

***HOFFMAN V. 21ST CENTURY NORTH
AMERICA INSURANCE COMPANY:
ABROGATION OF THE COLLATERAL
SOURCE RULE?***

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I. INTRODUCTION

Since its introduction into American jurisprudence, the collateral source rule¹ has been a source of persistent dispute and contention. American legal scholars have long been divided over the value of its function, and over the last century, both proponents and opponents have predicted its demise due to the ever-present push for tort reform and decades-long discussions of universal healthcare.² Several states have completely abrogated the rule, while several others have merely modified it by limiting

1. RESTATEMENT (SECOND) OF TORTS § 920A (AM. LAW INST. 1979). The collateral source rule shields the plaintiff from a reduction of his damages in the amount of any payments made to the plaintiff or any benefits conferred upon him (“collateral source benefits”) independent of the tortfeasor. Such collateral source benefits include payments made to the plaintiff by his insurer, employee benefits, and gratuities received (i.e. cash gratuities and services rendered, such as gratuitous medical services). *Id.*

2. See Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 MCGEORGE L. REV. 965, 965 & n.2 (2012) (citing Daena A. Goldsmith, Comment, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799, 829 (1988) (“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 Nearly every state legislature that met in 1986 . . . considered a bill to change the state’s civil liability system. [L]egislative 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.”); Jennifer Howard, *Alabama’s New Collateral Source Rule: Observations from the Plaintiff’s Perspective*, 32 CUMB. L. REV. 573, 585–90 (2002) (discussing “Alabama’s statutory modification of the traditional collateral-source rule”); Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1343–44 (1994) (“Reports of the impending death of the collateral source rule are greatly exaggerated. The rule is, in fact, alive and well in American courthouses despite being subject to forces that many predicted would lead to its demise. In the past twenty years, its abrogation was forecasted by scholars examining U.S. healthcare legislation, by tort reform advocates, and by writers promoting the increase in the use and exercise of subrogation rights by health insurance providers.”).

its application.³ The enactment of the Affordable Care Act (ACA) gave substance to collateral source naysayers' long-argued, scholarly fantasies of the rule's demise, and worried the pro-rule advocates who frequently claimed that the rule had indissoluble staying power.⁴ Few anticipated, however, that the ACA would have little effect on the collateral source rule, aside from confusing parties on both sides of the fence.⁵ Despite the recurrent controversy, the collateral source doctrine endures.⁶

3. See 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, 463–64, 464 n.7 (2007) (citations omitted) (“Dubbed an ‘oddit[y] of American accident law,’ the collateral source rule travels the path to extinction. Currently, only twelve states retain the rule’s immaculate common law form. Reacting to a perceived medical malpractice crisis, twenty states have modified the rule, and, in even more ambitious attempts at tort reform, fourteen states have simply abrogated the rule. Courts in four states, including Kansas[, Kentucky, Georgia, and New Hampshire], have found these legislative measures unconstitutional.”); see also *id.* at 463 nn.3 & 5, 464 n.6 (citations omitted) (noting that: (1) “[a]s of February 2006, only the common law collateral source rules in Arkansas, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wyoming remain intact”; (2) “[s]everal states have abrogated the rule only in the medical malpractice context,” and “[o]ther states have abrogated the rule in particular situations”; and (3) Alabama, Alaska, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Michigan, Minnesota, New York, North Dakota, Ohio, and Oregon “have entirely abrogated their collateral source rules”).

4. See Todd, *supra* note 2, at 982–85 (citations omitted) (“The new federal healthcare legislation and similar state healthcare initiatives potentially undermine the collateral source rule in three ways. First, they undermine the instrumentalist rationale, which claims that the collateral source rule provides incentives and rewards for the purchase of insurance The new federal healthcare regulations also undermine the contract-based arguments that support the collateral source rule Under the mandates, the expectations of the insured under the insurance contract will likely change in such a way that the insured no longer has the expectation of cumulative recovery in a tort action The third argument favoring abrogation of the collateral source rule in light of the Affordable Care Act is that jury instructions implementing the collateral source rule may become more complicated.”).

5. Rebecca Levenson, Comment, *Allocating the Costs of Harm to Whom They Are Due: Modifying the Collateral Source Rule After Healthcare Reform*, 160 U. PA. L. REV. 921, 936 (2012) (“In light of the Affordable Care Act, arguments for upholding the common law collateral source rule are no longer as persuasive as they were before. Whether . . . changes to the collateral source rule will be made in the [Act’s] wake . . . will vary from jurisdiction to jurisdiction. However, to evaluate this choice and determine how the rule should be changed, a number of factors must be considered to evaluate the effect that such a limitation may have on the existing tort regime.”).

6. See Todd, *supra* note 2, at 973–74 (citations omitted) (“The collateral source rule . . . receives support under law-and-economics notions of efficiency[, because it] causes the defendant–tortfeasor to pay the full cost of his risk-taking activities The only way the true cost can be determined is by requiring the tortfeasor to pay

Central to the doctrine's relevance is its core rationale that echoes fundamental principles of tort law, namely "deterrence, retribution, and economic efficiency."⁷ The many states that have retained the rule in its "pure, unmodified form" show that its functional qualities remain appealing within the legal system.⁸ Louisiana was counted among those states until 2015 when the Louisiana Supreme Court held that attorney-negotiated medical write-offs were not protected by the collateral source rule.⁹ Although many believed the decision was a precursor to further limitations, Louisiana courts subsequently (and promptly) declined to further limit the rule's application, thus showing its normative and functional value.¹⁰

Section II of this Note discusses the facts and procedural history that gave rise to the Louisiana Supreme Court decision. Next, Section III explains the history of the collateral source doctrine at common law, and its application in Louisiana jurisprudence. Then, Section IV summarizes the opinion in *Hoffman v. 21st Century North America Insurance Company*. Finally, Section V analyzes the holding's deviation from fundamental tort values and, specifically, Louisiana jurisprudence.

the full measure of damages. Reducing a tortfeasor's damages, in the absence of the collateral source rule, requires the plaintiff to subsidize the defendant's injurious and tortious behavior [In addition, n]otions of fairness and justice favor the defendant-tortfeasor paying for all of the damages of his tortious behavior and not receiving the benefits of collateral source compensation provided to the plaintiff by an insurance policy Instrumental rationales also support the collateral source rule. Instrumentalist arguments posit that the collateral source rule encourages the purchase of and promotes the benefits from insurance.").

7. Todd, *supra* note 2, at 973.

8. *See id.* at 979 (citations omitted) ("According to the most recent surveys . . . [twelve states] retain the rule in its pure, unmodified form."); *see also* Zorogastua, *supra* note 3, at 463 n.3 (citations omitted).

9. *See Hoffman v. 21st Century N. Am. Ins. Co.*, 14-2279, p. 6 (La. 10/02/15); 209 So. 3d 702, 708 ("In the present case, Mr. Hoffman did not incur any additional expense in order to receive the attorney-negotiated 'write-off,' nor has he suffered any diminution in his patrimony. Therefore, he cannot receive the advantage of the collateral source rule."), *reh'g denied* (12/7/15).

10. *See Johnson v. Neill Corp.*, 15-0430, p. 11 (La. App. 1 Cir. 12/23/15); 2015 WL 9464625, at *11 (holding that the collateral source rule applies in cases where medical discounts are gratuitously granted as a professional courtesy), *writ denied* 2016-0137 (La. 3/14/16); 189 So. 3d 1068; *Lockett v. UV Ins. Risk Retention Grp., Inc.*, 15-166, p. 5 (La. App. 5 Cir. 11/19/15); 180 So. 3d 557, 572 (holding that the collateral source rule is applicable in cases where medical discounts are negotiated by the plaintiff), *reh'g denied* (12/9/15).

II. FACTS AND HOLDING

Plaintiff, Eddie Hoffman, was injured in October 2010 when his vehicle was rear-ended. Mr. Hoffman subsequently filed suit against the following motorist, Carolyn Elzy, and her insurance company, 21st Century North American Insurance Company, for damages resulting from the injuries he suffered in the accident.¹¹

Following a bench trial on the issues of liability and damages, the court found the defendant “one-hundred percent at fault for the accident.”¹² Mr. Hoffman was awarded \$4,500 in general damages, and \$2,478 in special damages.¹³ On appeal, Mr. Hoffman asserted that the “award for special damages was erroneous.”¹⁴

However, the trial court’s verdict was affirmed “in all respects.”¹⁵ On rehearing, the appellate court affirmed its previous decision, finding that “the trial court had been presented with two conflicting medical bills” and had not erred in its choice between them.¹⁶ Specifically, the plaintiff introduced medical bills for two MRI procedures totaling \$3,000 (\$1,500 each), while the defendant introduced a medical statement showing that the plaintiff’s attorney had negotiated (and paid for) a discounted rate for each procedure.¹⁷ The defendant’s statement, although displaying \$3,000 in total charges, also displayed an attorney-negotiated write-off of \$1,025 for each MRI, reducing the amount paid for each MRI procedure to \$475.¹⁸

The Louisiana Supreme Court granted certiorari to determine whether the collateral source rule applied to attorney-negotiated medical discounts.¹⁹ The court held that the collateral source rule only applies where the plaintiff suffers some diminution of patrimony.²⁰ Furthermore, the court held that a plaintiff’s “contractual obligation . . . to pay attorney fees” is not

11. *Hoffman*, 14-2279, p. 1; 209 So. 3d at 703.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Hoffman*, 14-2279, p. 1; 209 So. 3d at 703.

17. *Id.*

18. *Id.*

19. *Id.* (“We are presented with a question of first impression as to whether a write-off from a medical provider, negotiated by the plaintiff’s attorney, may be considered a collateral source from which the tortfeasor receives no set-off.”).

20. *Id.* at p. 4; 209 So. 3d at 706.

“consideration for the benefit . . . [of] attorney-negotiated medical discounts.”²¹ Thus, an attorney-negotiated write-off is not a benefit that “fall[s] within the ambit of the collateral source rule.”²²

III. LEGAL BACKGROUND

The collateral source doctrine finds its American roots in *In re The Propeller Monticello*, wherein steam-propeller Monticello was found at fault for colliding with a schooner, causing it to sink and lose all her contents.²³ On appeal, after judgment was rendered for the schooner and against the owner of the Monticello, the owner alleged he was released from his responsibility to pay damages because the schooner’s owners had accepted payment for the damages from their insurer.²⁴ The U.S. Supreme Court affirmed the lower court’s rulings and held that, where a tort victim receives payment from an insurer for damages, the tortfeasor is not released from his responsibility.²⁵ Specifically, the Court held that “the contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern.”²⁶

The Restatement (Second) of Torts (Restatement) defines collateral source benefits as “payments made to or benefits conferred on the injured party from other sources.”²⁷ The payments and benefits to which the collateral source rule has generally been applied are those derived from: (1) private

21. *Hoffman*, 14-2279, p. 5; 209 So. 3d at 707 (quoting *Killebrew v. Abbott Labs.*, 359 So. 2d 1275, 1278 (La. 1978) (“It is . . . well recognized in the jurisprudence of this state that as a general rule attorney fees are not allowed except when authorized by statute or contract.”)) (“Because the tortfeasor is not liable for, and the tort victim has no right to recover, attorney fees, the payment of an attorney fee is not additional damage to the plaintiff’s patrimony so as to justify the ‘windfall’ or ‘double recovery’ represented by the attorney-negotiated discount.”) (emphasis in original).

22. *Id.*

23. 58 U.S. 152, 152 (1854).

24. *Id.* at 154 (“The answer . . . alleges, as a defence, that the schooner and cargo had been insured and abandoned to the insurers, who accepted the abandonment, and had paid the insurance to the [schooner’s owners], prior to the filing of the [suit].”).

25. *Id.* at 155 (“The defence . . . that the [schooner’s owners] have received satisfaction from the insurers, cannot avail the respondent.”).

26. *Id.* (“The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others. This is a doctrine well established at common law and received in courts of admiralty . . . [Thus, the tortfeasor] is bound to make satisfaction for the injury he has done.”).

27. See RESTATEMENT (SECOND) OF TORTS § 920A (AM. LAW INST. 1979).

insurance “for which the injured party has paid directly, or through contributions or is the contractual beneficiary”;²⁸ (2) wages;²⁹ (3) “worker’s compensation, disability insurance, unemployment compensation, sick pay, and related employee benefit programs”;³⁰ (4) “Social Security and its derivative Medicare and Medicaid programs”;³¹ (5) “pension and retirement

28. JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS pt. 3, § 17.01(1)(b) & nn.32–34, LEXIS (database updated 2016) (citing *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958); *Chenoweth v. Schaaf*, 576 F. Supp. 1556, 1558–59 (W.D. Pa. 1984) (holding that the collateral source rule applied where the “plaintiff’s decedent . . . bargain[ed] for” benefits in his employment contracts); *Squires v. Bd. of Cty. Rd. Comm’rs of Kalamazoo*, 147 N.W.2d 65, (Wis. 1967) (per curiam); RESTATEMENT (SECOND) OF TORTS § 920A, cmts. (b), (c)(1) (AM. LAW INST. 1979) (“The [collateral source] rule applies to . . . [i]nsurance policies, whether maintained by the plaintiff or a third party.”); see *Bradshaw v. United States*, 443 F.2d 759, 770–71 (D.C. Cir. 1971) (holding that the collateral source rule applied where plaintiff received benefits from a fund that drew “most of [its] money from . . . employee contributions”); *Werner v. Lane*, 393 A.2d 1329, 1335 (Me. 1978) (“The [collateral source] rule . . . [is] applied . . . where benefits have been received under the terms of an insurance contract”); *Kagarise v. Shover*, 275 A.2d 855, 856–57 (Pa. Super. Ct. 1971).

29. NATES ET AL., *supra* note 28, at pt. 3 § 17.01(1)(b) & n.35 (citing *Roland v. Krazy Glue, Inc.*, 342 So. 2d 383, 385 (Ala. Civ. App. 1977) (“Plaintiff is not required to negate the possibility that she was compensated by her employer for the time she was absent from work”); *Hall v. Olague*, 579 P.2d 577, 578 (Ariz. Ct. App. 1978) (“[T]he rule followed in most jurisdictions is that the amount of recovery from a third person (defendant) who is responsible for a personal injury is not to be mitigated or reduced by the plaintiff’s receipt from his employer of wages, salary, or commissions during the period of the plaintiff’s disability”), *reh’g denied* (4/12/78)); see *Werner v. Lane*, 393 A.2d 1329, 1335 (Me. 1978) (“The [collateral source] rule . . . [is] applied . . . where the injured person’s employer continued . . . pay[ing] . . . the person’s wages during his disability”); *Kagarise v. Shover*, 275 A.2d 855, 856 (Pa. Super. Ct. 1971) (“[A] continued salary payment from an employer to an employee . . . is immaterial in determining damages.”).

30. NATES ET AL., *supra* note 28, at pt. 3, § 17.01(1)(b) & nn.36–40 (citing *Amos v. Stroud*, 482 S.W.2d 592, 596 (Ark. 1972) (“[A]n employee is entitled to recover the full extent of his damages even though he was compensated . . . through workmen’s compensation.”); *Werner*, 393 A.2d at 1335 (“The [collateral source] rule . . . [is] applied . . . where industrial accident compensation benefits [a]re involved . . . [or] where the injured person collected unemployment compensation relief”); *Sporn v. Celebrity, Inc.*, 324 A.2d 71, 74–75 (N.J. Super. Ct. Law. Div. 1974) (“[A] tortfeasor cannot obtain reduction for benefits paid under a state compensation plan . . . [and] payments from the unemployment compensation fund should not be regarded as wages received from employment.”); *Ellard v. Harvey*, 231 S.E.2d 339, 343 (W. Va. 1976) (“It is well established in most jurisdictions that one claiming damages for loss of wages is not barred from recovering on the claim merely because he was paid in accordance with a sick leave policy or similar plan while away from work.”); RESTATEMENT (SECOND) OF TORTS § 920A, cmt. (c)(2) (AM. LAW INST. 1979)).

31. *Id.* at pt. 3, § 17.01(1)(b) & n.41 (citing *Renswick v. Wenzel*, 819 N.W.2d 198, 211 (Minn. Ct. App. 2012) (“We hold that an injured tort plaintiff’s Medicare benefits in the form of payments for medical care or Medicare-negotiated discounts to reduce

funds”;³² (6) “public welfare and related programs of social insurance”;³³ and (7) gratuitous services provided “by private parties or government agencies under compulsion of neither contract nor statute.”³⁴ The Restatement provides that such payments and benefits “are not credited against the tortfeasor’s liability” and deducted from the amount for which the tortfeasor is liable.³⁵ Thus, “it is the tortfeasor’s responsibility to compensate for all harm that he causes, not confined to the net

her medical care costs are collateral sources”); *Merz v. Old Republic Ins. Co.*, 191 N.W.2d 876, 879 (Wis. 1971) (“Appellants advance no cogent argument why Medicare payments should be exempted from the collateral source rule. Indeed, there is no apparent difference between private health insurance and Medicare, other than that Medicare is administered by the federal government.”); see *Eichel v. N.Y. Cent. R.R. Co.*, 375 U.S. 253 (1963) (per curiam) (“The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers The benefits received under [the Act] are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer.”) (internal quotations omitted); *Werner*, 393 A.2d at 1335 (“The [collateral source] rule . . . [is] applied . . . where the plaintiff pocketed social security benefits or his medical expenses were absorbed by medicare.”); RESTATEMENT (SECOND) OF TORTS § 920A, cmt. (c)(4) (AM. LAW INST. 1979) (“Social security benefits . . . are subject to the collateral-source rule.”).

32. *NATES ET AL.*, *supra* note 28, at pt. 3, § 17.01(1)(b) & n.42 (citing *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020–21 (9th Cir. 1973) (“[P]laintiff’s pension benefits are not . . . received ‘on account of his injury,’ but rather as a fringe benefit of his employment. . . . Thus, . . . it is clear that benefits paid from it are ‘collateral’ [sources]”); *Peters v. Pierce*, 858 S.W.2d 680, 683–84 (Ark. 1993) (“[T]his court follows the general rule regarding a collateral source, which would extend to cover pensions.”); see *Bradshaw v. United States*, 443 F.2d 759, 770–71 (D.C. Cir. 1971) (holding that the trial court erred in holding “that the collateral source rule did not apply” to plaintiff’s pension benefits, even though they were “paid under the Disability Act for retirement”); RESTATEMENT (SECOND) OF TORTS § 920A, cmt. (c)(4) (AM. LAW INST. 1979) (“[P]ensions under special retirement acts . . . are subject to the collateral-source rule.”).

33. *NATES ET AL.*, *supra* note 28, at pt. 3, § 17.01(1)(b) & n.43 (citing *Williams v. Pincombe*, 309 So. 2d 10, 10 (Fla. Dist. Ct. App. 1975) (holding that the trial court erred when it “admitted evidence that the plaintiff . . . had been receiving since 1970 welfare benefits for her children”); RESTATEMENT (SECOND) OF TORTS § 920A, cmt. (c)(4) (AM. LAW INST. 1979) (“[W]elfare payments . . . are subject to the collateral-source rule.”).

34. See *id.* at pt. 3, § 17.01(1)(b); RESTATEMENT (SECOND) OF TORTS § 920A, cmt. (c)(3) (AM. LAW INST. 1979) (stating that the collateral source rule “applies to cash gratuities and to the rendering of services”); see also *Werner*, 393 A.2d at 1335 (“The overwhelming weight of authority in the country is to the effect that the fact that necessary medical and nursing services are rendered gratuitously to one who is injured as a result of the negligence of another should not preclude the injured party from recovering the reasonable value of those services as part of his compensatory damages in an action against the tortfeasor.”).

35. RESTATEMENT (SECOND) OF TORTS § 920A (AM. LAW INST. 1979).

loss that the injured party receives.”³⁶ In sum, the doctrine allows tort victims “to recover full compensatory damages from a tortfeasor” notwithstanding any payments or benefits for her injuries received from sources independent of the tortfeasor.³⁷

A. THE FUNCTIONS OF THE COLLATERAL SOURCE RULE

The collateral source rule serves two functions. First and foremost, it is as an evidentiary rule, allowing courts to exclude evidence of payments or benefits from collateral sources.³⁸ Evidence of collateral source payments are “admissible only in the rarest of circumstances when offered for some purpose other than measurement of damages.”³⁹ Second, the collateral source rule functions as a substantive law of damages, which bars any reduction of the value of the aforementioned benefits and payments from the total amount of awardable damages.⁴⁰ The collateral source rule has been “applied in nearly all states” in its evidentiary function to serve its secondary role of aiding in the assessment of compensatory damages.⁴¹ Application of the collateral source rule is restricted to special damages, particularly medical costs and lost wages.⁴² General damages (which are difficult to quantify monetarily), such as pain and suffering, disability, and loss of earning potential, are outside the ambit of the collateral source rule.⁴³

B. RATIONALE: A CONCEPT OF JUSTICE

Historically, the collateral source rule has served to prevent the defendant–tortfeasor from benefiting from any payments or

36. RESTATEMENT (SECOND) OF TORTS § 920A, cmt. (b) (AM. LAW INST. 1979).

37. NATES ET AL., *supra* note 28, at pt. 3, § 17.01.

38. Todd, *supra* note 2, at 969–70.

39. NATES ET AL., *supra* note 28, at pt. 3, § 17.01(1)(c) & n.49 (citing *Selgado v. Commercial Warehouse Co.*, 526 P.2d 430 (N.M. Ct. App. 1974)). Evidence concerning collateral sources is by and large inadmissible unless it has clear probative value and involves a question of material fact, such as challenges to the credibility of the injured party or a witness, “especially as to the claimant’s desire to return to work and the possibility of malingering.” *Id.* at pt. 3, § 17.01(2)(b)–(c) (citations omitted); see *Selgado*, 526 P.2d at 435 (“The fact of insurance is generally inadmissible because it is immaterial to the issues tried and because it is prejudicial . . . [However, w]e have not adhered to a rule that insurance can never be mentioned when it is highly relevant to an issue in the lawsuit . . .”).

40. LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES pt. 9, § 43.18(1), LEXIS (database updated 2016).

41. See NATES ET AL., *supra* note 28, at pt. 3, § 17.01(1)(b).

42. *Id.* at pt. 3, § 17.01(3).

43. See *id.*

services collateral to the injury that were rendered to the plaintiff, either as a result of his forward thinking, or gratuitously from a third party unrelated to the tortfeasor—defendant.⁴⁴ Specifically, the collateral source rule has served to allocate loss to the most deserving party—the tortfeasor—and not the tort victim.⁴⁵ This rationale echoes the foundational goals of tort law; thus, the rule serves as an important tool to deter tortious conduct.⁴⁶ The Restatement states:

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.⁴⁷

Importantly, as the Restatement further explains, "The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him."⁴⁸ Although the court system, and society at large, is served by the deterrence of tortious conduct, controversy is bred by an adversarial and profit-making system; thus, despite the collateral source doctrine's wholesome aim, the merit of that aim has long been contested.

C. CONTROVERSY: DOUBLE RECOVERY

Opponents of the collateral source doctrine have long bemoaned the double recovery a plaintiff receives under the rule. The Restatement explains:

[T]here may be a double compensation for a part of the

44. Todd, *supra* note 2, at 974 (citations omitted) ("Concurrent with the notion of deterrence and optimal cost allocation are the moral notions of retribution that underlie the justification of the collateral source rule. Notions of fairness and justice favor the defendant-tortfeasor paying for all of the damages of his tortious behavior and not receiving the benefits of collateral source compensation provided to the plaintiff by an insurance policy.")

45. *Id.* at 971–72.

46. *Id.* at 974 (citations omitted).

47. RESTATEMENT (SECOND) OF TORTS § 920A (AM. LAW INST. 1979).

48. *Id.* at cmt. (b).

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 Perhaps there is an element of punishment of the wrongdoer involved. Perhaps also this is regarded as a means of helping to make the compensation more nearly compensatory to the injured party.⁴⁹

Despite worthy arguments advocating against the plaintiff's right to a double recovery, many have pointed out that plaintiffs are, in reality, often undercompensated due to court costs and attorneys' fees.⁵⁰ Taking this potential for under-compensation into account, the collateral source rule has been viewed as an "equalizer."⁵¹ Scholars have also pointed out that plaintiffs are undercompensated due to the reimbursement schemes and subrogation rights that "frequently accompany the payment of collateral benefits."⁵² Nevertheless, deserving or not, the double-recovery principle continues to be a controversial aspect of the collateral source doctrine.

D. THE COLLATERAL SOURCE RULE IN LOUISIANA

Civil Code article 2315 guides tort law in Louisiana, proclaiming that, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."⁵³ While the collateral source rule is primarily applied in the context of article 2315 tort cases, the Louisiana Supreme Court has held that the doctrine is applicable in other areas where a party seeks to recover damages caused by a defendant's harmful conduct.⁵⁴ Regarding its function as a substantive rule of damages, Louisiana courts hold that the collateral source rule prevents any

49. RESTATEMENT (SECOND) OF TORTS § 920A, cmt. (b) (AM. LAW INST. 1979) (citations omitted).

50. *See, e.g.*, Todd, *supra* note 2, at 976.

51. *Id.* at 976–77.

52. NATES ET AL., *supra* note 28, at pt. 3, § 17.01(4). The collateral source rule does not amount to a double recovery when viewed in light of subrogation rights, reimbursement schemes, and the costs of litigation. Without the collateral source rule, a tort victim's recovery is limited, ultimately resulting in reduced liability for the tortfeasor. *See id.*

53. LA. CIV. CODE ANN. art. 2315(A) (2016).

54. *See* La. Dep't of Transp. & Dev. v. Kansas City S. Ry. Co., 02-2349, pp. 9–10, 17 (La. 5/20/03); 846 So. 2d 734, 740–41, 745 (applying the collateral source rule to an environmental law case, and emphasizing that the goal of tort deterrence and accident prevention was equally important in deterring conduct harmful to the environment as it is for deterring conduct harmful to a person).

payments made to the plaintiff by a collateral source “independent of the wrongdoer’s procurement or contribution” to be deducted from the total award of damages.⁵⁵ As for its evidentiary function in Louisiana courts, the collateral source rule precludes the admissibility of evidence concerning payments to the plaintiff from collateral sources, unless the evidence is produced to impeach the credibility of the plaintiff or a witness.⁵⁶

Historically, Louisiana has announced a uniform policy for the continued application of the collateral source rule. In a decision issued four years before *Hoffman*, the Louisiana Supreme Court stated:

Under the collateral source rule, payments received from an independent source are not deducted from the award the aggrieved party would otherwise receive from the wrongdoer The objective in this regard is to promote tort deterrence and accident prevention.⁵⁷

In a subsequent decision just one year later, the Louisiana Supreme Court did not mince any words, stating, “The primary policy reason for the collateral source rule is tort deterrence.”⁵⁸ In the former decision, the court reasoned that the traditional objective of the collateral source doctrine resulted in its application to payments made by parties other than the tortfeasor, resulting from the plaintiff’s forward thinking or “from [other] benefits.”⁵⁹ As stated in the Restatement, the law “does not differentiate” among the other benefits, as long as they do not originate from the tortfeasor.⁶⁰

Then, in 2004, the court in *Bozeman v. State* acknowledged that it had rejected a traditional application of the collateral source rule in favor of a more narrow approach when considering the rule’s applicability to Medicaid write-offs.⁶¹ Furthermore, the

55. *Dumas v. Harry*, 94-19, 94-20, p. 3 (La. App. 5 Cir. 1994); 638 So. 2d 283, 286.

56. *See id.* (citing *Turich v. Baker*, 594 So. 2d 505, 507 (La. App. 5 Cir. 1992)).

57. *Bellard v. Am. Cent. Ins. Co.*, 07-1335, p. 18 (La. 4/18/08); 980 So. 2d 654, 668 (citations omitted).

58. *Cutsinger v. Redfern*, 08-2607, p. 10 (La. 5/22/09); 12 So. 3d 945, 952 (citations omitted).

59. *See Bellard*, 07-1335, p. 18; 980 So. 2d at 668 (citations omitted) (emphasis added).

60. RESTATEMENT (SECOND) OF TORTS § 920A, cmt. (b) (AM. LAW INST. 1979).

61. *Bozeman v. State*, 03-1016, pp. 15–16 (La. 7/2/04); 879 So. 2d 692, 702 (quoting *La. Dep’t of Transp. & Dev. v. Kansas City S. Ry. Co.*, 02-2349, pp. 14, 17

court outlined three approaches employed by various jurisdictions: (1) “Reasonable Value of Services”; (2) “Actual Amounts Paid”; and (3) “Benefit of the Bargain.”⁶² The court disagreed with both the logic of the reasonable-value-of-services approach and the actual-amounts-paid approach. Specifically, the court stated that the actual-amounts-paid approach violated a fundamental goal of tort law, writing, “[S]hould 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, and not the one whose wrongful acts caused the injury.”⁶³ The court adopted the “benefit of the bargain” approach and held that, where the plaintiff has suffered a diminution of patrimony, he receives the “benefit of the bargain,” i.e. the total-billed amount, including the write-off.⁶⁴ Where the plaintiff has not suffered a diminution in his patrimony, he is not entitled to the “benefit of the bargain,” and can only receive the actual-amount paid.⁶⁵ In a precise explanation for this rationale, the court stated, “The operative words here are ‘free medical care.’”⁶⁶ Thus, the public-policy considerations concerning taxpayer-subsidized programs decidedly outweighed the traditional values of tort law and caused a much-more-narrow reading of the traditional plaintiff-friendly collateral source rule.

Nonetheless, subsequent decisions still cited *Bozeman* while espousing the fundamental tort values of cost allocation,

(La. 5/20/03); 846 So. 2d 734, 743, 745) (“A wrongdoer’s liability should not be reduced by the amount of collateral source payments to an injured plaintiff, even where the nature of the collateral source is a public relief provided to the plaintiff by application of federal or state law [O]ur holding today is a narrow one addressing the applicability of the collateral source rule in the circumstances of this case.”).

62. See *Bozeman*, 03-1016, pp. 14–22; 879 So. 2d at 701–05 (citations omitted).

63. *Id.* at pp. 17–18; 879 So. 2d at 703 (internal quotations omitted) (quoting *Koffman v. Leichtfuss*, 630 N.W.2d 201, 209 (Wis. 2001)). *But see Hoffman v. 21st Century N. Am. Ins. Co.*, 14-2279, p. 5 (La. 10/02/15); 209 So. 3d 707 (citing *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1145 (Cal. 2011) (applying the actual-amounts-paid approach), *reh’g denied* (12/7/15)).

64. See *Bozeman*, 03-1016, pp. 18, 21–22; 879 So. 2d at 703, 705.

65. See *id.* at p. 22; 879 So. 2d at 705 (“After careful review, we conclude that Medicaid is a free medical service, and that no consideration is given by a patient to obtain Medicaid benefits. His patrimony is not diminished, and therefore, a plaintiff who is a Medicaid recipient is unable to recover the ‘write off’ amounts.”).

66. *Id.* (quoting *Gordon v. Forsyth Cty. Hosp. Auth.*, 409 F. Supp. 708, 719 (M.D.N.C. 1975) (“It would be unconscionable to permit the taxpayers to bear the expense of providing free medical care to a person and then allow that person to recover damages for medical expenses from a tort-feasor and pocket the windfall.”), *aff’d in part, vacated in part*, 544 F.2d 748 (4th Cir. 1976)).

retribution, and deterrence.⁶⁷ In 2008, the U.S. District Court for the Eastern District of Louisiana (Eastern District) cited and analyzed *Bozeman*, acknowledging the aforementioned public-policy reasons behind the Louisiana Supreme Court's narrow reading of the rule, and ultimately applied a more traditional version of the rule.⁶⁸ The court addressed the possibility of a double recovery, stating, "[T]here is an element to punitive damages to a collateral source award."⁶⁹ Further, the court in *Metoyer v. Auto Club Family Insurance Co. (Metoyer)* conducted an in-depth reading of *Bryant v. New Orleans Public Service, Inc.*,⁷⁰ the case heavily cited by the court in *Bozeman* to support its proposition that, where there is no diminution of patrimony, the collateral source rule is inapplicable.⁷¹ Specifically, the court in *Metoyer* explained:

While the *Bryant* court explained that this diminution of patrimony is what prevented a double recovery, the court did not hold that a reduction in a person's patrimony is *required* Even assuming . . . that Plaintiff's patrimony is not diminished, this conclusion does not prevent the application of the collateral source rule.⁷²

Thus, Louisiana courts have been consistent in espousing the traditional goals of tort law—retribution, cost allocation, and deterrence—in support of their application of the collateral source doctrine.

IV. THE *HOFFMAN* DECISION: NO DIMINUTION, NO DAMAGES

As justification for its decision not to apply the collateral

67. See, e.g., *Metoyer v. Auto Club Family Ins. Co.*, 536 F. Supp. 2d 664, 667 (E.D. La. 2008).

68. See *id.* at 667, 670 (citations omitted) ("In *Bozeman*, the Louisiana Supreme Court held that a tort victim who received medical care through Medicaid cannot recover the write-off amount above what Medicaid paid for the medical care. The court based its reasoning partly on the fact that Medicaid is a completely free service to the nation's poor. . . . In *Bozeman*, there is a danger of double recovery, because the victim would have received the medical care, and an amount above what the medical care cost the public. For public policy reasons, the court held that the plaintiff was not entitled to the higher amount. In the case at bar, there is no danger of a double recovery or windfall.").

69. *Id.* at 667.

70. 406 So. 2d 767 (La. App. 4 Cir. 1981).

71. See *Metoyer*, 536 F. Supp. 2d at 667; see also *Bozeman*, 03-1016, pp. 9–11; 879 So. 2d at 698–99.

72. *Metoyer*, 536 F. Supp. 2d at 667 (emphasis in original).

source rule to Mr. Hoffman's attorney-negotiated medical discounts, the Louisiana Supreme Court explained that, where there is no actual diminution of the plaintiff's patrimony, the collateral source rule is inapplicable. Specifically, the court held that a reduction of any award received to pay attorney's fees does not cause such a loss that the plaintiff's patrimony is reduced. Lastly, as its final justification, the court asserted that the application of the collateral source rule presented ethical conflicts for attorneys negotiating the discounts.

A. THE PLAINTIFF HAS NOT SUFFERED ANY DIMINUTION OF PATRIMONY TO OBTAIN THE WRITE-OFF; THUS, THE COLLATERAL SOURCE RULE DOES NOT APPLY

As the primary reason for its holding, the Louisiana Supreme Court found that "allowing the plaintiff to recover an amount for which he has not paid, and for which he has no obligation to pay, is at cross purposes with the basic principles of tort recovery in our Civil Code."⁷³ The court read article 2315 literally, and found that it does not allow the wrongdoer's liability to extend beyond the harm that he has caused.⁷⁴ The court reasoned that the plaintiff had "suffered no diminution of his patrimony to obtain the write-off," and, therefore, the collateral source rule did not apply.⁷⁵ Additionally, the court stated that awarding any more to Mr. Hoffman than the actual cost of the MRI amounted to a windfall and would "force the defendant to compensate the plaintiff for medical expenses the plaintiff has neither incurred nor is obligated to pay."⁷⁶

B. THE PAYMENT OF ATTORNEYS' FEES OUT OF AN AWARD OF DAMAGES DOES NOT AFFECT A DIMINUTION OF THE PLAINTIFF'S PATRIMONY

In its second justification for not applying the collateral source rule, the court stated that the payment of attorneys' fees out of an award of damages does not amount to a diminution of the plaintiff's patrimony.⁷⁷ Specifically, the court opined that the plaintiff would only be required to pay the fees in the event of a

73. *Hoffman v. 21st Century N. Am. Ins. Co.*, 14-2279, p. 4 (La. 10/02/15); 209 So. 3d 702, 706, *reh'g denied* (12/7/15).

74. *See id.* (citations omitted) ("The wrongdoer is responsible only for the damages he or she has caused.").

75. *Id.*

76. *Id.* at p. 4; 209 So. 3d at 706-707.

77. *Id.* at p. 5; 209 So. 3d at 707.

recovery, and this payment does not amount to additional damages suffered by the plaintiff.⁷⁸ Further, the court reasoned that finding the attorneys' fees to be a diminution of patrimony would amount to an award of attorney's fees.⁷⁹ In support, the court presented the well-settled rule that, in the absence of statute or contract, the plaintiff has no right to recover attorneys' fees as an item of damages.⁸⁰ Thus, the court held that the payment of an attorney's fee in a contingency-payment schedule does not justify applying the collateral source rule to an attorney-negotiated medical discount.⁸¹

C. APPLYING THE COLLATERAL SOURCE RULE TO ATTORNEY-NEGOTIATED WRITE-OFFS “INVITE[S] A VARIETY OF EVIDENTIARY AND ETHICAL DILEMMAS FOR COUNSEL”

1. INTRUSION UPON PRIVILEGES SURROUNDING CONTRACT AND COMMUNICATIONS REGARDING FEE ARRANGEMENTS

In its third and final justification for refusing to extend the collateral source rule to attorney-negotiated medical discounts, the Louisiana Supreme Court adopted a bright-line rule that attorney-negotiated discounts are not within the ambit of the collateral source rule, reasoning that, to hold otherwise “would invite a variety of evidentiary and ethical dilemmas for counsel.”⁸² Specifically, any inquiry into a payment arrangement between client and attorney to determine if a diminution of patrimony has occurred would violate attorney–client privilege.⁸³ In addition, the court held that an attorney:

78. *Hoffman*, 14-2279, p. 5; 209 So. 3d at 707 (“[W]e reject plaintiff’s argument that consideration for the benefit is given for attorney-negotiated medical discounts by virtue of the contractual obligation of the plaintiff to pay attorney fees, albeit only in the event of a recovery. This argument is based on the assumption that the payment of an attorney’s fee is additional damage suffered by the tort victim.”) (emphasis in original).

79. *See id.*

80. *Id.* (quoting *Killebrew v. Abbott Labs.*, 359 So. 2d 1275, 1278 (La. 1978)) (“However, ‘[i]t is . . . well recognized in the jurisprudence of this state that as a general rule attorney fees are not allowed except when authorized by statute or contract.’”).

81. *Id.*

82. *Id.*

83. *See Hoffman*, 14-2279, p. 5; 209 So. 3d at 707 (citing LA. CODE EVID. ANN. art. 506(B)(1) (2016)) (“[A]n evidentiary hearing inquiring into the details of the attorney-client relationship to uncover a ‘diminution in patrimony’ resulting from the attorney-negotiated medical discount might intrude upon the privilege surrounding the employment contract and communications as to fee arrangements.”).

[W]ho negotiates a discount with a medical provider and then attempts to recover the undiscounted full “cost” from the defendant might run afoul of Rule 4.1 of the Rules of Professional Conduct, entitled “Truthfulness in Statements to Others,” which provides in Subsection (a) that a lawyer in the course of representing a client shall not knowingly make a false statement of material fact to a third person.⁸⁴

D. DECREE: “AN ATTORNEY-NEGOTIATED MEDICAL DISCOUNT OR ‘WRITE-OFF’ IS NOT A PAYMENT OR BENEFIT THAT FALLS WITHIN THE AMBIT OF THE COLLATERAL SOURCE RULE.”

In offering its final justification for creating a bright-line rule that the collateral source rule does not apply to attorney-negotiated discounts, the court cited *Howell v. Hamilton Meats & Provisions, Inc.*, a 2011 California Supreme Court case.⁸⁵ There, the court found the collateral source rule inapplicable where the plaintiff’s insurer negotiated for a write-off with the healthcare provider because neither the plaintiff, nor her insurer, incurred actual cost or debt; thus, the court applied the “actual amount paid” approach discussed in *Bozeman*.⁸⁶

V. ANALYSIS

A. BREAKING GROUND: AN ARBITRARY BRIGHT-LINE RULE IS AT ODDS WITH JURISPRUDENCE AND THE GOALS OF TORT LAW

1. AT ODDS WITH JURISPRUDENCE

The court in *Hoffman* viewed the collateral source rule as applied to medical write-offs in a vacuum, considering them only in the context of Medicaid, and providing little law or jurisprudence to justify its decision. In providing legal background of the collateral source rule, *Hoffman* ignored decisions that better analyzed the few cases it had chosen as support. After the *Bozeman* decision, the Eastern District, in *Metoyer*, aptly acknowledged the pertinent public-policy issues in *Bozeman* that caused the court to limit the collateral source rule’s application, namely a tax-payer-subsidized healthcare system.⁸⁷

84. *Hoffman*, 14-2279, p. 5; 209 So. 3d at 707.

85. *Id.* (citing 257 P.3d 1130 (Cal. 2011), *reh’g denied* (11/2/11)).

86. *Howell*, 257 P.3d at 1145 (“[A]n injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial.”).

87. *See Metoyer v. Auto Club Family Ins. Co.*, 536 F. Supp. 2d 664, 667–68 (E.D.

It is well established at common law, and in Louisiana jurisprudence, that the collateral source rule applies to monies, payments, gratuities, and other benefits that are not affiliated with the tortfeasor.⁸⁸ Because Medicaid is a taxpayer-funded program, a tortfeasor who pays taxes has technically contributed to the payment; thus, the collateral source rule does not apply. The courts have tap-danced around this rationale, careful not to appear to disfavor the poor or impoverished.⁸⁹ The court in *Metoyer* acknowledged that the collateral source rule cannot be construed as narrowly as the *Bozeman* court had done, and found that a diminution of patrimony was not required for an application of the collateral source rule. Importantly, this was not a new notion. *Metoyer* cited a case from the Louisiana Fourth Circuit Court of Appeal wherein the court held that the defendant was not entitled to an offset for welfare payments made to the plaintiff, but never mentioned whether the plaintiff's patrimony was diminished in any way.⁹⁰

The Court in *Hoffman* also cited *Louisiana Department of Transportation & Development v. Kansas City Southern Railway Company (Kansas City S. Ry. Co.)* in the legal background, but similarly ignored the principal holding of that case, just a few paragraphs into its analysis. In *Kansas City S. Ry. Co.*, the court held that the collateral source rule was not only applicable in tort cases, and extended its application to environmental damages, stating:

We additionally believe it is mere happenstance that the collateral source rule has been applied chiefly in the context of a conventional La. Civ. Code art. 2315 tort. The court of appeal's finding that the collateral source rule is inapplicable to this "environmental clean-up dispute" because it "does not involve insurance, tort deterrence, or accident prevention" is erroneous Like conventional tort cases, environmental law statutory remedies involve claims to recover damages for harm caused by a defendant's acts [T]he logic supporting

La. 2008).

88. See generally NATES ET AL., *supra* note 28, at pt. 3, § 17.01(1)(b).

89. See *Bozeman v. State*, 03-1016, p. 21 (La. 7/2/04); 879 So. 2d 692, 705 ("Care of the nation's poor is an admirable social policy. However, where the plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source benefits he receives, we hold that the plaintiff is unable to recover the 'write-off' amount.").

90. See *Metoyer*, 536 F. Supp. 2d at 670 (citing *Bonnet ex rel. Bonnet v. Slaughter*, 422 So. 2d 499, 503 (La. App. 4 Cir. 1982)).

application of the collateral source rule is equally persuasive whether we are dealing with a defendant polluter under the LEQA, or a traditional “tortfeasor” whose liability arises under La. Civ. Code art. 2315, or other general tort law.⁹¹

Despite this voluminous espousal of the collateral source rule’s versatile function, the court in *Hoffman* cited *Kansas City S. Ry. Co.* in support of an opinion that scolds the plaintiff for seeking to extend the collateral source rule beyond its typical application to private-insurance benefits.⁹²

Not surprisingly, in *Hoffman*, the Louisiana Supreme Court based its holding on a principle that has been refuted in its own prior decisions. Specifically, the court in *Hoffman* held that, for the collateral source rule to apply, there must be some diminution of the plaintiff’s patrimony. However, just three years prior, in *Cutsinger v. Redfern*, the Louisiana Supreme Court stated:

While it is important to consider whether plaintiff paid for the collateral source or suffered some diminution in her patrimony due to the availability of the benefit to determine whether a double recovery would result from application of the rule, *this consideration alone is not the determinative factor in deciding whether the collateral source rule applies.*⁹³

Thus, the narrative in *Hoffman* regarding the application of the collateral source rule both ignores and contravenes its own prior decisions.

2. AT ODDS WITH TORT LAW AND THE DOCTRINE ITSELF

Likewise, the court wholly ignored the traditional values fundamental to tort law that Louisiana courts have routinely declared as the prevailing purpose of the collateral source rule: cost allocation, deterrence, and retribution. The collateral source rule has been applied in Louisiana as a tool to efficiently allocate costs where such costs are caused by the tortfeasor.

91. La. Dep’t of Transp. & Dev. v. Kansas City S. Ry. Co., 02-2349, p. 10 (La. 5/20/03); 846 So. 2d 734, 741.

92. See *Hoffman v. 21st Century N. Am. Ins. Co.*, 14-2279, p. 4 (La. 10/02/15); 209 So. 3d 702, 706 (“Nevertheless, the plaintiff seeks to extend the application of the collateral source rule beyond the typical situation involving receipt of private insurance benefits to attorney-negotiated discounts of medical bills . . .”), *reh’g denied* (12/7/15).

93. *Cutsinger v. Redfern*, 08-2607, p. 13 (La. 5/22/09); 12 So. 3d 945, 954 (emphasis added).

The court in *Hoffman* conveniently cherry-picked quotes that suited its ruling from various collateral source cases. For example, the court relied on both *Hamilton*, the California Supreme Court case that advocated for an “actual amount paid” approach to damages, as well as *Bozeman*, in which the court unequivocally rejected such an approach.⁹⁴ This line of thinking is clearly at odds with Louisiana jurisprudence, which has consistently followed the Restatement’s position that the tortfeasor, and not the tort victim, should benefit from any windfall.⁹⁵ Under the “actual amount paid” approach, the tortfeasor’s liability is reduced. As a result, the deterrent factor of tort law is reduced, a factor hardly considered by the court in *Hoffman*.

In the aforementioned *Cutsinger* ruling, the Louisiana Supreme Court justified its application of the collateral source rule even where the plaintiff has not suffered a diminution of patrimony, stating, “The collateral source rule exists to prevent the tortfeasor from benefitting from the victim’s receipt of monies from independent sources. In this way, the collateral source rule furthers the major policy of tort deterrence.”⁹⁶ This rationale is absent in *Hoffman*. Instead, the tortfeasor’s liability is reduced by way of an approach that the Louisiana Supreme Court previously determined negated tort deterrence. Thus, the result is a marked departure from precedent, as well as Louisiana’s purposeful adherence to the collateral source doctrine.

3. GRASPING AT STRAWS

Perhaps aware of the instability of its *raison d’être*, the court in *Hoffman* looked to broad evidentiary and ethical rules in support of its proposition. Specifically, the court stated that, even if the plaintiff had suffered some diminution of patrimony upfront, in order to benefit from the attorney-negotiated medical discount, the court could not even investigate because it would

94. *Bozeman*, 03-1016, p. 17; 879 So. 2d at 703 (“According to defendant, allowing plaintiff to recover an amount that neither he nor anyone was ever obligated to repay, an amount over and above what was actually paid for his medical expenses, would be to grant the plaintiff a windfall because plaintiff would recover damages in excess of what it took to make the plaintiff whole, thus, violating the goal of tort recovery. We disagree.”).

95. RESTATEMENT (SECOND) OF TORTS § 920A, cmt. (b) (AM. LAW INST. 1979) (“[I]t 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.”).

96. *Redfern*, 08-2607, p. 13; 12 So. 3d at 954.

violate rules protecting attorney–client privilege.⁹⁷ The court also posited that, for an attorney to seek payment in an amount greater than that which was actually paid would be an “ethical dilemma” that would “run afoul of Rule 4.1 of the Rules of Professional Conduct,” whereby an attorney is prohibited from making misstatements of material fact to third-parties.⁹⁸ While these are valid points, they ignore the fact that an attorney-negotiated medical discount is no different from a gratuity, or from the “other benefits” that the Restatement qualifies as protected by the collateral source rule. The court in *Hoffman* should have remembered that the law does not distinguish amongst the benefits, so long as they did not come from the tortfeasor himself. In failing to do so, the court abandoned a salient feature of the collateral source rule, and cursory readings of the decision manifested what could be an uncertain future for the common law doctrine.

B. HOFFMAN’S IMPACT

1. AFTER THE HOLDING IN HOFFMAN, LOUISIANA COURTS PROMPTLY DECLINED TO FURTHER LIMIT THE COLLATERAL SOURCE RULE’S APPLICATION

While such a bright-line ruling elicited both hopes and fears that the death knell of the collateral source doctrine in Louisiana was nigh, courts promptly declined to establish additional limitations on the rule. For example, in *Johnson v. Neill Corp.*, the Louisiana First Circuit Court of Appeal held that the collateral source rule is applicable in cases where medical discounts are gratuitously granted as a professional courtesy.⁹⁹ Similarly, the Louisiana Fifth Circuit Court of Appeal held that the collateral source rule is applicable in cases where medical discounts are negotiated by the plaintiff herself.¹⁰⁰ Therefore, it

97. See *Hoffman*, 14-2279, p. 5; 209 So. 3d at 707.

98. *Id.*

99. See *Johnson v. Neill Corp.*, 15-0430, p. 11 (La. App. 1 Cir. 12/23/15); 2015 WL 9464625, at *11, *writ denied* 2016-0137 (La. 3/14/16).

100. See *Lockett v. UV Ins. Risk Retention Grp., Inc.*, 15-166 p. 24 (La. App. 5 Cir. 11/19/15); 180 So. 3d 557, 571–72 (“[W]e find that the collateral source rule applies to Plaintiff’s bill from Ochsner for \$55,146.70 in medical expenses, such that she was entitled to recover the full amount of those expenses. Specifically, as a result of Plaintiff’s own initiative in personally negotiating with Ochsner, she obtained the benefit of a reduction in the total amount of medical expenses that she was obligated to pay as the guarantor. In exchange for this benefit, Plaintiff was required to provide consideration, which consisted of a payment to Ochsner of \$13,786.66 of her own money, towards the total amount of medical expenses she was obligated to

would seem that the collateral source rule is alive and well, and perhaps even unaffected by the ruling in *Hoffman*. If, for example, attorneys simply instruct their plaintiffs to negotiate their own discounts during litigation, the ruling in *Hoffman* becomes entirely empty on its face. Therefore, the ability to circumvent the bright-line rule renders the holding only superficially significant.

VI. CONCLUSION

The collateral source rule is an important tool used by courts to deter tortious conduct and allocate loss where it is due. To chip away at the doctrine denies the plaintiff an essential apparatus with which she can level an often-uneven playing field. The decision in *Hoffman* left much to be desired, both in rationale and substance, particularly because it was not only a matter of first impression in the state of Louisiana, but in the entire nation. When drawing a bright-line rule such as this, courts and scholars alike should adopt a more thoughtful analysis.

Reagan Charleston