each state to reevaluate the rule as they debate tort reform in their state.
Casenotes and Statute Notes