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## Note

### *Arthur v. Catour*: An Examination of the Collateral Source Rule in Illinois

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#### I. INTRODUCTION

The topic of tort reform has received much attention in recent years, from both the legal community and the nation as a whole.<sup>1</sup> Illinois, in particular, has received sharp criticism from those calling for limits on recoveries.<sup>2</sup> Critics decry pro-plaintiff sentiment for causing corporations and medical providers to flee Illinois.<sup>3</sup> A 2004 poll of businesses ranked Illinois as the forty-sixth fairest state to defendants in litigation, while three Illinois counties were ranked among the fifteen jurisdictions in the country most unfair to defendants.<sup>4</sup> In a 2005 report, the American Medical Association included Illinois on its list of seventeen crisis states, based on the volume and dollar amount of filed lawsuits.<sup>5</sup>

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1. In 2005, President Bush chose Madison County as the location for the start of his campaign for federal tort reform. *George Bush Visits Physicians in Madison County, IL*, CHICAGO MEDICAL SOCIETY, <http://www.cmsdocs.org/content/index.pl?iid=2725&isa=Category> (last visited September 25, 2006) (reporting on the President's visit and stating that "[l]egal industry critics have ranked Madison County as America's worst 'judicial hellhole' for lawsuits and class action suits").

2. HUMPHREY TAYLOR ET AL., 2005 U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY 45 (2005), available at <http://www.instituteforlegalreform.org/harris/pdf/harrispoll2005-fullreport.pdf>.

3. See generally *id.*

4. *Id.* at 17, 45. The three Illinois counties receiving this dubious distinction were Cook, Madison, and St. Clair. *Id.* at 17.

5. American Medical Association Medical Liability Crisis Map, <http://www.ama-assn.org/ama/noindex/category/11871.html> (last visited Oct. 7, 2006).

However, in 2003 Illinois ranked only thirty-second in a list of states having the most paid claims per 1,000 physicians.<sup>6</sup> In fact, reports from the defense bar's own lobbyists reveal that medical malpractice verdicts in Cook County actually decreased from 2000 through 2004.<sup>7</sup>

The plaintiffs' bar and consumer watchdogs respond that the insurance companies deserve the blame for this perceived litigation crisis.<sup>8</sup> In 2003, Illinois life and health insurers reported total earnings of more than \$1.6 billion for the first three quarters, up from \$236 million the previous year.<sup>9</sup> Nationally, life and health insurers posted total earnings of \$18.1 billion for the first three quarters of 2003, a more than fivefold increase from \$3.3 billion the prior year.<sup>10</sup> Nationwide, profits for property-casualty insurers also soared.<sup>11</sup>

In *Arthur v. Catour*, the Illinois Supreme Court decided a widely debated issue that has been a concern on both sides of the tort-reform struggle.<sup>12</sup> The case involved the question of whether an injured party may recover damages for medical bills that were later discounted by the health care provider, or if the plaintiff's recovery is limited to the amount actually accepted as payment in full.<sup>13</sup> Medical discounts have become widespread in modern health care, as the strength of both private and government-supported health care providers has increased.<sup>14</sup>

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6. Berkley Rice, *Malpractice: Where Does Your State Rank?*, MED. ECON., Oct. 7, 2005, available at <http://www.memag.com/memag/article/articleDetail.jsp?id=182789&&pageID=1>.

7. Mark Deaton, Senior Vice President and General Counsel, The Illinois Hospital Association Supports a Reasonable Range for Awarding Non-economic Damages, (April 7, 2005), <http://www.ihatoday.org/issues/liability/talk/testdeaton.pdf>. In 2000, jury verdicts awarded in medical malpractice cases totaled \$212,000,000, whereas in 2004 that value was \$157,200,000. *Id.*

8. Letter from J. Robert Hunter, Dir. of Ins. of the Consumer Fed'n of Ins., Birny Birnbaum, Executive Dir. of the Ctr. for Econ. Justice, to Ins. Comm'r 50 States and the District of Columbia, at 1 (May 11, 2004), available at [http://www.insurance-reform.org/AIR\\_Ins\\_Comm\\_04.pdf](http://www.insurance-reform.org/AIR_Ins_Comm_04.pdf) [hereinafter Letter to Insurance Commissioners] (labeling prevailing rates as "price gouging" in arguing for insurance reform). The author reports that after an Illinois medical malpractice insurer reported a \$20 million profit the company's senior executives responded by giving themselves 12–18% raises in salary and raised premiums by 35%. *Id.* at 3.

9. *Insurers' Profits Fall in Missouri, Rise in Illinois*, ST. LOUIS BUS. J., Mar. 29, 2004, available at <http://www.bizjournals.com/stlouis/stories/2004/03/29/daily14.html>.

10. *Id.*

11. Letter to Insurance Commissioners, *supra* note 8, at 3 (reporting that the five largest national insurers reported Returns on Equity ranging from 12.5 to 17.4%, due in large part to falling "loss ratios"). Profits for 2003 were \$29.9 billion, almost ten times the \$3 billion reported in 2002. *Id.*

12. *Arthur v. Catour*, 833 N.E.2d 847, 849 (Ill. 2005) (holding that plaintiffs may present to a jury amounts originally billed for health care, even when those amounts are discounted by the health care provider pursuant to a contract with the plaintiff's health insurer).

13. *Id.*

14. Michael K. Beard, *The Impact of Changes in Health Care Provider Reimbursement*

As these discounts have become more common, courts across the country have been forced to address this debate.<sup>15</sup> A majority of states permit a plaintiff to recover the amount billed for medical expenses, and do not limit recovery to the amount actually paid.<sup>16</sup> Although the Illinois Supreme Court adopted the majority view in *Arthur*, the court left a number of questions unanswered and failed to address several conflicts arising from prior rulings.<sup>17</sup>

This Note reviews the recent *Arthur* opinion in light of the inherent conflicts between the collateral source rule<sup>18</sup> and Illinois policy for awarding compensatory damages.<sup>19</sup> Part II of this Note provides background on compensatory damages and the collateral source rule, the recent trend of discounting medical services, and Illinois's adoption of and limitations upon the collateral source rule.<sup>20</sup> Part III discusses the *Arthur* case from its commencement in the trial court through the Illinois Supreme Court's decision.<sup>21</sup> Part IV analyzes the case, showing that the Illinois Supreme Court adopted the preferable rule but failed to provide guidelines on how the holding should be applied in practice. This Part also discusses the court's refusal to address discrepancies and conflicts arising from earlier opinions that limited the collateral source rule in Illinois.<sup>22</sup> Finally, Part V predicts how the *Arthur* holding will change trial practice in Illinois.<sup>23</sup>

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*Systems on the Recovery of Damages for Medical Expenses in Personal Injury Suits*, 21 AM. J. TRIAL ADVOC. 453, 463–66 (1998). The Beard article has been cited by an Illinois court when addressing the issue of medical discounts. See, e.g., *Arthur*, 833 N.E.2d at 854 (citing Beard as support for the court's review of medical discounts).

15. *Arthur*, 833 N.E.2d at 863 (McMorrow, C.J., dissenting).

16. *Id.* at 863 (McMorrow, C.J., dissenting).

17. See *id.* at 856–59 (McMorrow, C.J., dissenting) (arguing that the majority opinion fails to address a number of conflicts and unanswered questions).

18. The collateral source rule provides that if an injured party receives compensation from a third party (the collateral source), the amount of that compensation will not be deducted from the damages that must be paid by the tortfeasor. BLACK'S LAW DICTIONARY 256 (8th ed. 2004).

19. *Arthur*, 833 N.E.2d at 858 (McMorrow, C.J., dissenting).

20. See *infra* Part II (outlining the development of the collateral source rule, the modern trend of discounted health care, and the adoption and limitations of the collateral source rule in Illinois).

21. See *infra* Part III (providing an account of the developments in *Arthur v. Catour*).

22. See *infra* Part IV (arguing that the Illinois Supreme Court's holding is correct, but the court's refusal to address all issues presented in the case will likely cause confusion and future litigation).

23. See *infra* Part V (examining the possible implications that the *Arthur* opinion will have on trial practice in Illinois).

## II. BACKGROUND

Although the collateral source rule has developed into a firmly entrenched principle of tort law, the doctrine has been attacked by critics and limited by state legislatures.<sup>24</sup> The collateral source rule has received renewed attention in recent years because of the rule's impact and effect upon awards of damages.<sup>25</sup> This Part provides a basic overview of compensatory damages, followed by a description of how the collateral source rule operates.<sup>26</sup> Next, this Part presents a history of the common law collateral source rule<sup>27</sup> and the historic arguments for and against the rule.<sup>28</sup> This Part then reviews the recent trend of discounted medical services in the modern health care industry,<sup>29</sup> and discusses the methods that courts outside of Illinois use when confronted with damage claims for amounts that have been discounted by health care providers.<sup>30</sup> Finally, this Part describes the evolution of the collateral source rule in Illinois, particularly the restrictions that have been placed on the doctrine.<sup>31</sup>

### A. *Compensatory Tort Damages*

Compensatory damages attempt to restore the injured party as close as possible to the position he would have been in had the tort not occurred.<sup>32</sup> It is these compensatory damages that are affected by the collateral source rule.<sup>33</sup> A discussion of the collateral source rule in Illinois is best understood by first reviewing Illinois's evidentiary rules and policies regarding medical damages.<sup>34</sup> This Section will first

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24. See *infra* Parts II.B.2–B.4 (discussing the development of the rule, the rationale behind the rule, and limitations on the rule).

25. See *infra* Parts II.B.3–B.4 (discussing the rationale behind the rule and limitations on the rule).

26. See *infra* Part II.B.1 (explaining the purpose and operation of the collateral source rule).

27. See *infra* Part II.B.2 (tracing the early development and adoption of the collateral source rule in the United States).

28. See *infra* Parts II.B.3–B.4 (reviewing popular judicial and academic arguments for and against the collateral source rule).

29. See *infra* Parts II.B.3–B.4 (reviewing popular judicial and academic arguments for and against the collateral source rule).

30. See *infra* Part II.C (reviewing the recent development of health care as an industry, and the modern trend of granting discounts to insurers in exchange for a steady supply of clients).

31. See *infra* Part II.D (reviewing the adoption and development of the collateral source rule in Illinois, as well as judicial restrictions placed on it).

32. *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958).

33. *Arthur v. Catour*, 833 N.E.2d 847, 852 (Ill. 2005) (citing J. FISCHER, UNDERSTANDING REMEDIES § 12(a), at 77 (1999)).

34. See *id.* at 856–59 (McMorrow, C.J., dissenting) (discussing Illinois's evidentiary rules and policies regarding compensatory damages in medical cases).

present the purpose, goal, and policy reasons for awarding compensatory damages in Illinois.<sup>35</sup> It then provides the evidentiary rules for establishing compensatory damages in Illinois.<sup>36</sup>

The goal of compensatory damages is to make an injured plaintiff whole,<sup>37</sup> by attempting to place him in the position he would have been in had the tort never occurred.<sup>38</sup> Plaintiffs are entitled to recover as compensatory damages their reasonable expenses for necessary medical care, treatment, and services.<sup>39</sup> Illinois courts have explicitly stated that compensatory damages are not intended to punish the tortfeasor or bestow a windfall upon the plaintiff.<sup>40</sup> Furthermore, Illinois courts condemn double recovery,<sup>41</sup> and have held that a plaintiff shall have only one recovery for an injury.<sup>42</sup>

In order to recover medical expenses in Illinois, the injured party must first prove that he has made a payment or that he is liable to pay a specific amount and, second, that the charges are reasonable for services of that nature.<sup>43</sup> A paid bill is *prima facie* evidence of reasonableness,<sup>44</sup> because it is assumed that voluntary payment of the amount implies its reasonableness.<sup>45</sup> This rule also promotes efficient judicial administra-

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35. See *infra* Part II.A (discussing the purpose and policy reasons for awarding compensatory damages in Illinois).

36. See *infra* Part II.A (explaining Illinois evidentiary rules for establishing reasonableness of medical bills in tort actions).

37. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1076 (Ill. 1997) (stating that “[t]here is universal agreement that the compensatory goal of tort law requires that an injured plaintiff be made whole.”).

38. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979). “[C]ompensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.” *Id.*

39. 3-112 ILLINOIS FORMS OF JURY INSTRUCTION § 112.01 (2005).

40. *Wilson v. Hoffman Group*, 546 N.E.2d 524, 530 (Ill. 1989). Because such damages are intended to compensate, rather than punish, they are labeled as “compensatory damages.” *Id.* Damages awarded in order to punish a defendant are called “punitive damages.” *Mattyasovsky v. West Towns Bus Co.*, 330 N.E.2d 509, 511 (Ill. 1975).

41. *Popovich v. Ram Pipe & Supply Co.*, 412 N.E.2d 518, 521 (Ill. 1980) (citing policy concerns against double recoveries for tort injuries).

42. *Dial v. City of O’Fallon*, 411 N.E.2d 217, 222 (Ill. 1980) (stating that Illinois courts “have long recognized the legal principle that a plaintiff shall have only one satisfaction for an injury irrespective of the availability of multiple theories that recovery for the injury can be sought under.”).

43. *Barreto v. City of Waukegan*, 478 N.E.2d 581, 589 (Ill. App. Ct. 1985) (providing the rules for establishing reasonableness of medical bills).

44. *Wicks v. Cuneo-Henneberry Co.*, 150 N.E. 276, 278 (Ill. 1925). See also M. GRAHAM, CLEARY & GRAHAM’S HANDBOOK OF ILLINOIS EVIDENCE § 803.22 (8th ed. 2004) (explaining the evidentiary rules for introducing medical bills in Illinois).

45. See *Lanquist v. City of Chicago*, 65 N.E. 681, 683 (Ill. 1902) (stating that reasonableness of value may be shown by sales “made in a free and open market, and where a fair opportunity for competition exists”); see also *Cloyes v. Plaatje*, 231 Ill. App. 183, 192–93 (App. Ct. 1923)

tion by eliminating the need for numerous witnesses to establish that the billed amounts are reasonable.<sup>46</sup> However, evidence of the amount charged, by itself, will not establish reasonableness.<sup>47</sup> For unpaid medical bills, a plaintiff must establish reasonableness by other means, usually through the testimony of a witness from the medical community.<sup>48</sup>

### B. *The Collateral Source Rule*

The collateral source rule prevents damage awards from being reduced when a plaintiff has received compensation from a third party, and it also serves to prevent the jury from learning of those third-party payments.<sup>49</sup> Although the injured party may have received benefits such as insurance payments or worker's compensation, those amounts will not be deducted from the damage award, and the jury may not learn of such payments.<sup>50</sup> At first blush, the operation of the collateral source rule appears to allow an injured party to collect twice for his injury—once from the third party, and then again from the tortfeasor.<sup>51</sup> This perceived “double recovery” has resulted in criticism of the doctrine by both courts and academics.<sup>52</sup> This Section will first explain the operation of the collateral source rule and how it interacts with damages principles.<sup>53</sup> It then traces the history of the rule and common law restrictions that have developed since its inception.<sup>54</sup> Finally, the arguments developed by courts and academics in favor and in criticism of the collateral source rule are presented.<sup>55</sup>

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(holding that the price paid to satisfy a bill is presumptive evidence of the reasonable value of the services).

46. *Flynn v. Cusentino*, 375 N.E.2d 433, 436 (Ill. App. Ct. 1978) (explaining that the “rationale for the rule is the desire to eliminate unnecessary cost to the parties and inconvenience to the public by having to call multiple witnesses”).

47. *Cooper v. Cox*, 175 N.E.2d 651, 655 (Ill. App. Ct. 1961) (finding reversible error where an unpaid medical bill was admitted without any further evidence establishing that the amount charged was reasonable).

48. *Victory Mem'l Hosp. v. Rice*, 493 N.E.2d 117, 119 (Ill. App. Ct. 1986) (explaining that a witness must testify that he is familiar with the usual and customary charges for the services rendered to the patient and that the charges were reasonable).

49. *Arthur v. Catour*, 833 N.E.2d 847, 852 (Ill. 2005).

50. *Id.*; RESTATEMENT (SECOND) OF TORTS, *supra* note 38, at § 901(A).

51. RESTATEMENT (SECOND) OF TORTS, *supra* note 38, at § 901(A).

52. *See infra* Part II.B.4 (explaining criticisms of the collateral source rule).

53. *See infra* Part II.B.1 (explaining the purpose and operation of the collateral source rule).

54. *See infra* Part II.B.2 (tracing the early development and adoption of the collateral source rule in the United States).

55. *See infra* Parts II.B.3–B.4 (reviewing popular judicial and academic arguments for and against the collateral source rule).

### 1. Operation of the Collateral Source Rule

The collateral source rule is an exception to the general rule of damages preventing a double recovery by an injured party.<sup>56</sup> The rule prevents benefits received by a plaintiff from independent sources from diminishing recoverable damages.<sup>57</sup> Under the collateral source doctrine, an injured party who receives benefits from a collateral source may still recover full damages from the party who caused the injury.<sup>58</sup> Theoretically, a plaintiff may recover twice for a single injury—once from the defendant and once from the collateral source (usually insurance).<sup>59</sup> Typically, however, the collateral source will have a lien or subrogation right, which prevents a double recovery.<sup>60</sup>

The collateral source rule operates as both a rule of damages and a rule of evidence.<sup>61</sup> As to damages, the rule prevents any reduction of a plaintiff's recovery due to amounts received from third parties, which are "collateral" from the tortfeasor.<sup>62</sup> As a rule of evidence, it prevents juries from learning anything about collateral income that could affect their assessment of damages.<sup>63</sup>

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56. *Muranyi v. Turn Verein Frisch-Au*, 719 N.E.2d 366, 369 (Ill. App. Ct. 1999) (explaining that under the collateral source rule a "plaintiff may recover twice for a single injury—once from the defendant and once from the collateral source. This result leaves the rule open to the criticism that it bestows a windfall on plaintiffs, violating the principle that the purpose of tort damages is simply to make plaintiffs whole.").

57. BLACK'S LAW DICTIONARY, *supra* note 18, at 256 (defining the collateral source rule as "[t]he doctrine that if an injured party receives compensation for the injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay.").

58. RESTATEMENT (SECOND) OF TORTS, *supra* note 38, at § 920A(1). However, if a defendant makes any payment toward the plaintiff's liabilities, that amount would have the effect of limiting the defendant's liability. *Id.* § 920A cmt. a. For example, if a defendant pays the plaintiff's hospital bills, or if a defendant employer pays a plaintiff's insurance premiums, those payments are not collateral and would be used to mitigate any award of damages to the plaintiff. *Id.*

59. *See id.* § 920A(2). In addition to insurance, other possible collateral sources include employment benefits, gratuities, and social legislation benefits. *Id.* § 920A cmt. c.

60. *Koffman v. Leichtfuss*, 630 N.W.2d 201, 210 (Wis. 2001). "Subrogation exists to ensure that the loss is ultimately placed upon the wrongdoer and to prevent the subrogor from being unjustly enriched through a double recovery, i.e., a recovery from the subrogated party and the liable third party." *Id.* at 211. Subrogation means that the insurer is substituted for the insured in regard to a right the insured has to receive compensation from another source. JOHN APPLEMAN, INSURANCE LAW & PRACTICE, § 3.1 (Supp. 2005). An insurer asserting a subrogation right is viewed as "standing in the shoes" of the insured and is entitled to receive reimbursement for expenditures previously made on behalf of the insured. *Id.*

61. *Arthur v. Catour*, 833 N.E.2d 847, 852 (Ill. 2005) (citing J. FISCHER, UNDERSTANDING REMEDIES § 12(a), at 77 (1999)).

62. *Id.*

63. *Id.* This protection is in addition to the common evidence rule barring evidence that any party had insurance. *Guardado v. Navarro*, 197 N.E.2d 469, 474 (Ill. App. Ct. 1964).

## 2. Development of the Collateral Source Rule

The collateral source rule originated in England during the 1820s<sup>64</sup> and was first accepted in the United States in 1854.<sup>65</sup> In *The Propeller Monticello v. Mollison*, a maritime case, the United States Supreme Court adopted the English rule in holding that insurance benefits could not be used to reduce an award of damages.<sup>66</sup> Referring to the insurance policy as “a wager between third parties,” the Court ruled that because the insurer was not a joint tortfeasor, the liability of the defendant “could not be offset by the insurance policy.”<sup>67</sup>

New York implemented the doctrine in 1860, refusing to deduct life insurance proceeds from a widow’s wrongful death recovery.<sup>68</sup> The Vermont Supreme Court gave the doctrine its current name in 1871, when it described a plaintiff’s accident insurance benefits as being “collateral.”<sup>69</sup> Since then, the collateral source rule has become a fixture in American common law, adopted to some degree in every state.<sup>70</sup> Jurisdictions vary widely in their application of the rule—some

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64. THOMAS MOORE, *MEDICAL MALPRACTICE* § 5:2.1 (7th ed. Supp. 2005) (stating that English courts adopted the rule in 1823); see also RESTATEMENT (SECOND) OF TORTS, *supra* note 38, at § 920A cmt. d (explaining that “the collateral source rule is of common law origin”).

65. Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 741 n.3 (1964) [hereinafter *Unreason*] (citing *The Propeller Monticello v. Mollison* as the first American case recognizing the collateral source rule). See also Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962) (also recognizing *The Propeller Monticello* as the first American case recognizing the collateral source rule).

66. *The Propeller Monticello v. Mollison*, 58 U.S. 152, 155 (1854). This case involved a nighttime collision between a steamboat and a schooner on Lake Huron, causing the schooner to sink. *Id.* at 153. Writing that “[t]he insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others,” the Court held a wrongdoer cannot be allowed to use the equities between an insurer and insured as a defense. *Id.* at 155.

67. *Id.* The court added that regardless of any insurance benefits received by the plaintiff, a defendant “is bound to make satisfaction for the injury he has done.” *Id.*

68. *Althorf v. Wolfe*, 22 N.Y. 355, 358 (1860). In *Althorf*, the decedent was a pedestrian who was killed when struck in the head by snow and ice thrown from the roof of the defendant’s house. *Id.* at 359. The court upheld the trial court, which had refused a jury instruction offered by the defendant that requested an offset in damages for any life insurance benefits received by the widow. *Id.* at 358.

69. *Harding v. Town of Townshend*, 43 Vt. 536, 538 (1870). The Vermont court held there is no reason to allow insurance benefits received by a plaintiff to be used as a defense or offset of damages by the defendant, because there is no legal privity between the defendant and insurer, and the insurer is not a joint tortfeasor. *Id.* The insurance was acquired solely by the plaintiff, at his own expense, and for his own benefit, rather than for the benefit of the defendant, and it would be inappropriate to allow a defendant to benefit from such a policy. *Id.*

70. John L. Antracoli, Note, *California’s Collateral Source Rule and Plaintiff’s Receipt of Uninsured Motorist Benefits*, 37 HASTINGS L.J. 667, 667 n.5 (1986) (detailing the widespread acceptance of the collateral source rule by American courts). Alabama was the last state to adopt the collateral source rule, finally recognizing the doctrine in 1977. *Id.* (citing *Gribble v. Cox*, 349

allow plaintiffs to recover for the value of services, even when the services were rendered free of charge.<sup>71</sup> Other jurisdictions have attempted to limit the doctrine, through statutory and judicial restraints.<sup>72</sup>

Soon after the U.S. Supreme Court recognized the collateral source rule, and only a few years after Vermont named it, state courts began to find exceptions to the doctrine. In 1880, a New York case held the collateral source rule to be inapplicable when medical services are provided gratuitously.<sup>73</sup> Soon thereafter, Pennsylvania also recognized this exception, forbidding use of the collateral source rule as a method to recover for gratuitous services.<sup>74</sup> Today in some jurisdictions there can be no recovery for medical services unless money has actually been paid or liability has been incurred.<sup>75</sup> Another common restriction is that a plaintiff usually may not recover medical bills that were discharged in bankruptcy.<sup>76</sup>

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So. 2d 1141 (Ala. 1977)).

<sup>71</sup> See James L. Branton, *Symposium: Developments in Tort Law and Tort Reform—The Collateral Source Rule*, 18 ST. MARY'S L.J. 883, 886 (1987) (describing what has been termed a “pure” collateral source rule). See also *Oil Country Haulers, Inc. v. Griffin*, 668 S.W.2d 903, 904 (Tex. App. 1981) (ruling that gratuitous medical bills are recoverable from a tortfeasor); *Texas Power & Light v. Jacobs*, 323 S.W.2d 483, 494–95 (Tex. Civ. App. 1959) (holding that medical services provided gratuitously through a veteran’s program were recoverable as damages).

<sup>72</sup> Branton, *supra* note 71, at 888–89 (describing statutory and judicial limits that have been placed on the doctrine, such as limiting or abolishing the rule for medical malpractice cases or cases where the government is a defendant); Antracoli, *supra* note 70, at 678 (discussing exceptions and limits to the collateral source rule in California, such as abolishing its applicability to medical malpractice actions).

<sup>73</sup> *Drinkwater v. Dinsmore*, 80 N.Y. 390, 393 (1880) (holding that a plaintiff could not recover damages for nursing expenses because the services were provided gratuitously by a religious foundation). See also *Morris v. Grand Ave. Ry. Co.*, 46 S.W. 170, 172 (Mo. 1898) (holding a plaintiff could not recover for gratuitous services).

<sup>74</sup> *Walker v. City of Phila.*, 45 A. 657, 658 (Pa. 1900) (precluding recovery for gratuitous nursing services provided by plaintiff’s daughter, despite the fact that she quit her job in order to provide the care); *Goodhart v. Penn. R.R. Co.*, 35 A. 191, 192 (Pa. 1896) (holding that a plaintiff cannot recover for nursing provided by members of his own household, because the care of his wife and minor children involves the performance of the ordinary offices of affection, which is his duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred).

<sup>75</sup> *Daniels v. Celeste*, 21 N.E.2d 1, 2 (Mass. 1939) (holding that the collateral source rule does not protect services provided free of charge—in order to recover damages, the plaintiff must either have incurred liability or will incur future liability); *Biddle v. Griffin*, 277 A.2d 691, 692 (Del. Super. Ct. 1970) (reciting a state rule that because a “loved one rendering free unskilled nursing services to a family member does not do so for compensation, . . . the value of such services may not be recovered by the injured party in a tort action”). The Illinois Supreme Court adopted this rule. See *infra* Part II.D.2 (describing the *Peterson* decision).

<sup>76</sup> *Olariu v. Marrero*, 549 S.E.2d 121, 123–24 (Ga. Ct. App. 2001) (holding that a plaintiff may not recover compensatory damages for medical expenses discharged in bankruptcy because bankruptcy does not constitute a collateral source; and also because allowing so would encourage

### 3. Rationales for the Collateral Source Rule

Perhaps the most common justification for the collateral source rule is that the defendant should not be allowed to benefit from the plaintiff's foresight in acquiring insurance.<sup>77</sup> Under this "benefit of the bargain" theory, a wrongdoer should not benefit from the fact that the injured plaintiff made payments to acquire insurance coverage.<sup>78</sup> In such an instance, a plaintiff has paid consideration for these benefits, committing resources that otherwise could have been put toward a different use.<sup>79</sup> If a plaintiff has invested in insurance premiums, he should be the one to receive the benefits from those premiums—not the defendant who made no such expenditures.<sup>80</sup> Because the defendant did not make an expenditure for the insurance contract, he should not reap the benefits.<sup>81</sup> If the benefit is shifted to the defendant, the plaintiff is in a worse situation than if he had never bothered to acquire insurance coverage.<sup>82</sup> In such a case, the benefit of the premium payments would be shifted to the defendant instead of the plaintiff.<sup>83</sup>

Moreover, proponents of the collateral source rule argue that the doctrine supports public policy by acknowledging that it is beneficial to encourage the public to acquire insurance coverage.<sup>84</sup> Allowing a defendant to benefit from a plaintiff's insurance coverage would be a

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bankruptcy, which is against public policy); *Oliver v. Heritage Mut. Ins. Co.*, 505 N.W.2d 452, 461 (Wis. Ct. App. 1993) (holding that the plaintiff could not recover medical bills that had been discharged in bankruptcy because no benefits had been provided by a third party but instead were the result of the plaintiff's own act).

77. *Unreason*, *supra* note 65, at 748–49 (listing this first among a list of justifications, on the grounds that it is the oldest and most often cited reason for the rule).

78. 22 AM. JUR. 2D *Damages* § 408 (2004) (citing *Taylor v. Jennison*, 335 S.W.2d 902 (Ky. 1960), *Anderson v. Miller*, 33 S.W. 615 (Tenn. 1896), and *Criez v. Sunset Motor Co.*, 213 P. 7 (Wash. 1923)).

79. *Overton v. United States*, 619 F.2d 1299, 1306 (8th Cir. 1980).

80. *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 66 (Cal. 1970); *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958); *Muranyi v. Turn Verein Frisch-Auf*, 719 N.E.2d 366, 369 (Ill. App. Ct. 1999) (citing *Beaird v. Brown*, 373 N.E.2d 1055, 1057 (Ill. App. Ct. 1978)) (recognizing that a reduction "of a plaintiff's damages by the amount of his insurance proceeds would deprive him not of a mere gratuity, but of the benefit of his bargain").

81. *Balt. & Ohio R.R. Co. v. Wightman's Adm'r.*, 70 Va. 431, 446 (1877). "[T]he party effecting the insurance paid full value for it, and there is no equity in the claim of the defendant to the benefit of a contract for which it gave no consideration." *Id.*

82. *Helfend*, 465 P.2d at 66.

83. *Id.*; *Grayson*, 256 F.2d at 65.

84. *Bozeman v. Louisiana*, 879 So. 2d 692, 704 (La. 2004) (arguing the collateral source rule encourages citizens to purchase insurance). *See also Helfend*, 465 P.2d at 66 (arguing that without the collateral source rule, there would be less incentive to acquire insurance coverage).

disincentive to the public to acquire coverage,<sup>85</sup> granting the tortfeasor an “unjust enrichment.”<sup>86</sup>

A second argument is that if anyone receives a windfall, it is best that it be the injured party rather than the tortfeasor.<sup>87</sup> If a decision must be made between the parties, an impartial person would most likely side with the innocent victim.<sup>88</sup> Allowing the “windfall” to shift to the defendant would result in the defendant benefiting from his wrongful act, and would relieve him of the full responsibility for his wrongdoing.<sup>89</sup>

Another justification for the collateral source rule is that tort law is supposed to have a deterrent effect.<sup>90</sup> Commentators argue that if courts do not require defendants to pay the full amount of damages they cause, this deterrent effect will be diminished.<sup>91</sup> Although the reality of such deterrence is debatable, some studies indicate that money damages actually do deter tortious conduct.<sup>92</sup>

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85. *Bozeman*, 879 So. 2d at 704 (noting that in such an instance the payment of premiums by the plaintiff would yield no benefit to him).

86. *Beaird v. Brown*, 373 N.E.2d 1055, 1057–58 (Ill. App. Ct. 1978) (citing *Ullman v. Wolverine Ins. Co.*, 269 N.E.2d 295, 300 (Ill. 1970) (Ward, J., dissenting)) (stating that it would be unjust enrichment to allow a defendant to benefit from plaintiff’s payment of insurance premiums).

87. *Grayson*, 256 F.2d at 65; *Werner v. Lane*, 393 A.2d 1329, 1335–36 (Me. 1978). This justification for the collateral source rule was specifically rejected by the Illinois Supreme Court. *See infra* Part II.D.2 (discussing the *Peterson* decision).

88. *Branton*, *supra* note 71, at 889 (posing a hypothetical, the author claims that uninterested parties would award any windfall to the injured person, rather than the tortfeasor). Supporters of the rule also argue that a reasonable person would not choose to be injured, even if he was fully compensated for that injury. *Hudson v. Lazarus*, 217 F.2d 344, 346 (D.C. Cir. 1954) (arguing that “[l]egal ‘compensation’ for personal injuries does not actually compensate”). In other words, not many people would sell their arm for the amount typically recovered in a lawsuit for loss of an arm. *Id.*

89. *Grayson*, 256 F.2d at 65. Perhaps the most cited explanation of this theory was provided in this opinion, when the court wrote:

Where a part of a wrongdoer’s liability is discharged by payment from a collateral source, as here, the question arises who shall benefit therefrom, the wrongdoer or the injured person. No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act. If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.

*Id.*

90. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 38, at § 901(c) (stating that one of the purposes of tort damages is to “punish wrongdoers and deter wrongful conduct”).

91. Christian D. Saine, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 CASE W. RES. L. REV. 1075, 1092–97 (1997) (presenting research supporting the idea that compensatory damages have a deterrent effect).

92. *Id.* at 1092–97. In contrast, see Gary T. Schwartz, *Reality in the Economic Analysis of*

Supporters also argue that the collateral source rule helps ensure that a plaintiff is fully compensated for a tortious injury.<sup>93</sup> Because of litigation costs and attorney fees, double recovery rarely occurs.<sup>94</sup> In most cases, when a plaintiff receives the full amount of damages, the legal expenses combine with subrogation rights to provide a fair outcome.<sup>95</sup> The California Supreme Court endorsed this view, noting that a plaintiff's attorney usually receives a large portion of the plaintiff's recovery, and, therefore, the collateral source rule to some extent serves to compensate for the attorney's share and does not actually result in a double recovery.<sup>96</sup> Similarly, supporters suggest that the rule promotes efficiency, given that the plaintiff's attorney often serves the interests of both the injured plaintiff and the collateral source maintaining its subrogation rights.<sup>97</sup>

The rule has also been defended for the same reason it is most often criticized—its perceived punitive effect.<sup>98</sup> The collateral source rule requires a tortfeasor to compensate for all harm that he causes, rather than just the plaintiff's net loss.<sup>99</sup> Even when the plaintiff has not suffered a net financial loss, under the collateral source rule, damages are not reduced.<sup>100</sup> If not for the rule, the individual recovery of two

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*Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381–87 (1994) (providing a comprehensive list of recent authors who doubt the deterrent effect of tort liability and the factors they suggest mitigate deterrence).

93. David L. Edwards, Note, *Jurgensen v. Smith: Shutting The Door on Collateral Source Evidence in South Dakota*, 46 S.D. L. REV. 316, 331–32 (2001); *Unreason*, *supra* note 65, at 750.

94. *Hudson v. Lazarus*, 217 F.2d 344, 349 (D.C. Cir. 1954); *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 68 (Cal. 1970); John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1480–84 (1966).

95. *Saine*, *supra* note 91, at 1098.

96. *Helfend*, 465 P.2d at 68.

97. *Id.* Otherwise, both the plaintiff and the collateral source would be required to obtain legal representation in order to assert their rights against the tortfeasor. *Id.*

98. *Hubbard Broadcasting, Inc. v. Loescher*, 291 N.W.2d 216, 222–23 (Minn. 1988) (stating that “[a]lthough the [plaintiff] may be overcompensated, the collateral source rule requires that a wrongdoer pay for the full extent of the damages he or she has caused.”).

99. RESTATEMENT (SECOND) OF TORTS, *supra* note 38, at § 920A cmt. b. The Restatement provides:

A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.

Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

*Id.*

100. RESTATEMENT (SECOND) OF TORTS, *supra* note 38, at § 924 cmt. c. “The damages are not reduced by the fact that the plaintiff has suffered no net financial loss as the result of the entire transaction, as when he receives insurance money or an amount equal to his lost wages

plaintiffs who were similarly injured would be based on the type of their insurance coverage, rather than the nature of their injuries.<sup>101</sup> Proponents of this theory argue that without the collateral source rule, defendants would get a break if they harmed a poor person whose medical bills were paid by Medicaid.<sup>102</sup>

A final argument for the doctrine is that medical expenses are often the best barometers for juries to assess plaintiffs' injuries, and for attorneys to value cases for settlement purposes.<sup>103</sup> Under this theory, if the collateral source rule allows a plaintiff to inflate the dollar amount of his economic damages, more money will also be awarded for indefinable damages such as pain and suffering.<sup>104</sup> Similarly, courts have repeatedly applied the evidentiary function of the rule to prevent the jury from learning of collateral payments.<sup>105</sup> The fear is that a jury may become confused or misled if presented with evidence that a plaintiff received money from parties other than the defendant.<sup>106</sup>

#### 4. Criticism of the Collateral Source Rule

Academic criticism of the collateral source rule began to flourish in the middle of the twentieth century.<sup>107</sup> The perceived punitive effect of

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from his employer or from a friend." *Id.*

101. *Bynum v. Magno*, 101 P.3d 1149, 1162 (Haw. 2004); *Koffman v. Leichtfuss*, 630 N.W.2d 201, 210 (Wis. 2001) ("Applying the collateral source rule to payments that have been reduced by contractual arrangements between insurers and health care providers assures that the liability of similarly situated defendants is not dependent on the relative fortuity of the manner in which each plaintiff's medical expenses are financed.").

102. *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611, 619 (Miss. 2001). Stated more explicitly, a defendant "does not get a break on damages just because it caused permanent injuries to a poor person" whose medical bills were discounted by Medicaid. *Id.*

103. See, e.g., Stephen G. Olson, *Is the Collateral Source Rule Applicable to Medicare and Medicaid Write-offs?*, 71 DEF. COUNS. J. 172, 178 (2004) (arguing that a "real danger" of the collateral source rule is that the higher damage award is often used as a benchmark to determine "compensation for more intangible injuries such as pain and suffering"). See also *Smithers v. C & G Custom Module Hauling*, 172 F. Supp. 2d 765, 778 (E.D. Va. 2000) (explaining that any increase in the base amount of damages due to recovery of medical discounts will likely form a basis to demand and receive additional compensation for more intangible injuries such as pain and suffering).

104. Olson, *supra* note 103, at 178.

105. 3-110 ILLINOIS FORMS OF JURY INSTRUCTION § 110.30 (2005). The Illinois Supreme Court Committee on Jury Instructions in Civil Cases notes that "juries may sometimes speculate or be concerned about whether a plaintiff has or will receive compensation in addition to any damages award." *Id.* The jury instruction is to be read even when no direct evidence of collateral sources has been presented because collateral sources may be inferred from the evidence or the experiences of the jury members. *Id.*

106. Beard, *supra* note 14, at 460 (citing *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 68 (Cal. 1970), and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 36 (1963)).

107. HARPER & JAMES, *THE LAW OF TORTS* (1968 Supp.) § 25.22, at p. 152. See also *Helfend*, 465 P.2d at 64 n.6 (citing the following articles and commentaries criticizing the

the collateral source rule is often criticized, as some argue that the application of the collateral source rule overcompensates plaintiffs.<sup>108</sup> Opponents argue that this overcompensation contradicts the policy of modern tort law, which aims to compensate the victim in an attempt to make him whole, not to punish the tortfeasor.<sup>109</sup> This argument is based on the premise that once a plaintiff is compensated, regardless of the source, the victim should not be compensated a second time by the wrongdoer.<sup>110</sup> By forcing the tortfeasor to pay damages to a plaintiff who has already been made whole, the damages serve solely as a punishment to the tortfeasor.<sup>111</sup> Under this perspective, allowing such “double recoveries” overcompensates plaintiffs and places them in a better position than before the tort occurred, while at the same time the damages awarded merely serve to punish the defendant rather than compensating the injured party.<sup>112</sup> Accordingly, under this argument the operation of the collateral source rule violates the principal purposes of compensatory damages.<sup>113</sup>

Another argument against the collateral source rule is that the doctrine conflicts with mitigation principles.<sup>114</sup> Pursuant to the Restatement (Second) of Torts, if a plaintiff has received a benefit due to an injury caused by the defendant, the defendant should be able to use the value of the benefit to mitigate damages.<sup>115</sup> According to this

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collateral source rule: “Fleming, *Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1966); James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537 (1952); Schwartz, *The Collateral Source Rule*, 41 B.U. L. REV. 348 (1961); West, *The Collateral Source Rule Sans Subrogation: A Plaintiff’s Windfall*, 16 OKLA. L. REV. 395; Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964)”.

108. Victor E. Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569, 570–72 (1986) (arguing that the collateral source rule results in overcompensation in product liability cases).

109. *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979); *Wilson v. Hoffman Group, Inc.*, 546 N.E.2d 524, 530 (Ill. 1989); *F.B.C. Stores, Inc. v. Duncan*, 198 S.E.2d 595, 599 (Va. 1973).

110. Fleming, *supra* note 94, at 1481–85 (presenting academic critiques of the collateral source rule).

111. *Peterson*, 392 N.E.2d at 5.

112. See Julie A. Schafer, *The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45*, 53 OHIO ST. L.J. 587, 590 (1992) (reviewing common criticisms of the collateral source rule).

113. *Wilson*, 546 N.E.2d at 530 (explaining that compensatory damages are not intended to punish the tortfeasor or bestow a windfall upon the plaintiff).

114. Antracoli, *supra* note 70, at 670 (reviewing the inherent conflict between the collateral source rule and the concept of tort mitigation).

115. RESTATEMENT (SECOND) OF TORTS, *supra* note 38, at § 920. “When the defendant’s tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.” *Id.*

theory, because the defendant's conduct has produced a benefit to the plaintiff, that benefit should be a mitigating factor when calculating damages.<sup>116</sup> However, one court rejected this argument noting that allowing a defendant to mitigate damages with insurance benefits would result in the plaintiff being worse off than if she had never purchased insurance, because her payment of premiums would result in no benefit.<sup>117</sup>

### C. Medical Discounts

Like almost every other industry and service in the United States, healthcare has seen rapid developments in recent years.<sup>118</sup> In addition to technological and scientific advances, the economics and business of healthcare have also evolved.<sup>119</sup> This Section begins with a brief history of organized health care and the development of the modern practice of providing discounts for medical services.<sup>120</sup> It then reviews how various jurisdictions have approached these medical discounts in light of the collateral source rule.<sup>121</sup>

#### 1. The Growth of the Health Care Industry and Discounting of Medical Bills

As the collateral source rule was expanded and limited by the courts during the second half of the twentieth century, significant changes occurred in the health care industry. Until the Great Depression, health insurance was generally rare.<sup>122</sup> Doctors and other health care providers had significant power in setting fees because patients generally had little bargaining power.<sup>123</sup> During the Depression, government-sponsored plans such as Blue Cross were created.<sup>124</sup> Under these health

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116. Branton, *supra* note 71, at 886. Proponents of this argument believe that without such mitigation any damages awarded are punitive rather than compensatory, since the plaintiff has already been compensated. *Id.*

117. *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 66 (Cal. 1970) (arguing that under such an approach the benefit of the premiums paid by the plaintiff would be realized by the defendant, rather than the plaintiff).

118. *See infra* Part II.C.1.

119. *Id.*

120. *See infra* Part II.C.1 (reviewing the recent development of health care as an industry, and the modern trend of granting discounts to insurers in exchange for a steady supply of clients).

121. *See infra* Part II.C.2 (surveying various approaches jurisdictions have taken toward the issue of whether a plaintiff may recover damages for the discounted portions of medical bills).

122. Beard, *supra* note 14, at 461.

123. *Id.* During this era, doctors based their fees "more on the patient's ability to pay than anything else." *Id.*

124. Sylvia A. Law, *Negotiating Physicians' Fees: Individual Patients or Society? (A Case Study in Federalism)*, 61 N.Y.U. L. REV. 1, 9 (1986). Blue Cross originated in Dallas in 1929,

plans, the premiums were the same for everyone within a given community, regardless of health history.<sup>125</sup> After World War II, health insurance became even more common, as employers used health coverage as an incentive when recruiting potential employees.<sup>126</sup>

As the health-insurance industry grew, so did its leverage.<sup>127</sup> Medical charges became flexible, as the insurance companies used their new power to negotiate lower fee schedules with medical providers.<sup>128</sup> HMOs and public health programs such as Medicaid and Medicare also commanded significant discounts for medical care.<sup>129</sup> Under these reduced fee schedules, medical providers accept as payment in full a discounted portion of the amount initially billed to the patient.<sup>130</sup> The providers then “write off” the discount, and the original debt is discharged.<sup>131</sup> Although health care providers gave up their billing

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providing teachers with 21 days of hospitalization in exchange for a pre-payment of 50 cents per month. Wikipedia: The Free Encyclopedia, Blue Cross and Blue Shield Association, [http://en.wikipedia.org/wiki/Blue\\_Cross](http://en.wikipedia.org/wiki/Blue_Cross) (last visited February 8, 2006). Similar plans began to spread nationally, including the lumber and mining camps of the Pacific Northwest. *Id.* These West Coast plans eventually evolved into Blue Shield in 1939. *Id.* Today, Blue Cross operates as hospital insurance, and Blue Shield operates as physician insurance. *See* ROBERT CUNNINGHAM III & ROBERT M. CUNNINGHAM JR., *THE BLUES: A HISTORY OF THE BLUE CROSS AND BLUE SHIELD SYSTEM* (N. Ill. Univ. Press 1998). Blue Cross and Blue Shield operate as intertwined, nonprofit institutions, and act as the principal intermediary between federal health programs (such as Medicare) and their clients. *Id.*

125. Law, *supra* note 124, at 10 (discussing the evolution of health care during the early twentieth century).

126. M. RAFFEL, *THE U.S. HEALTH SYSTEM: ORIGINS AND FUNCTIONS* 244 (3d ed. 1989). The government froze wages during the war, so employers began to offer health benefits as a substitute for higher wages. *Id.* Between the early 1940s and the late 1960s, organized labor bargained for an expansive package of service benefits for workers and dependents alike. *Id.*

127. Beard, *supra* note 14, at 453–54.

128. *Id.*

129. *Id.* at 463–66. Health Maintenance Organizations (“HMOs”) provide a form of health insurance coverage, but differ from traditional insurance policies in that the care provided in an HMO generally follows a set of guidelines by the HMO. *See* Wikipedia: The Free Encyclopedia, Health Maintenance Organization, [http://en.wikipedia.org/wiki/Health\\_maintenance\\_organization](http://en.wikipedia.org/wiki/Health_maintenance_organization) (last visited February 9, 2006) (explaining the function of an HMO). Under this model, providers contract with an HMO to receive more patients and in return usually agree to provide services at a discount. *Id.* This allows HMOs to charge lower monthly premiums than typical indemnity insurance. *Id.* HMOs attempt to gain an advantage over traditional insurance plans by managing their patients’ health care and reducing unnecessary services by requiring members to select a primary care physician, who acts as a “gatekeeper” to medical services. *Id.* Medicare and Medicaid are federal programs that were signed into law on July 30, 1965, by President Lyndon B. Johnson. U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services: History, [http://www.cms.hhs.gov/History/01\\_Overview.asp#TopOfPage](http://www.cms.hhs.gov/History/01_Overview.asp#TopOfPage) (last visited February 10, 2006). Medicare coverage is available to those over 65 years of age, while Medicaid is available to lower-income households. *Id.*

130. Olson, *supra* note 103, at 172.

131. *Id.*

power, in return they received a steady supply of patients and guaranteed payment.<sup>132</sup>

Discounting of medical bills has become a common practice in contemporary healthcare.<sup>133</sup> Insurance companies in Illinois receive an average discount of 40% for their customers' hospital bills.<sup>134</sup> Experts have stated that modern health care prices are as inflated as list prices for new cars; they are amounts that everyone knows are inaccurate, and no one actually pays them.<sup>135</sup> Courts have found that these discounts are due to the power and size of the entities paying such medical bills.<sup>136</sup> The collateral source rule has received increased criticism over the past twenty-five years because of these changes, as commentators have labeled recovery of these discounts as "windfalls" or "phantom damages."<sup>137</sup>

## 2. Cases Addressing Medical Discounts

The development of discounts in the health care industry has created a new question in the collateral source rule debate—may a plaintiff recover the amount originally billed, or are his damages limited to the amount actually paid?<sup>138</sup> Both sides present strong arguments, structured largely around the policy arguments surrounding the

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132. *N.C. v. A.W.*, 713 N.E.2d 775, 776–77 (Ill. App. Ct. 1999) (holding that a medical provider could not place a lien on plaintiffs' recovery for an amount exceeding what was accepted as payment in full, the court wrote that although the provider only received 18.6 cents on the dollar as payment, the provider benefited from an increased number of patients in exchange for the reduced rate). Finding that the provider itself had bargained for and assented to the reduced rate, the court stated that "it is a little late for [the provider] to experience buyer's remorse over its own voluntary contract." *Id.* at 777. The health care provider benefits from such contracts because the insureds are usually able to seek treatment from only a limited number of facilities. *Id.*

133. *Arthur v. Catour*, 803 N.E.2d 647, 649 (Ill. App. Ct. 2004) (citing *Mitchell v. Hayes*, 72 F. Supp. 2d 635, 637 (W.D. Va. 1999) and *Beard*, *supra* note 14, at 463–66).

134. Brief for Illinois Association of Defense Trial Counsel as Amicus Curiae Supporting Defendants-Appellants at 12, *Arthur v. Catour*, 216 Ill. 2d 72 (2005) (No. 97920). Amicus retained a consulting firm to survey Illinois health insurers, which determined that the seven largest insurers in the state received discounts between 34 and 53%. *Id.*

135. Lucette Lagundo, *Full Price: A Young Woman, an Appendectomy, and a \$19,000 Debt*, WALL ST. J., Mar. 17, 2003, at 1. "In some ways, hospital charges are like automobile 'list prices' or hotel 'rack rates'—posted prices that everybody knows nobody pays." *Id.*

136. *Arthur*, 803 N.E.2d at 649 (explaining that such discounts are "a consequence of the power wielded by those entities, such as insurance companies, employers and governmental bodies, who pay the bills") (citing *Beard*, *supra* note 14, at 453).

137. *Beard*, *supra* note 14, at 458–61 (arguing that it is inequitable and unjust to allow plaintiffs to recover these "windfalls"); Olson, *supra* note 103, at 173–75 (labeling recovery of medical discounts as "phantom damages"). See *supra* Part II.B.4 (discussing criticisms of the collateral source rule).

138. *Beard*, *supra* note 14, at 470–71.

collateral source rule itself.<sup>139</sup> Although the majority of jurisdictions allow recovery of the amount billed regardless of any discount, some state courts limit awards to the amount actually paid on behalf of the plaintiff.<sup>140</sup>

Most of the jurisdictions restricting recovery to the amount paid have based their decisions on state statutory limitations on the collateral source rule.<sup>141</sup> For example, an Idaho court held that the intent of a state statute prevented double recovery by a plaintiff receiving damages for medical discounts.<sup>142</sup> Courts in Florida,<sup>143</sup> New York,<sup>144</sup> and Montana<sup>145</sup> also relied on state statutes that expressed a policy against plaintiffs receiving double recoveries.

Even courts in California and Pennsylvania, states without statutes limiting the collateral source rule, have still determined that plaintiffs may not recover the discounted portion of medical bills.<sup>146</sup> In these decisions, the courts focused on the fact that damages are meant to compensate plaintiffs for their medical expenses, not to punish defendants.<sup>147</sup> Hence, the expenses must be restricted to the costs that were actually incurred.<sup>148</sup> Relying on the Restatement, the courts concluded that the collateral source rule did not apply to the discounted

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139. *See supra* Parts II.B.3–B.4 (presenting arguments both in favor and in opposition to the collateral source rule).

140. *Robinson v. Bates*, 828 N.E.2d 657, 669 (Ohio Ct. App. 2005) (listing state court decisions limiting recovery to the amount actually paid).

141. *Id.* at 669–71 (reviewing cases from Idaho, Florida, and Montana where the courts relied on state statutes).

142. *Dyet v. McKinley*, 81 P.3d 1236, 1239 (Idaho 2003) (holding that a plaintiff may not recover for Medicare write-offs).

143. *See Coop. Leasing Inc. v. Johnson*, 872 So. 2d 956, 960 (Fla. Dist. Ct. App. 2004) (holding that pursuant to state statute, Medicare benefits are not a collateral source, and therefore are not recoverable, because the plaintiff never became liable and the federal government has no right to reimbursement).

144. *See Kastick v. U-Haul Co.*, 740 N.Y.S.2d 167, 169 (2002) (holding that amounts written off by a medical provider are not payments from a collateral source within the meaning of state statute, since the plaintiff did not incur liability).

145. *See generally Chapman v. Mazda Motor of Am., Inc.*, 7 F. Supp. 2d 1123 (D. Mont. 1998) (holding that plaintiff's recovery was limited to the amount paid by Medicaid due to a state statute, but allowing admission of plaintiff's medical bills to show the jury the severity and extent of her injuries and to establish required future medical care and expenses).

146. *See Hanif v. Housing Auth. of Yolo County*, 200 Cal. App. 3d 635, 643–44 (Ct. App. 1988) (declining to award plaintiff amount in excess of the amount actually paid by Medi-Cal); *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 791 (Pa. 2001) (holding that the collateral source rule did not require that plaintiff recover the amount of the Medicaid write-off since no one incurred the written-off amount).

147. *Moorhead*, 765 A.2d at 790–91.

148. *Id.*

portions because no collateral source actually paid those charges.<sup>149</sup> Although these decisions are still good law in both states, other decisions barring recovery of discounted amounts were later overruled in Virginia,<sup>150</sup> Louisiana,<sup>151</sup> and Kansas.<sup>152</sup>

The majority of jurisdictions that have addressed this issue allow full recovery of discounted medical bills.<sup>153</sup> Courts in the District of Columbia, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Hampshire, South Carolina, Texas, Virginia, and Wisconsin have ruled that plaintiffs may recover the amounts discounted from their medical bills.<sup>154</sup> Under these cases, the collateral source rule protects medical discounts, finding them to be a benefit of the plaintiff's bargain with his insurance carrier.<sup>155</sup> Consequently, a court or jury may not reduce damage awards by the amount of the discount received by the plaintiff's insurer.<sup>156</sup> Some courts have also addressed the evidentiary component of the collateral source rule, holding that neither the amount

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149. *Bynum v. Magno*, 101 P.3d 1149, 1159 n.19 (Haw. 2004) (noting that both *Hanif* and *Moorhead* erroneously relied upon Restatement § 911 cmt. h (1977), "which specifically references the reasonable exchange value of 'services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages'"). For a more detailed discussion of this misapplication of the Restatement, see *infra* Part IV.A.

150. *Mitchell v. Hayes*, 72 F. Supp. 2d 635, 637 (W.D. Va. 1999) and *McAmis v. Wallace*, 980 F. Supp. 181, 185 (W.D. Va. 1997), *overruled by* *Acuar v. Letourneau*, 531 S.E.2d 316, 322 (Va. 2000).

151. *Cook v. Jefferson Parish Hosp. Serv. Dist. No. 2*, 876 So. 2d 173, 178–79 (La. Ct. App. 2004); *Suhor v. Lagasse*, 770 So. 2d 422, 427 (La. Ct. App. 2000); *Terrell v. Nanda*, 759 So. 2d 1026, 1031 (La. Ct. App. 2000) *overruled by* *Bozeman v. Louisiana*, 879 So. 2d 692 (La. 2004) (stating that amounts written off by the health care provider through Medicare and private insurance, where consideration is provided for the benefit, are recoverable).

152. *Bates v. Hogg*, 921 P.2d 249 (Kan. Ct. App. 1996), *later restricted by* *Rose v. Via Christi Health System, Inc.*, 78 P.3d 798 (Kan. 2003).

153. *Robinson v. Bates*, 828 N.E.2d 657, 667 (Ohio Ct. App. 2005) (surveying developing trends among courts on the issue of whether to allow recovery of medical discounts).

154. *Id.* at 665–69 (citing and reviewing the following opinions that allowed a plaintiff to recover amounts discounted by health care providers: *Wal-Mart Stores, Inc. v. Frierson*, 818 So. 2d 1135 (Miss. 2002); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611 (Miss. 2001); *Hardi v. Mezzanotte*, 818 A.2d 974 (D.C. 2003); *Acuar v. Letourneau*, 531 S.E.2d 316 (Va. 2000); *Bynum v. Magno*, 101 P.3d 1149 (Haw. 2004); *Haselden v. Davis*, 579 S.E.2d 293 (S.C. 2003); *Koffman v. Leichtfuss*, 630 N.W.2d 201 (Wis. 2001); *Olariu v. Marrero*, 549 S.E.2d 121 (Ga. Ct. App. 2001); *Candler Hosp., Inc., v. Dent*, 491 S.E.2d 868 (Ga. Ct. App. 1997); *Brown v. Van Noy*, 879 S.W.2d 667 (Mo. Ct. App. 1994); *Bozeman v. Louisiana*, 879 So. 2d 692 (La. 2004); *Rose v. Via Christi Health System, Inc.*, 78 P.3d 798 (Kan. 2003)).

155. *See, e.g., Acuar*, 531 S.E.2d at 322 ("[T]he focal point of the collateral source rule is not whether an injured party has 'incurred' certain medical expenses. Rather, it is whether a tort victim has received benefits from a collateral source that cannot be used to reduce the amount of damages owed by a tortfeasor.").

156. *Id.*

written off nor the amount accepted as payment in full may be presented as evidence that the amount originally charged was unreasonable.<sup>157</sup>

According to these cases, the collateral source rule provides that the tortfeasor should not receive the benefit from the plaintiff's contracts with third parties.<sup>158</sup> A reduction of the plaintiff's damages because of medical discounts would in effect reward the defendant for injuring a person with comprehensive insurance.<sup>159</sup> As illustrated by the Wisconsin Supreme Court, one plaintiff may be uninsured, another's insurer may pay full value, and the third's insurer may receive a sizable discount.<sup>160</sup> Without the collateral source rule, the defendant's liability could vary in each case even where the injuries and medical bills were the same for each plaintiff.<sup>161</sup>

Courts allowing plaintiffs to recover the full amount billed have also cited many of the policy arguments presented above to support their conclusions.<sup>162</sup> According to one court, the collateral source rule is best understood by focusing on its effect on the tortfeasor rather than the plaintiff, and failure to apply it to medical discounts would provide a windfall to the wrongdoer.<sup>163</sup> If there must be a windfall, it is most just for that windfall to go to the injured party.<sup>164</sup> Courts have also reasoned that allowing recovery of the discounted amounts deters tortious conduct and encourages the acquisition of insurance coverage.<sup>165</sup>

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157. *Radvany v. Davis*, 551 S.E.2d 347, 348 (Va. 2001) (holding that a defendant may not present the amount accepted as payment in full as evidence that the amount originally billed is unreasonable).

158. *Acuar*, 531 S.E.2d at 322.

159. *Koffman*, 630 N.W.2d at 209–10.

160. *Id.* (presenting a hypothetical to illustrate the inequities that would result absent the application of the collateral source rule to medical discounts).

161. *Id.*

162. *See supra* Part II.B.3 (reviewing justifications for the collateral source rule).

163. *Griffin v. La. Sheriff's Auto Risk Ass'n*, 802 So. 2d 691, 715 (La. Ct. App. 2001) (reviewing policy justifications in favor of applying the collateral source rule to medical discounts).

164. *Acuar v. Letourneau*, 531 S.E.2d 316, 323 (Va. 2000) (explaining that because “[a] plaintiff who receives a double recovery for a single tort enjoys a windfall, [and] a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall[,] [the] law must sanction one windfall and deny the other[—]it favors the victim of the wrong rather than the wrongdoer”). *See also Koffman*, 630 N.W.2d at 210–11 (arguing that justice calls for an award of any windfall to the less culpable party).

165. *Griffin*, 802 So. 2d at 715.

#### D. The Collateral Source Rule in Illinois

Illinois has long recognized the collateral source rule, but it also imposes restrictions on the doctrine.<sup>166</sup> This Section begins with a history of the adoption and expansion of the collateral source rule in Illinois, as well as policy justifications.<sup>167</sup> Next, it discusses limits and restrictions the Illinois Supreme Court has placed on the collateral source rule.<sup>168</sup>

##### 1. Adoption and Development of the Collateral Source Rule in Illinois

The collateral source rule is firmly established in Illinois and has even been adopted within the state's standard jury instructions.<sup>169</sup> The Illinois Supreme Court's rationale for recognizing the rule in Illinois is to protect the benefit of the plaintiff's bargain, preventing the defendant from benefiting from payments made by the plaintiff or from taking advantage of contracts between the plaintiff and third persons.<sup>170</sup>

The Illinois Supreme Court first adopted the rule in 1870, in a case involving a railroad accident.<sup>171</sup> Over the next thirty years, the state's appellate courts applied the rule often, usually in dram shop suits<sup>172</sup> or claims against railroad companies.<sup>173</sup> The courts in all of these early Illinois cases protected insurance benefits,<sup>174</sup> and the rule as stated by

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166. See *infra* Parts II.D.1–D.2 (describing the history of and limitations on the collateral source rule in Illinois).

167. See *infra* Part II.D.1 (discussing the collateral source rule in Illinois jurisprudence as well as policy justifications for adherence to the rule).

168. See *infra* Part II.D.2 (discussing the Illinois rule that a plaintiff may not recover damages for services that are provided gratuitously).

169. ILLINOIS FORMS OF JURY INSTRUCTION § 30.22 (2005). The Illinois pattern instruction reads, “If you find for the plaintiff you shall not speculate about or consider any possible sources of benefits the plaintiff may have received or might receive. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.” *Id.*

170. *Wilson v. Hoffman Group, Inc.*, 546 N.E.2d 524, 530 (Ill. 1989); 11 ILL. JUR. *Personal Injury & Torts* § 5:63 (2002).

171. *Pittsburg, C. & S. L. R. Co. v. Thompson*, 56 Ill. 138, 143 (1870) (refusing a jury instruction regarding an insurance policy covering the plaintiff, the court held that “any sum paid to the plaintiff by an accident insurance company, was properly refused. If such sum was paid, it was not *pro tanto* a discharge of the railway company. The primary liability was on this company.”). See also 11 ILL. JUR. *Personal Injury & Torts* § 5:63 (2002) (describing the initial adoption of the collateral source rule in Illinois).

172. *Deel v. Heiligenstein*, 91 N.E. 429, 431 (Ill. 1910) (refusing a jury instruction regarding life insurance coverage in a dram shop suit); *Whiteside v. O’Connors*, 162 Ill. App. 108, 117–18 (App. Ct. 1911) (refusing evidence of insurance coverage in a dram shop case).

173. *Cox v. Chicago*, 83 Ill. App. 540, 542 (App. Ct. 1899) (rejecting evidence about plaintiff’s insurance coverage in claim against a railroad).

174. *Id.* at 542 (finding error in allowing defense attorney to prove, against objections by

modern Illinois courts is almost identical to the language contained in the Restatement.<sup>175</sup>

After the initial adoption, the Illinois Supreme Court did not address the collateral source rule for over thirty years. In 1904 the court again applied the doctrine, and for the first time in Illinois, used the term “collateral source” to describe the principle.<sup>176</sup> Holding that there could be no offset in a dram shop suit for funeral benefits received from the decedent’s employer, the court stated that such benefits “would accrue from a collateral source wholly independent” of the defendant railroad company and presented no grounds for a reduction in damages.<sup>177</sup>

Nearly twenty years later, the court expanded the protections of the collateral source rule beyond insurance benefits in *O’Brien v. Chicago Railway*.<sup>178</sup> In *O’Brien* the court allowed recovery for lost wages even though the plaintiff’s employer provided gratuitous payments during the plaintiff’s time away from work.<sup>179</sup> Illinois appellate courts soon expanded the collateral source rule’s protection of benefits received from a plaintiff’s employer, including the receipt of worker’s

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plaintiff’s attorney, that an insurance company paid plaintiff \$150 on account of the accident); *Deel*, 91 N.E. at 431 (holding a death insurance policy did not affect widow’s “right to recover for the loss of the support she was entitled to receive from her husband”); *Whiteside*, 162 Ill. App. at 117–18 (holding that the introduction of evidence as to insurance benefits was wholly “incompetent and immaterial, and its admission was manifestly prejudicial to the plaintiff in error”); *Consolidated Coal Co. v. Shepherd*, 112 Ill. App. 458, 461–62 (App. Ct. 1904) (holding that evidence of accident insurance benefits received by plaintiff was properly excluded by trial court).

175. *Wilson*, 546 N.E.2d at 530 (citing the Restatement and stating that the Illinois rule provides that “benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor”); *see also Bernier v. Burris*, 497 N.E.2d 763, 774–75 (Ill. 1986) (citing the Restatement when stating the collateral source rule).

176. *Illinois C. R. Co. v. Prickett*, 71 N.E. 435, 436 (Ill. 1904) (holding that it was immaterial whether the widow of a deceased railroad engineer received life insurance benefits because “[a]ny such mortuary benefit would accrue from a collateral source, wholly independent of the appellant company, and would present no ground for an abatement of the pecuniary loss occasioned by the death of the appellee’s intestate to his widow and next of kin”).

177. *Id.*

178. *O’Brien v. Chicago Ry. Co.*, 137 N.E. 214, 221 (Ill. 1922). In *O’Brien*, the plaintiff was a city employee who was struck by a train while working. *Id.* at 215. Rejecting the defendant’s argument that the plaintiff’s recovery was limited to worker’s compensation benefits, the court stated that “[n]o injustice is done to a person negligently injuring another in requiring him to pay the full amount of damages for which he is legally liable, without deduction for compensation which the injured person may receive from another source which has no connection with the negligence, whether that source is a claim for compensation against his employer, a policy of insurance against accidents, a life insurance policy, a benefit from a fraternal organization or a gift from a friend.” *Id.* at 221.

179. *Id.*

compensation benefits and vacation pay.<sup>180</sup> The collateral source rule currently applies to almost all forms of insurance and worker's compensation benefits.<sup>181</sup>

Like most jurisdictions, in Illinois the rule serves as both a rule of damages and a rule of evidence. The rule protects collateral payments that benefit the plaintiff by denying the defendant any corresponding offset or credit.<sup>182</sup> These collateral benefits do not reduce the defendant's tort liability, even though they reduce the plaintiff's loss.<sup>183</sup> The rule also functions to prevent juries from learning anything about collateral proceeds received by plaintiffs.<sup>184</sup> In Illinois, revealing that a plaintiff had insurance can be prejudicial error, because a jury could conclude that the plaintiff sustained no actual damages since his medical bills were paid by insurance.<sup>185</sup>

## 2. Limits on the Collateral Source Rule in Illinois

Despite these numerous applications of the collateral source rule, Illinois is one of the few states with common law restrictions on the

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180. *Cooney v. Yellow Cab Co.*, 34 N.E.2d 566, 570 (Ill. App. Ct. 1940) (holding that a plaintiff could recover lost wages regardless of whether his employer actually compensated the plaintiff while he was injured and away from work); *Hoobler v. Voelpel*, 246 Ill. App. 69, 78-79 (App. Ct. 1927) (refusing to permit the defendant to take advantage of the plaintiff's employment contract to mitigate damages, the court allowed the plaintiff to recover damages despite his receipt of worker's compensation benefits and stated that "the general and more reasonable rule is that the gratuitous payment in such case will not preclude recovery for such loss of time, on the theory that the wrongdoer can have no concern with the transaction between the employer and the employee, and the amount so paid is not to be regarded, under the circumstances, as in any sense compensation for lost time but rather as a gratuity given by one to the other out of relations of friendship or sympathy between them").

181. *See Harden v. Playboy Enterprises, Inc.*, 633 N.E.2d 764, 772 (Ill. App. Ct. 1993) (holding that breach of employment claims cannot be offset with unemployment compensation); *Fear v. Smith*, 539 N.E.2d 1297, 1302 (Ill. App. Ct. 1989) (protecting benefits received from worker's compensation and disability insurance); *Logman v. Jasiek*, 414 N.E.2d 520, 525 (Ill. App. Ct. 1980) (allowing recovery of gratuitous payment of medical bills made by plaintiff's parents); *Fejes v. State*, 46 Ill. Ct. Cl. 109, 111 (Ct. Cl. 1994) (protecting life insurance benefits).

182. *Arthur v. Catour*, 833 N.E.2d 847, 851 (Ill. 2005).

183. *Id.*

184. *Wolfe v. Whipple*, 251 N.E.2d 77, 82 (Ill. 1969). Stressing the importance of this aspect of the collateral source rule, the court wrote, "The entire theory of the collateral source rule is to keep the jury from learning anything about collateral income so that it will not influence the decision of the jury." *Id.*

185. *Biehler v. White Metal Rolling & Stamping Corp.*, 333 N.E.2d 716, 723 (Ill. App. Ct. 1975); *accord Boden v. Crawford*, 552 N.E.2d 1287, 1291 (Ill. App. Ct. 1990). *See also Davidson v. Loomis*, 282 Ill. App. 515, 519 (App. Ct. 1935) (holding it was prejudicial error to allow cross-examination of plaintiff regarding benefits received from collateral sources for her injuries); *Phelan v. Santelli*, 334 N.E.2d 391, 398 (Ill. App. Ct. 1975) (holding it was improper for a defendant to pursue a line of questioning designed to suggest that the plaintiff could receive any necessary future care at free governmental or charitable facilities).

doctrine.<sup>186</sup> Since 1907, an Illinois plaintiff may not recover the value of free medical services,<sup>187</sup> although permitted in a majority of jurisdictions.<sup>188</sup> This approach was reaffirmed and expanded in 1977 in *Peterson v. Lou Bachrodt Chevrolet Co.*, where the Illinois Supreme Court determined that a plaintiff is not entitled to recover the value of services obtained without expense, obligation, or liability.<sup>189</sup>

In *Peterson*, free medical services were provided to the plaintiff's child by the Shriner's Hospital, and the plaintiff attempted to recover the reasonable value of those services in his claim for medical damages.<sup>190</sup> The *Peterson* court held that the collateral source rule is inapplicable in such situations and emphasized the distinction between gratuitous services and the usual application of the collateral source rule when insurance is involved.<sup>191</sup> The justification for the rule is that it

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186. *Arthur*, 833 N.E.2d at 858–59 (McMorrow, C.J., dissenting) (citing *Muranyi v. Turn Verein Frisch-Auf*, 719 N.E.2d 366 (Ill. App. Ct. 1999)); 11 ILL. JUR. *Personal Injury & Torts* § 5:62 (2002); and M. POLLELLE & B. OTTLEY, ILLINOIS TORT LAW § 24.13 (3d ed. 2000); which refer to *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1 (Ill. 1979).

187. *Jones & Adams Co. v. George*, 81 N.E. 4, 6 (Ill. 1907) (holding a personal injury plaintiff could not recover for the value of nursing services gratuitously rendered by the plaintiff's family). Illinois appellate courts had also prevented recovery of gratuitous medical services in earlier cases, but note that Illinois appellate decisions prior to 1935 are not binding. *Basham v. Hunt*, 773 N.E.2d 1213, 1224 n.3 (App. Ct. 2002). See, e.g., *Chicago, B. & Q. R. Co. v. Johnson*, 24 Ill. App. 468, 471 (App. Ct. 1887) (holding that it was an error to admit evidence of nursing care provided by plaintiff's daughters because there was no charge for services); *Peoria, D. & E. R. Co. v. Johns*, 43 Ill. App. 83, 85 (App. Ct. 1892) (holding that it was an error for plaintiff to testify about the value of free nursing services provided by his wife because plaintiff was under no legal obligation to pay those services); *Malott v. Woods*, 109 Ill. App. 512, 515 (App. Ct. 1903) (holding that it was improper to instruct the jury that plaintiff was entitled to recover value of medical services provided by a doctor at no charge). See also J.A. Connelly, Annotation, *Damages for Personal Injury*, 90 A.L.R. 2D 1323, 1325–34 (1963) (stating that most jurisdictions allow recovery of gratuitous services).

188. Dag E. Ytreberg, Annotation, *Collateral Source Rule: Receipt Of Public Relief Or Gratuity As Affecting Recovery In Personal Injury Action*, 77 A.L.R. 3D 366, § 2(a) (1977) (explaining that, in general, the collateral source rule still applies if services are rendered gratuitously).

189. *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979). In *Peterson*, the plaintiff's daughter was killed and his son seriously injured in an accident allegedly caused by a defective braking system in a used car sold by the defendant to a third party. *Id.* at 2. The two children were standing near an electrical pole and were struck by the vehicle. *Id.*

190. *Id.* at 2, 5. The surviving child, plaintiff's eight-year-old son, suffered significant injuries resulting in the amputation of his leg. *Id.* at 2.

191. *Id.* at 5. The court explained:

[T]he policy behind the collateral-source rule simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation. This is further made apparent upon comparison of the present case with a situation in which the collateral-source rule is frequently applied, that of the defendant who seeks a reduction in damages because the plaintiff has received insurance benefits. . . . [“]This rule is usually justified on the basis that the wrongdoer should not benefit from the expenditures made by the injured party in procuring the

prevents the wrongdoer from benefiting from expenditures made by the injured party in obtaining insurance coverage.<sup>192</sup> Because the *Peterson* plaintiff did not make any such expenditures, the court saw no reason for applying the rule.<sup>193</sup>

Noting the tension between the concepts of compensatory damages and the collateral source rule, the *Peterson* majority “refuse[d] to join those courts which, without consideration of the facts of each case, blindly adhere to the collateral source rule.”<sup>194</sup> According to the majority, the purpose of compensatory tort damages is to compensate—not to punish defendants or bestow windfalls upon plaintiffs.<sup>195</sup> The court further stated that awarding a windfall to the plaintiff (should a windfall exist) would be akin to awarding punitive damages, which is a violation of Illinois policy and common law.<sup>196</sup> In the wake of *Peterson*, later decisions emphasized that Illinois policy dictates that only one recovery should be available for an injury.<sup>197</sup>

### III. DISCUSSION

In *Arthur v. Catour*, the Illinois Supreme Court held that a plaintiff may present the amount initially billed for medical services, but a defendant may in turn present evidence that the billed amount is not reasonable.<sup>198</sup> Although the court refused to overturn the *Peterson* decision outright, the majority held that medical discounts are protected by the collateral source rule and are not gratuitous payments.<sup>199</sup> This Part first presents the facts of the *Arthur* case and the decision of the

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insurance coverage. In a situation in which the injured party incurs no expense, obligation, or liability, we see no justification for applying the rule.[”]

*Id.* at 5 (emphasis in original) (quoting 22 AM. JUR. 2D, *Damages* § 210, 293–94 (1965)).

192. *Id.* (citing 22 AM. JUR. 2D § 210, *supra* note 191, at 293–94).

193. *Id.* The collateral source rule was inapplicable because the plaintiff had not paid any consideration in exchange for free treatment, rather than a lack of expenditure for the treatment itself. *Id.*

194. *Id.* (quoting *Unreason*, *supra* note 65, at 742) (internal quotation marks omitted).

195. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979)).

196. *Id.* (citing and rejecting *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958)). The *Peterson* opinion explained that “[t]he view that a windfall, if any is to be enjoyed, should go to the plaintiff borders too closely on approval of unwarranted punitive damages, and it is a view not espoused by our cases.” *Id.* (citation omitted).

197. *Popovich v. Ram Pipe & Supply Co.*, 412 N.E.2d 518, 521 (Ill. 1980) (citing *Peterson*, the court offset the amount received from a covenant not to sue from the recovery, reciting state policy against double recovery in Illinois). See also *Dial v. City of O’Fallon*, 411 N.E.2d 217, 222 (Ill. 1980) (citing *Peterson* as an illustration that state policy calls for only one recovery for an injury).

198. *Arthur v. Catour*, 833 N.E.2d 847, 854 (Ill. 2005).

199. *Id.*

trial court.<sup>200</sup> It discusses the majority opinion of the Appellate Court, as well as Presiding Justice Holdridge's dissent.<sup>201</sup> Next, the Illinois Supreme Court majority opinion is discussed.<sup>202</sup> Finally, a review of Chief Justice McMorrow's dissent is presented.<sup>203</sup>

*A. The Facts of Arthur and the Trial Court's Ruling*

On October 2, 1999, Joyce Arthur stepped in a hole and fell while at an auction taking place on a farm.<sup>204</sup> Mrs. Arthur fractured her leg below the knee, requiring surgery.<sup>205</sup> Mrs. Arthur's medical bills totaled \$19,355.25 and were covered by medical insurance provided through her husband's employer.<sup>206</sup> Because of contractual discount agreements between her healthcare providers and her insurance company, the insurance company only paid \$13,577.97 to satisfy the billed amounts.<sup>207</sup> Her medical providers discharged the remaining \$5,777.28.<sup>208</sup>

Mrs. Arthur filed suit against both the owner of the farm and the auction house, alleging negligence.<sup>209</sup> Mrs. Arthur's claim for medical damages was based on the higher amount originally billed, rather than the amount actually paid.<sup>210</sup> Before trial the defendants filed a Motion for Partial Summary Judgment, seeking to limit Mrs. Arthur's medical damages to the amount paid rather than the amount billed, thus preventing Mrs. Arthur from claiming the discounted amount of \$5,777.28.<sup>211</sup> The circuit court granted the motion and found that allowing Mrs. Arthur to seek \$19,355.25 in medical damages when she was "only charged for and became liable for \$13,577.97 would only serve to punish the defendants punitively and provide a windfall for the

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200. *See infra* Part III.A (discussing the facts of *Arthur* and the trial court's decision to grant partial summary judgment in favor of the defendants).

201. *See infra* Part III.B (discussing the majority and dissenting opinions of the appellate court).

202. *See infra* Part III.C.1 (discussing the Illinois Supreme Court's majority opinion).

203. *See infra* Part III.C.2 (discussing the dissent authored by Chief Justice McMorrow).

204. *Arthur v. Catour*, 833 N.E.2d 847, 849 (Ill. 2005).

205. *Id.* at 850.

206. *Id.* Mrs. Arthur was covered by Blue Cross/Blue Shield. *Id.*

207. *Id.* The total payments made by Mrs. Arthur were \$1,215.74, while Blue Cross paid \$12,362.23. *See id.* (totaling payments made by Mrs. Arthur and Blue Cross).

208. *Id.* A total of five health care providers treated Mrs. Arthur, and each had a contractual agreement with Blue Cross providing for a discount. *Id.*

209. *Id.* at 849. Both defendants denied negligence or liability. *Id.*

210. *Id.* at 850.

211. *Id.*

plaintiff.”<sup>212</sup> The circuit court ruled that the collateral source rule was not applicable in this situation.<sup>213</sup>

### *B. Appellate Court Decision*

After the trial court entered its order for partial summary judgment, Mrs. Arthur filed an appeal.<sup>214</sup> On appeal, Mrs. Arthur argued that the collateral source rule protects the discounts received by her insurers, allowing her to seek recovery of the full amount billed.<sup>215</sup> Defendants did not contest that the collateral source rule applied to the amount paid for Mrs. Arthur’s medical services, but did defend the trial court’s decision that the \$5,777.28 difference between the amount billed and amount paid could not be recovered.<sup>216</sup> Defendants presented two main arguments on appeal in defense of the trial court’s ruling.<sup>217</sup> First, a plaintiff should not be entitled to recover damages for amounts she was never liable for—such a recovery would be a windfall.<sup>218</sup> Second, the difference between the billed amounts and the amount paid is “illusory” and therefore not subject to the collateral source rule.<sup>219</sup>

#### 1. The Appellate Court Majority Opinion

The appellate court reversed the circuit court, concluding that Mrs. Arthur’s damages could extend to the entire amount billed and were not limited to the amount paid by her insurer.<sup>220</sup> Defendants argued that the amount paid to satisfy the obligation was the true amount of damages, because Mrs. Arthur was never obligated to pay the full amount billed.<sup>221</sup> The court refuted this argument, stating that although discounting of medical bills has become a common practice in modern healthcare, it is a consequence of the power wielded by those entities that pay the bills, such as insurance companies, employers, and governmental bodies.<sup>222</sup> Although large consumers of healthcare are

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212. *Id.* The circuit court’s order echoed language in *Peterson*. *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979).

213. *Arthur v. Catour*, 833 N.E.2d 847, 850 (Ill. 2005).

214. *Id.*

215. *Id.* at 851.

216. *Id.*

217. *Arthur v. Catour*, 803 N.E.2d 647, 649 (Ill. App. Ct. 2004).

218. *Id.*

219. *Id.*

220. *Id.* at 651.

221. *Id.* at 649.

222. *Id.* (citing *Mitchell v. Hayes*, 72 F. Supp. 2d 635, 637 (W.D. Va. 1999) and *Beard*, *supra* note 14, at 453). For a discussion of the development of discounts in the health care industry, *see supra* Part II.C.1 (describing modern development of the health care industry and the resulting

able to negotiate favorable rates, people who do not have insurance are often charged the full, undiscounted price.<sup>223</sup> According to the majority, even though medical bills are often discounted, a plaintiff may still be liable for the billed amount.<sup>224</sup> If a plaintiff does receive damages greater than the amount paid by her insurer, that amount is a benefit of her contract with her insurer, not a “windfall” granted by the defendant.<sup>225</sup> The amount billed may be unreasonable, and defendants may dispute the amount, but it is not unreasonable simply because an insurance company was able to negotiate a lesser charge.<sup>226</sup>

The court then addressed the defendants’ second argument, that the difference between the amount billed and amount paid was “illusory.”<sup>227</sup> The defendants argued that because no one paid or was liable for the discounted amount, the discounted amount of \$5,777.28 was “illusory.”<sup>228</sup> The court first provided an overview of the collateral source rule in Illinois, reiterating the view that damages recovered from a tortfeasor are not decreased by insurance proceeds received by the plaintiff.<sup>229</sup> Limiting Mrs. Arthur’s damages to the amount paid by her insurer would confer a benefit of her coverage to the defendants.<sup>230</sup> The court then reiterated the Illinois justification for the collateral source rule—a defendant should not benefit from the bargains made between a plaintiff and third parties.<sup>231</sup> But for her insurance coverage, Mrs. Arthur would have been liable for the full amount charged.<sup>232</sup>

If a plaintiff’s damages were limited to the amount paid by her insurer, the court would in essence be shifting the benefit of the insurance contract from Mrs. Arthur to the defendants.<sup>233</sup> The purpose of the collateral source rule, said the court, is to prevent a defendant from receiving the benefit of this contractual relationship instead of the

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practice of discounting medical bills).

223. *Arthur*, 803 N.E.2d at 649 (citing B. Hewitt, M. Harrington & C. Clark, *Target: Medical Bills*, PEOPLE, Oct. 6, 2003, at 159–60).

224. *Id.* A plaintiff may not have insurance coverage, in which case the plaintiff would be liable for the entire billed amount. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 650.

229. *Id.* at 649 (citing *Wilson v. Hoffman Group, Inc.*, 546 N.E.2d 524, 530 (Ill. 1989)).

230. *Id.* at 650.

231. *Id.* at 649–50 (citing *Wilson*, 546 N.E.2d at 530). “The justification for this rule is that the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons.” *Id.*

232. *Id.* at 650.

233. *Id.*

plaintiff.<sup>234</sup> The \$5,777.28 discount was not illusory because Mrs. Arthur was originally liable for the full amount.<sup>235</sup> According to the appellate court, the discount negotiated by Mrs. Arthur's insurance company was a benefit of her insurance contract.<sup>236</sup> Under the collateral source rule, this benefit should inure to the plaintiff, not the defendant.<sup>237</sup> The court also noted that in many other jurisdictions rules have been established allowing plaintiffs to recover full payment for medical expenses, even when the bills were settled for reduced amounts.<sup>238</sup>

The majority dismissed the cases cited by the defendants that hold medical damages should be limited to the amount actually paid.<sup>239</sup> The court distinguished these cases because they address payments and discounts provided by public entities, such as Medicaid and Medicare, rather than private insurance providers.<sup>240</sup> According to the court, "In such cases the rationale that plaintiff is being denied the 'benefit of her bargain' is less compelling" because no payments or obligations were made by those plaintiffs.<sup>241</sup> The majority concluded by stating that the decision was not based on the rulings of other courts, but rather the court's "own judgment of how to best harmonize the law of compensatory damages with the principles underlying the collateral source rule."<sup>242</sup>

The appellate court held that Mrs. Arthur's claim for damages was not limited to the amount paid by her insurer and could extend to the entire amount billed, provided those charges were reasonable expenses

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234. *Id.* (citing *Wilson*, 546 N.E.2d at 530).

235. *Id.*

236. *Id.* (citing *Acuar v. LeTourneau*, 531 S.E.2d 316, 322 (Va. 2000)).

237. *Id.*

238. *Arthur*, 803 N.E.2d at 650 (citing *Calva-Cerqueira v. United States*, 281 F. Supp. 2d 279 (D.D.C. 2003); *Hardi v. Mezzanotte*, 818 A.2d 974 (D.C. 2003); *Koffman v. Leichtfuss*, 630 N.W.2d 201 (Wis. 2001); *Haselden v. Davis*, 579 S.E.2d 293 (S.C. 2003); *First Midwest Trust Co. v. Rogers*, 701 N.E.2d 1107 (Ill. App. Ct. 1998)).

239. *Arthur*, 803 N.E.2d at 650. Defendants provided the following cases in support of their arguments: *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786 (Pa. 2001) (damages limited to amount paid by Medicare and supplemental insurance rather than reasonable value of medical services); *McAmis v. Wallace*, 980 F. Supp. 181 (W.D. Va. 1997) (no recovery for amounts "written off" pursuant to Medicaid contracts); *Bates v. Hogg*, 921 P.2d 249 (Kan. 1996) (damages limited to amounts paid by Medicaid); *Hanif v. Housing Auth. of Yolo County*, 200 Cal. App. 3d 635 (Ct. App. 1988).

240. *Arthur*, 803 N.E.2d at 651.

241. *Id.* (citing *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1975) (finding that collateral source rule did not allow plaintiff to recover the value of free medical services provided by Shriner's Hospital)).

242. *Id.*

of necessary medical care.<sup>243</sup> However, the majority did agree that the defendants should be permitted to present evidence that the full amount was not paid.<sup>244</sup> The court declined to address how this counterproof should be presented, claiming this evidentiary matter was beyond the scope of the certified question.<sup>245</sup>

## 2. Dissenting Opinion to Appellate Court Decision

In a sole dissent, Presiding Justice Holdridge stated that Mrs. Arthur should be prevented from claiming the discounted amount.<sup>246</sup> Illinois requires a plaintiff to incur liability in order to recover, and Mrs. Arthur had never paid or become liable for these charges.<sup>247</sup> Because Mrs. Arthur never incurred or became liable for the discounted amount, wrote Justice Holdridge, that amount should not be protected by the collateral source rule.<sup>248</sup>

Justice Holdridge also questioned the majority's rationale that the discount was a benefit of Mrs. Arthur's bargain with her insurance company.<sup>249</sup> The real benefit of the bargain, he argued, was that Mrs. Arthur's insurer would pay her medical bills, irrespective of what that amount turned out to be.<sup>250</sup> The benefit of the discount belonged to the insurer, not Mrs. Arthur, and was a result of the insurer's contract with the medical providers.<sup>251</sup> Mrs. Arthur, argued Justice Holdridge, received the benefit of her bargain when her insurance provider paid her medical bills, alleviating her of any liability.<sup>252</sup>

### C. *Illinois Supreme Court—Arthur v. Catour*

The Illinois Supreme Court affirmed the appellate court's decision, holding that a plaintiff may present evidence showing the amount billed, rather than the amount actually paid, when medical providers provide a

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243. *Id.*

244. *Id.*

245. *Id.* Interestingly, the Illinois Supreme Court reached a similar holding—the court agreed that a defendant could challenge the reasonableness of medical bills—but also refused to address how such a challenge could properly be made on the grounds that the issue was beyond the scope of the certified question. *Arthur*, 833 N.E.2d at 854.

246. *Arthur*, 803 N.E.2d at 651 (Holdridge, P.J., dissenting).

247. *Id.* (citing *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1975)). Justice Holdridge reiterated the Illinois rule that “[m]edical services obtained without expense, obligation or liability to a plaintiff are not recoverable against a defendant . . .” *Id.*

248. *Id.* at 652.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

discount.<sup>253</sup> After reviewing the collateral source rule in Illinois<sup>254</sup> and the foundational requirements to establish medical damages,<sup>255</sup> the court adopted the appellate court's conclusion that Mrs. Arthur became liable when the services were provided and not when they were paid.<sup>256</sup> The majority then found the only relevant question in *Arthur* to be the determination of the reasonable value of the medical services, since the certified question merely asked whether certain evidence is admissible in such cases.<sup>257</sup> This Section begins with a presentation of the majority's analysis in the *Arthur* case.<sup>258</sup> It then reviews the dissenting opinion by Chief Justice McMorro.<sup>259</sup>

### 1. Majority Opinion

The majority opinion began with a basic recital of the collateral source rule as recognized in Illinois.<sup>260</sup> The collateral source rule has both substantive and evidentiary components, said the court.<sup>261</sup> The substantive component of the rule is one of damages,<sup>262</sup> denying the tortfeasor any corresponding offset or credit for collateral payments made to or on behalf of the plaintiff.<sup>263</sup> Collateral benefits do not decrease the tortfeasor's liability even though they decrease the plaintiff's loss.<sup>264</sup> Although the rule may sometimes result in a double recovery for the plaintiff, the law dictates that "a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor."<sup>265</sup> The Illinois Supreme Court limited the certified

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253. *Arthur v. Catour*, 833 N.E.2d 847, 854 (Ill. 2005).

254. *Id.* at 851–53.

255. *Id.* at 853–54.

256. *Id.* at 853.

257. *Id.* The certified question read: "Whether the Plaintiff who was charged \$19,355.25 in medical bills for medical services related to her injuries can present that amount of bills as medical expenses in the case or, whether the Plaintiff shall be limited to presenting only \$13,577.97 in medical bills to the jury because that is the amount that was paid by the Plaintiff and Blue Cross/Blue Shield, who was an insurance carrier for the Plaintiff and who paid the Plaintiff's medical bills pursuant to insurance contracts at a substantially reduced rate with the medical providers and which the providers accepted as payment in full." *Id.* at 849.

258. *See infra* Part III.C.1 (discussing the Illinois Supreme Court's majority opinion).

259. *See infra* Part III.C.2 (discussing the dissent authored by Chief Justice McMorro).

260. *Arthur v. Catour*, 833 N.E.2d 847, 851–52 (Ill. 2005).

261. *Id.* at 852.

262. *Id.* (quoting J. FISCHER, UNDERSTANDING REMEDIES § 12(a), at 77 (1999)).

263. *Id.* at 851.

264. *Id.*

265. *Id.* at 851–52, quoting RESTATEMENT (SECOND) OF TORTS § 920A cmt. b, at 514 (1979). This statement is in direct conflict with the Illinois Supreme Court's holding in *Peterson*. *See supra*, Part II.D.2 (discussing the holding of *Peterson*).

question in *Arthur* to an evidentiary component of the collateral source rule and not a substantive rule of damages.<sup>266</sup>

The evidentiary element of the collateral source rule bars admission of evidence of the collateral source's existence or the receipt of any benefits.<sup>267</sup> The concern is that a jury may use the evidence improperly to deny the plaintiff full recovery of the proper amount of compensatory damages.<sup>268</sup> Pointing out that a plaintiff was insured can be prejudicial error in Illinois, since the jury may assume the plaintiff never incurred any real damages since the insurer paid the medical bills.<sup>269</sup> However, the collateral source rule does not permit a defendant to limit a plaintiff from introducing evidence establishing the reasonable cost of medical services that were necessary due to the defendant's negligence.<sup>270</sup> A defendant must pay the reasonable value of required medical treatment even when the plaintiff's insurance has paid for the services.<sup>271</sup>

Before reaching this "evidentiary component," the court first ruled that Mrs. Arthur became liable for her medical expenses when the services were provided, not when the bills were issued.<sup>272</sup> Although her providers billed her insurance company directly, she was still liable, and there was a possibility her insurance company could have denied coverage—making Mrs. Arthur liable for the full amount.<sup>273</sup> Her insurance company covered Mrs. Arthur's medical expenses in full, by paying a portion and having the balance written off pursuant to a contractual agreement.<sup>274</sup> The court found that the true collateral source was the insurance company, and not the discount, since Mrs. Arthur did not individually receive any discounts.<sup>275</sup> Instead, she received the benefit of her bargain with her insurance company—full coverage for her medical expenses.<sup>276</sup>

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266. *Id.* at 853.

267. *Id.* at 852.

268. *Id.* (quoting J. FISCHER, UNDERSTANDING REMEDIES § 12(a), at 77 (1999)).

269. *Id.* (citing *Biehler v. White Metal Rolling & Stamping Corp.*, 333 N.E.2d 716 (Ill. App. Ct. 1975); *Boden v. Crawford*, 552 N.E.2d 1287 (Ill. App. Ct. 1990)).

270. *Id.* at 852.

271. *Id.* at 852–53 (quoting 1 D. DOBBS, REMEDIES § 3.8(1), at 373 (2d ed. 1993)); accord *Wilson v. Hoffman Group, Inc.*, 546 N.E.2d 524, 530 (Ill. 1989).

272. *Arthur*, 833 N.E.2d at 853.

273. *Id.* For example, "the policy may have lapsed for nonpayment of premiums, or the policy may not cover some services, such as cosmetic or reconstructive surgery." *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

The majority then addressed what it labeled as the only relevant question of the case—the reasonable value of the medical services.<sup>277</sup> Because the certified question “merely asks whether certain evidence is admissible in such cases,” the majority determined that the true issue only addressed whether the discounted amount may be presented to the jury.<sup>278</sup> The court declined to address whether such discounts were actually protected by the collateral source rule.<sup>279</sup> The court began its analysis by reviewing the law of damages in Illinois.<sup>280</sup>

In Illinois, evidence of medical expenses may be admitted after the plaintiff shows that (1) she has paid or is liable for the bill, (2) the expenses were necessary as a result of the defendant’s negligence, and (3) that the charges were reasonable.<sup>281</sup> When a medical bill has been paid, the bill is *prima facie* reasonable.<sup>282</sup> If the bill has not been paid, the plaintiff must establish reasonableness through testimony of a witness who has knowledge of the services rendered and customary fees.<sup>283</sup> Meeting these admission requirements permits the jury to decide whether to award none, part, or the entire bill as damages.<sup>284</sup>

The *Arthur* majority’s holding confirmed the appellate court’s conclusion that Mrs. Arthur could not make a *prima facie* case of reasonableness based on the bills alone, because she could not truthfully claim that the total billed amount had been paid.<sup>285</sup> The bills may be submitted as evidence, but Mrs. Arthur must establish the reasonableness of the discounted portions by other means, just as if the bills were unpaid or the services had not yet been rendered.<sup>286</sup> The court also held that a defendant may challenge the plaintiff’s proof on cross-examination and offer their own evidence contesting the reasonableness of the medical bills.<sup>287</sup> The court did not explain the methods or evidence parties might use to establish and contest the reasonableness of discounted medical bills.<sup>288</sup>

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277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* (citing *North Chicago Street Ry. Co. v. Cotton*, 29 N.E. 899, 902 (Ill. 1892) and *Wicks v. Cuneo-Henneberry Co.*, 150 N.E. 276, 279 (Ill. 1925)).

282. *Id.* (citing *Flynn v. Cusentino*, 375 N.E.2d 433, 436 (Ill. App. Ct. 1978)).

283. *Id.* at 853–54.

284. *Id.* at 854 (citing *Baker v. Hutson*, 775 N.E.2d 631, 638 (2002)).

285. *Id.* at 854.

286. *Id.*

287. *Id.*

288. *Id.* at 861–62 (McMorrow, C.J., dissenting).

## 2. Chief Justice McMorrow's Dissent

In her dissent, Chief Justice McMorrow began by chastising the majority opinion for failing to answer the true issues presented in the case, calling the opinion “an answer that amounts to no answer at all.”<sup>289</sup> She defined the majority analytical framework as “unworkable” and described the holding as “a major change in trial practice,” arguing that the majority opinion compromises the traditional protections of the collateral source rule and may require a trial within a trial whenever reasonableness of a plaintiff's medical expenses are at issue.<sup>290</sup>

Throughout her dissent, McMorrow reiterated that she was not expressing an opinion on the final disposition of the issue presented in the case but rather was basing her dissent solely on the majority's analysis.<sup>291</sup> According to the Chief Justice, the *Arthur* case presented a concrete issue created by two things: (1) the tension between the principles of compensatory damages and the protections provided to a plaintiff by the collateral source rule; and (2) the restrictive interpretation the Illinois Supreme Court previously placed on the collateral source rule in *Peterson*.<sup>292</sup> In Chief Justice McMorrow's view, the majority failed to address the true issue—whether a plaintiff may recover the amount billed or the amount paid for medical services.<sup>293</sup> The majority also completely ignored the *Peterson* holding in its analysis, overlooking the prior constraints the Illinois Supreme Court had placed on the collateral source rule.<sup>294</sup> The *Peterson* case, according to McMorrow, was especially significant to the *Arthur* case, given that the circuit court had cited that case in the order originally denying Mrs. Arthur's claim for the discounted amounts.<sup>295</sup> By limiting analysis to the “evidentiary component of the collateral source rule,” the majority crafted the issue so as to avoid discussion of both the *Peterson*

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289. *Id.* at 856.

290. *Id.* at 856–57.

291. *Id.* at 857, 863. Although she wrote that she had no opinion on the ultimate disposition, Chief Justice McMorrow's dissent reflects many of the same arguments presented in the defendants' briefs. *Id.* at 859–63. Similarly, if the chief justice disagreed with the majority's reasoning but agreed with the ultimate holding, she could have filed a concurrence in the disposition only. *See, e.g.,* *People v. Lander*, 831 N.E.2d 596 (Ill. 2005) (McMorrow, C.J., concurring in part and dissenting in part) (concurring in the ultimate holding, but dissenting to the majority's analysis).

292. *Arthur*, 833 N.E.2d at 856. *See supra* Part II.D (discussing the *Peterson* holding that the collateral source rule is inapplicable to gratuitous services).

293. *Arthur*, 833 N.E.2d at 856.

294. *Id.* at 858–59. (McMorrow, C.J., dissenting). The *Peterson* decision was not cited in the majority's opinion. *Id.*

295. *Id.* at 859.

decision and the conflict between the collateral source rule and compensatory damages.<sup>296</sup>

Chief Justice McMorrow began her dissent by noting that a direct conflict exists between the policy behind compensatory damages and the principles of the collateral source rule.<sup>297</sup> Illinois courts have firmly established that the purpose of compensatory damages is to compensate the plaintiff for her injuries, rather than to punish a defendant or provide the plaintiff a windfall.<sup>298</sup> In contrast, the collateral source rule is based upon the idea that a tortfeasor should not benefit from expenditures or contracts between the plaintiff and third parties.<sup>299</sup> It is this failure to reduce the defendant's liability, even though plaintiff's loss has been reduced, that generates the conflict between the two principles.<sup>300</sup>

The Illinois Supreme Court addressed this conflict in *Peterson* and rejected an absolute version of the collateral source rule.<sup>301</sup> With the *Peterson* decision, Illinois became one of the few jurisdictions to apply a restricted version of the collateral source rule, excluding gratuities from the protections of the rule.<sup>302</sup> In *Arthur*, the circuit court had based its decision on language from *Peterson*.<sup>303</sup> More importantly, it was on this issue that the circuit court certified the question for appeal.<sup>304</sup> By avoiding the real issue presented in *Arthur*, wrote Chief Justice McMorrow, the majority had also avoided the issue of whether

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296. *Id.* at 860.

297. *Id.* at 858 (citing M. POLLELLE & B. OTTLEY, ILLINOIS TORT LAW § 24.13, at 24–39 (3d ed. 2000) (the collateral source rule “runs counter to the compensatory damage principle of reimbursement for loss alone”).

298. *Id.* at 857 (quoting *Wilson v. Hoffman Group*, 546 N.E.2d 524, 530 (Ill. 1989) and stating that “compensatory damages are designed to place [a plaintiff] in a position substantially equivalent in a pecuniary way to that which [plaintiff] would have occupied had no tort been committed.”). See also *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 406, 689 N.E.2d 1057 (1997) (“There is universal agreement that the compensatory goal of tort law requires that an injured plaintiff be made whole”); RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979).

299. *Arthur*, 833 N.E.2d at 858 (McMorrow, C.J., dissenting) (citing *Wilson*, 546 N.E.2d 524; *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986); 15 ILL. L. & PRAC. *Damages* § 40 (2000)).

300. *Id.* at 859.

301. *Id.* (quoting *Muranyi v. Turn Verein Frisch-Auf*, 719 N.E.2d 366, 369 (Ill. Ct. App. 1999)). See also M. POLLELLE & B. OTTLEY, ILLINOIS TORT LAW § 24.13 (3d ed. 2000).

302. *Id.* (citing 2 D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.6(3), at 494 (2d ed. 1993) (recognizing Illinois as one of the few jurisdictions omitting gratuities from the collateral source rule and noting that in this view “the collateral source rule applies only to benefits the plaintiff has obtained by purchase or his own efforts”); F. HARPER, F. JAMES & O. GRAY, TORTS § 25.9, at 561 n.8 (2d ed. 1986) (listing Illinois as one of a few jurisdictions excluding gratuities from the collateral source rule)).

303. *Id.* at 859. The circuit court decision quoted *Peterson*, stating that “the purpose of compensatory damages is to compensate a plaintiff and not to punish defendants or bestow a windfall upon a plaintiff.” *Id.*

304. *Id.* The certified question is provided at *supra* note 257.

to reaffirm *Peterson*, or overrule that decision and join the majority of jurisdictions that apply a pure collateral source rule.<sup>305</sup> According to the Chief Justice, if the majority had addressed *Peterson* and decided to abandon it and adopt the majority rule, the charged bill would be the only admissible evidence.<sup>306</sup>

Chief Justice McMorrow also predicted that the majority opinion will cause problems in future trials.<sup>307</sup> First, she wrote, the majority's holding as to reasonableness may instigate a trial within a trial.<sup>308</sup> Parties will be required to call witnesses for each health care provider to testify to the reasonableness of the medical bills, adding time and expense to the parties, courts, and medical community.<sup>309</sup> The second fault, she added, is that the majority holding appears unworkable.<sup>310</sup> The majority allows defendants to challenge a plaintiff's evidence of reasonableness, both on cross-examination and by offering its own proof.<sup>311</sup> However, wrote the chief justice, the majority opinion offers no guidance on how this may be done without jeopardizing other recognized rules of evidence.<sup>312</sup>

#### IV. ANALYSIS

The *Arthur* holding places Illinois among the majority of states that have addressed the issue of how discounted medical bills should be addressed when assessing damages.<sup>313</sup> The *Arthur* opinion broadens the reach of the collateral source rule, but the court refused to reconsider

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305. *Id.* at 863.

306. *Id.*

307. *Id.* at 856.

308. *Id.* at 862.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* Chief Justice McMorrow illustrated the impracticability of the majority opinion with a hypothetical. Justice McMorrow's hypothetical presented the following dilemma: After a plaintiff has presented testimony establishing her medical bills were reasonable, defense counsel will likely challenge the witness on cross-examination by asking whether the provider accepted less than that "reasonable amount" as payment in full. *Id.* Plaintiff's attorney would then likely object, arguing that such questioning would reveal that the plaintiff's bills were paid by a collateral source—insurance. *Id.* If the plaintiff's objection is sustained, then the *Arthur* opinion is irrelevant because defendants have no means of challenging the reasonableness of plaintiff's medical damages on cross. *Id.* However, if plaintiff's objection is overruled, the protections of the collateral source rule will be compromised. *Id.* The jury would then be presented with testimony that amount "X" was billed, but amount "Y" was accepted as payment in full; "the jury may be confused and left to create an explanation"—most likely the existence of insurance. *Id.*

313. *Robinson v. Bates*, 828 N.E.2d 657, 667 (Ohio Ct. App. 2005) (surveying developing trends among courts on the issue of whether to allow recovery of medical discounts).

the basis for recognizing the doctrine in the first place.<sup>314</sup> Although the Illinois Supreme Court adopted the majority rule as to medical discounts, the court refused to reassess or even discuss the *Peterson* decision.<sup>315</sup> Accordingly, Illinois is still one of the few jurisdictions forbidding recovery when liability has not been incurred.<sup>316</sup> Though the *Arthur* opinion addressed the immediate issues of that case, the inherent conflict between the *Arthur* and *Peterson* decisions leaves many issues unresolved.<sup>317</sup>

This Part begins by surveying arguments on both sides of the issue presented in the *Arthur* case, and then inspects the analysis provided by courts outside of Illinois in allowing recovery of medical discounts, before reaching the conclusion that the majority adopted the better rule.<sup>318</sup> This Part then examines the many unanswered questions and unresolved conflicts that the *Arthur* holding failed to address.<sup>319</sup>

#### A. *The Illinois Supreme Court Adopted the Majority Rule in Arthur*

In *Arthur*, the question of fairness revolves around money. The defense bar argues that allowing recovery of these “phantom damages” will cause the estimated value of tort cases to increase, hindering settlements.<sup>320</sup> Attorneys generally consider medical expenses to be the best indication of jury awards.<sup>321</sup> A rule of thumb commonly used for calculating pain-and-suffering damages is medical expenses multiplied by three.<sup>322</sup> Consequently, according to defense attorneys, the danger is that the higher base amount of these “inflated and fictitious charges” will be used to demand and obtain extra damage amounts for more intangible injuries, such as pain and suffering.<sup>323</sup>

In response, the plaintiffs’ bar argues that allowing evidence of the amounts initially billed presents a fairer and more realistic picture of a

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314. *Arthur*, 833 N.E.2d at 863 (McMorrow, C.J., dissenting).

315. *Id.*

316. *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979).

317. *See infra* Part IV.B.

318. *See infra* Part IV.A.

319. *See infra* Part IV.B.

320. Beard, *supra* note 14, at 455.

321. *Id.*

322. *Cal. Union Ins. Co. v. Liberty*, 920 F. Supp. 908, 921 n.9 (N.D. Ill. 1996) (explaining how trial attorneys typically assess the value of their cases).

323. Olson, *supra* note 103, at 178 (citing *Smithers v. C & G Custom Module Hauling*, 172 F. Supp. 2d 765, 778 (E.D. Va. 2000), *rev’d by Acuar v. Letourneau*, 531 S.E.2d 316, 323 (Va. 2000)).

plaintiff's injuries and damages.<sup>324</sup> Although the difference between the amounts paid and billed in *Arthur* was not significant, the difference in other cases is.<sup>325</sup> In an earlier Illinois case, *First Midwest Trust v. Rogers*, the difference was much more drastic.<sup>326</sup> In *Rogers*, roughly \$710,000 in medical expenses was originally billed, but the plaintiff's HMO negotiated a discount of approximately \$377,000.<sup>327</sup> Under these circumstances, if the collateral source rule did not protect the discounted amounts, the plaintiff would have difficulty establishing that the reasonable value of the medical services was closer to the higher amount.<sup>328</sup> Without allowing evidence of the discounted amounts, the collateral source rule would evolve from a shield into a sword—what once protected plaintiffs could become a weapon used to prevent the jury from learning the extent of a plaintiff's medical injuries.<sup>329</sup>

The *Arthur* holding places Illinois among the majority on this issue,<sup>330</sup> and the majority view is the proper application of the collateral source rule.<sup>331</sup> Court decisions not allowing discounts in other jurisdictions were either based on a state statute, misapplied the Restatement, or were later criticized or narrowed within their own jurisdictions.<sup>332</sup>

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324. Douglas Rallo, *Insurance Write-Offs and the Collateral Source Rule*, TRIAL, Sept. 2002, at 50–51.

325. *Arthur*, 833 N.E.2d at 850. In *Arthur* the initial bills totaled \$19,355.25, but the providers accepted \$13,577.97 as payment in full. *Id.*

326. *First Midwest Trust Co. v. Rogers*, 701 N.E.2d 1107 (Ill. App. Ct. 1998), *overruled on other grounds* by *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 767 N.E.2d 314 (Ill. 2002).

327. *Rogers*, 701 N.E.2d at 1110, 1117. The decedent in this case was struck by a snow plow, resulting in brain damage, a ruptured lung, broken left leg and hip, dislocated hip, and right ankle, spinal, skull, and jaw fractures for which he underwent several surgeries. *Id.* at 1109–10. He spent six months in a coma and eventually died. *Id.*

328. *Cal. Union Ins. Co. v. Liberty*, 920 F. Supp. 908, 921 (N.D. Ill. 1996) (reviewing how attorneys estimate compensatory damages). *See also* *Chapman v. Mazda Motor of Am., Inc.*, 7 F. Supp. 2d 1123 (D. Mont. 1998) (holding that plaintiff's recovery was limited to the amount paid by Medicaid due to a state statute, but allowing admission of plaintiff's medical bills to show the jury the severity and extent of her injuries and to establish required future medical care and expenses).

329. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979). Juries use medical bills as a benchmark when determining the extent of a plaintiff's injuries. *See, e.g.*, *Lapidus v. Hahn*, 450 N.E.2d 824 (Ill. App. Ct. 1983) (describing how juries assess compensatory damage awards based on the incurred expenses, such as medical treatment and lost wages).

330. *Robinson v. Bates*, 828 N.E.2d 657, 667 (Ohio Ct. App. 2005) (surveying developing trends among courts on the issue of whether to allow recovery of medical discounts).

331. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979).

332. *Bynum v. Magno*, 101 P.3d 1149, 1159 (Haw. 2004) (detailing how most cases that had refused recovery of medical discounts were later overturned). *See also supra* Part II.C.2 (describing cases that were later either overturned or limited).

Nationally, only two jurisdictions have refused to allow recovery of discounts without a state statute defining the collateral source rule.<sup>333</sup> The Supreme Court of Hawaii argued that both jurisdictions reached their conclusions after misapplying the Restatement.<sup>334</sup> The Restatement language cited by both courts deals with valuation of services obtained through fraud or duress, rather than the collateral source rule.<sup>335</sup> Both courts either overlooked or ignored the section of the Restatement that specifically addresses the collateral source rule.<sup>336</sup>

Because the *Arthur* majority applied the proper Restatement rules addressing the collateral source rule, it is less likely that the holding will be later overturned or limited.<sup>337</sup> According to the Restatement, the tortfeasor is to compensate for all harm that he causes, rather than just the injured party's net loss.<sup>338</sup> If the *Arthur* holding becomes overly burdensome, as the defense bar and insurance industry predict, the state legislature may always act to limit the collateral source rule.<sup>339</sup>

### B. Issues the Majority Failed to Address

The *Arthur* decision leaves many questions and unresolved issues. First, although the opinion allows for recovery of the discounted amounts, the court did not address whether Mrs. Arthur's insurer had

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333. *Hanif v. Housing Auth. of Yolo County*, 200 Cal. App. 3d 635, 644 (Ct. App. 1988) (declining to award plaintiff an amount in excess of the amount actually paid by Medi-Cal); *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 791 (Pa. 2001) (holding that the collateral source rule did not require that plaintiff recover the amount of the Medicaid write-off since no one incurred the written-off amount).

334. *Magno*, 101 P.3d at 1159 (noting that both *Hanif* and *Moorhead* erroneously relied upon Restatement § 911 cmt. h (1977), "which specifically references the reasonable exchange value of 'services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages'").

335. RESTATEMENT (SECOND) OF TORTS § 911 cmt. h (1979). "[N]ormally the amount recovered is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him." *Id.*

336. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (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 . . . [I]f the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers . . . [o]ne way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party receives.

*Id.*

337. *Bynum*, 101 P.3d at 1159; RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979).

338. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979).

339. Branton, *supra* note 71, at 889 (describing efforts in some states to limit the collateral source rule through legislative barriers).

the right to enforce a lien over that discounted amount.<sup>340</sup> This is an important issue, as Illinois appellate courts currently disagree over such rights of subrogation.<sup>341</sup> Second, the majority's failure to address the *Peterson* opinion raises many questions, such as possible limitations on recoveries by lower-income plaintiffs receiving medical coverage through government social programs.<sup>342</sup>

Although the Illinois Supreme Court had earlier rejected the concept of awarding windfalls to plaintiffs, the *Arthur* holding creates such a windfall, and awards it to the plaintiff.<sup>343</sup> As presented earlier, in most instances the collateral source rule does not result in double recoveries because of the insurer's subrogation interest.<sup>344</sup> However, there is currently a split among Illinois appellate courts as to whether a lienholder may collect the amount originally billed, in the event the plaintiff later recovers the higher amount.<sup>345</sup> If the insurer's subrogation interest is protected, the insurer would later recoup both the amount of the discount as well as the dollar amount actually paid for the medical bills.<sup>346</sup>

The *Arthur* majority could have resolved this circuit split and allowed the insurer to recover the amount recovered by the plaintiff. Such a holding would have allowed subrogation to eliminate the "windfall," reflecting the policies inherent in the *Peterson* decision.<sup>347</sup> Although addressing subrogation could have prevented such windfalls, the majority's decision to allow recovery of the discounted amounts appears to be the fairest approach.

The majority's silence regarding the *Peterson* holding is also important because the collateral source rule in most jurisdictions protects gifts and gratuitous services.<sup>348</sup> Many of the foreign opinions protecting the plaintiff's ability to recover for the billed amount, particularly in cases involving Medicaid and Medicare, are based on the

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340. *Arthur v. Catour*, 833 N.E.2d 847, 854 (Ill. 2005).

341. *Lopez v. Morley*, 817 N.E.2d 592 (Ill. App. Ct. 2004); *Rogalla v. Christie Clinic, P.C.*, 794 N.E.2d 384, 392–93 (Ill. App. Ct. 2003).

342. *Robinson v. Bates*, 828 N.E.2d 657, 667 (Ohio Ct. App. 2005).

343. *See supra* Part II.D.2 (discussing the *Peterson* case).

344. *Koffman v. Leichtfuss*, 630 N.W.2d 201, 210 (Wis. 2001) (explaining principles of subrogation).

345. *Compare Lopez*, 817 N.E.2d at 599 and *N.C. v. A.W.*, 713 N.E.2d 775, 776 (Ill. App. Ct. 1999) (holding that a medical provider may not place a lien on the discounted amount) with *Rogalla*, 794 N.E.2d at 392–93 (holding a lien may be placed on the discounted amount).

346. *Koffman*, 630 N.W.2d at 210–11.

347. *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979).

348. *Arthur v. Catour*, 833 N.E.2d 847, 863 (Ill. 2005) (McMorrow, C.J., dissenting).

collateral source rule's protection of gifts.<sup>349</sup> The South Carolina Supreme Court, for example, stated that "[r]ecovery does not depend on whether there is any bill at all, and the tortfeasor is liable for the value of medical services even if they are given without charge, since it is their value and not their cost that counts."<sup>350</sup> The Hawaii Supreme Court wrote that medical discounts could be viewed conceptually as gratuitous services, placing them within the protections of the collateral source rule.<sup>351</sup> However, in *Arthur* Illinois has again aligned itself with those other courts that have justified the collateral source rule's protection of medical discounts on a contractual basis.<sup>352</sup>

The *Arthur* majority's dependence on the contractual element, a holdover from *Peterson*, may in the future preclude recovery of the billed amounts by plaintiffs covered by Medicare or Medicaid.<sup>353</sup> Just like the plaintiff in *Peterson*, those covered by Medicaid and Medicare do not make any "expenditures" for their coverage, so it is foreseeable that a future court may prevent recovery for these "services obtained without expense, obligation or liability."<sup>354</sup> Some foreign courts have rejected claims by public-aid recipients because there is no "benefit of the bargain" to protect, since the premiums are paid by the taxpayers rather than the plaintiff.<sup>355</sup> By overruling or clarifying *Peterson*, the *Arthur* majority could have prevented this situation from arising in the future.

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349. *Robinson v. Bates*, 828 N.E.2d 657, 667 (Ohio Ct. App. 2005).

350. *Haselden v. Davis*, 579 S.E.2d 293, 295 (S.C. 2003) (citing DOBBS, HANDBOOK ON THE LAW OF REMEDIES, § 8.1, at 543 (1973)).

351. *Bynum v. Magno*, 101 P.3d 1149, 1156 (Haw. 2004).

352. *Acuar v. Letourneau*, 531 S.E.2d 316, 323 (Va. 2000); *Hardi v. Mezzanotte*, 818 A.2d 974, 984 (D.C. 2003).

353. *See* *Coop. Leasing v. Johnson*, 872 So. 2d 956, 960 (Fla. Dist. Ct. App. 2004) (holding that pursuant to state statute Medicare benefits are not a collateral source and not recoverable because the plaintiff never became liable and the federal government has no right to reimbursement); *Dyet v. McKinley*, 81 P.3d 1236, 1239 (Idaho 2003) (holding that a plaintiff may not recover for Medicare write-offs). *Cf.*, *Haselden*, 579 S.E.2d at 294 (holding that "the collateral source rule applies to Medicaid payments"); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611, 619 (Miss. 2001) (holding "that Medicaid payments are subject to the collateral source rule"); *Ellsworth v. Schelbrock*, 611 N.W.2d 764, 767 (Wis. 2000) (applying the collateral source rule to medical expenses paid directly by Medicaid); *Cates v. Wilson*, 361 S.E.2d 734, 738 (N.C. 1987) (explaining that Medicaid is "social legislation; it is the equivalent of health insurance for the needy" and "is an acceptable collateral source"); *Thoreson v. Milwaukee & Suburban Transp. Co.*, 201 N.W.2d 745, 752 (Wis. 1972) (holding that the collateral source rule applies to Medicare and "is not limited to paid-for benefits but applies to gratuitous medical services provided or paid for by the state"). *See also* RESTATEMENT (SECOND) OF TORTS § 920A cmt. c (1979) (explaining that "social legislation benefits" are subject to the collateral source rule).

354. *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979).

355. *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 790 (Pa. 2001).

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## V. IMPACT

Although Chief Justice McMorrow's dissent raised concerns regarding the *Arthur* majority's opinion, courts in Virginia and South Carolina have resolved similar dilemmas.<sup>356</sup> This Part begins with a discussion of McMorrow's questions and how similar issues have been addressed in other jurisdictions.<sup>357</sup> Illinois will most likely adopt the methods and means utilized by those courts when defendants challenge the reasonableness of discounted medical bills.<sup>358</sup>

### A. *Change in Trial Practice*

Chief Justice McMorrow predicted that the *Arthur* decision will change trial practice in Illinois.<sup>359</sup> The holding alters the rule that paid bills are prima facie reasonable and encourages defendants to challenge a plaintiff's evidence of reasonableness through the use of cross-examination and counterproof.<sup>360</sup> Because the majority did not specifically address how a defendant may properly contest the reasonableness, this may be an area ripe for abuse and conflicting opinions.<sup>361</sup>

#### 1. Examples from Virginia and South Carolina

Shortly after the supreme courts of Virginia and South Carolina presented holdings akin to *Arthur* (permitting recovery of medical discounts), cases quickly followed addressing the practice of those opinions.<sup>362</sup> Both suits specifically address one of Chief Justice McMorrow's concerns: the use of the discounted amount by a defendant to contest reasonableness of medical bills.<sup>363</sup> Both Virginia and South Carolina agreed that a defendant may not present the amount actually paid as counterproof.<sup>364</sup>

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356. See *infra* Part V.A.1 (discussing court decisions from Virginia and South Carolina addressing the attempted evidentiary use of discounted medical bills by defendants in order to show unreasonableness of the originally billed amounts).

357. *Id.*

358. See *infra* Part V.A.2 (predicting Illinois's adoption of the Virginia and South Carolina holdings).

359. *Arthur v. Catour*, 833 N.E.2d 847, 856 (Ill. 2005) (McMorrow, C.J., dissenting).

360. *Id.* at 854 (majority opinion).

361. *Id.* at 863 (McMorrow, C.J., dissenting).

362. *Radvany v. Davis*, 551 S.E.2d 347 (Va. 2001); *Covington v. George*, 597 S.E.2d 142 (S.C. 2004).

363. *Arthur*, 833 N.E.2d at 863 (McMorrow, C.J., dissenting); *Radvany*, 551 S.E.2d at 348; *Covington*, 597 S.E.2d at 143.

364. *Radvany*, 551 S.E.2d at 348; *Covington*, 597 S.E.2d at 143.

In *Acuar v. Letourneau*, the Virginia Supreme Court held that a plaintiff could present the amount originally billed for medical services, rather than just the amount actually paid.<sup>365</sup> Soon after that decision, another Virginia case arose addressing the evidentiary effect of the holding.<sup>366</sup> In *Radvany v. Davis*, defense counsel attempted to introduce the amount accepted as payment in full by plaintiff's medical provider, as counterproof of reasonableness.<sup>367</sup> The defense attorney argued *Acuar* only established that a plaintiff could recover for amounts discounted by his medical providers, and did not address whether the discounted amounts could be presented by a defendant as evidence of the reasonable value of the services.<sup>368</sup> This is exactly the same argument predicted and presented in Chief Justice McMorrow's hypothetical.<sup>369</sup>

The Virginia Supreme Court used the argument presented in *Radvany* to reemphasize that *Acuar* found the discounted amounts to be part of the plaintiff's contractual benefit.<sup>370</sup> The negotiated discounts were agreed upon pursuant to contractual obligations and "do not reflect the 'prevailing cost' of those services to other patients."<sup>371</sup> Thus, defendants in Virginia may not present evidence showing that a lesser amount was accepted as payment in full.<sup>372</sup> The court stated that however they may be labeled, the payments made and amounts accepted are "one and the same" and are not admissible because of the collateral source rule.<sup>373</sup>

In South Carolina, the state supreme court held that plaintiffs could recover medical discounts as part of a damages claim.<sup>374</sup> Within a year, the defendant in *Covington v. George* proposed testimony from the manager of medical records from one of the plaintiff's providers, revealing that \$276.86 was accepted as payment in full for a charged bill of \$1,430.00.<sup>375</sup> The trial court refused the evidence of the partial

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

366. *Radvany*, 551 S.E.2d at 348.

367. *Id.*

368. *Id.*

369. *Arthur*, 833 N.E.2d at 863 (McMorrow, C.J., dissenting).

370. *Radvany*, 551 S.E.2d at 348 (writing that medical discounts are "as much of a benefit for which [the plaintiff] paid consideration as are the actual cash payments made by his health insurance carrier to the health care providers" (citing *Acuar*, 531 S.E.2d at 322)).

371. *Id.*

372. *Id.*

373. *Id.*

374. *Haselden v. Davis*, 579 S.E.2d 293, 294 (S.C. 2003).

375. *Covington v. George*, 597 S.E.2d 142, 143 (S.C. 2004).

payment and discount.<sup>376</sup> The *Covington* defendant argued the prior decision permitted a defendant to introduce evidence that a provider had accepted a discounted amount as payment in full, so that the defendant could establish the reasonable value of services.<sup>377</sup> The defendant argued the prior decision permitted him to dispute reasonableness by introducing testimony of the reduced payment.<sup>378</sup> The court rejected these arguments.<sup>379</sup>

The *Covington* court explained that allowing a defendant to present evidence of the discounted payments would confuse a jury, and any attempts by the plaintiff to explain the discount would lead to the existence of insurance, the collateral source.<sup>380</sup> The evidentiary limits established by the Virginia and South Carolina courts appear to be the initial foundation of a growing majority rule, as a Georgia court has also ruled that defendants may not contest reasonableness of medical bills by presenting evidence that a discounted amount was accepted as payment in full.<sup>381</sup>

## 2. The Likely Outcome in Illinois

While Chief Justice McMorro's concerns about the *Arthur* holding's impact on future trials in Illinois are legitimate, it is likely Illinois courts will reach the same conclusions as the courts in Virginia and South Carolina.<sup>382</sup> Defendants will be allowed to contest the reasonableness of medical charges, but they will be restricted from presenting evidence showing that a discounted amount was accepted as payment in full.<sup>383</sup> Instead, defendants will have to use other methods, such as presenting witnesses familiar with medical billing in the relevant community.<sup>384</sup> This likely outcome is most consistent with current Illinois trial practice.<sup>385</sup>

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376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Covington*, 597 S.E.2d at 145 ("While a defendant is permitted to attack the necessity and reasonableness of medical care and costs, he cannot do so using evidence of payments made by a collateral source.").

381. *Olariu v. Marrero*, 549 S.E.2d 121, 123 (Ga. Ct. App. 2001).

382. *Radvany v. Davis*, 551 S.E.2d 347, 348 (Va. 2001); *Covington*, 597 S.E.2d at 144.

383. *See Covington*, 597 S.E.2d at 144 (establishing a rule where reasonableness of medical bills may be contested through witness testimony, but not by introducing into evidence the amount accepted as payment in full).

384. *See Victory Mem'l Hosp. v. Rice*, 493 N.E.2d 117, 119 (Ill. App. Ct. 1986) (explaining that a witness must testify that they are "familiar with the usual and customary charges for the services rendered to the patient and that the charges were reasonable").

385. *Id.* It follows that a witness will also be required to argue that any bills are unreasonable.

According to the *Arthur* majority, a plaintiff wishing to claim the amount originally billed will be required to present a witness to establish that the bills were reasonable.<sup>386</sup> This is because the bills were not paid in full, so the original billed amount does not meet the prima facie rule.<sup>387</sup> Hence, a plaintiff who receives discounts on her medical bills must decide whether to present at trial either the amount billed or the amount paid as a measure of her damages.<sup>388</sup> If the plaintiff opts to present only the amount actually paid, her bills are prima facie reasonable, and she will not need witness testimony to admit the bills.<sup>389</sup> However, if a plaintiff desires to pursue recovery for the amount initially billed, she will need to retain a witness to testify to the reasonableness of those initial charges.<sup>390</sup> If the plaintiff decides to present evidence establishing that this higher, initial charge is reasonable, the defense will have an opportunity to rebut that testimony, either through cross-examination or rebuttal witnesses.<sup>391</sup>

## VI. CONCLUSION

The majority holding of *Arthur v. Catour* may be both criticized and commended. Because Illinois is one of the few states that has placed judicial restraints on the collateral source rule, it was quite possible for the court to reject Mrs. Arthur's arguments and forbid her from presenting evidence of the higher, originally billed amount. By allowing plaintiffs to present claims for the billed amount rather than limiting suits to the amount actually paid, Illinois has followed the majority rule and adopted the method that presents the clearest picture for the jury. However, by ignoring the conflicts remaining from *Peterson* and refusing to review opinions from foreign jurisdictions, the *Arthur* holding leaves questions and conflicts that the Illinois Supreme Court will most likely be forced to decide in the future.

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*See supra* Part V.A.1 (describing the rules adopted in Virginia and South Carolina).

386. *Arthur v. Catour*, 833 N.E.2d 847, 854 (Ill. 2005).

387. *Id.*

388. *Id.* *See also* Cal. Union Ins. Co. v. Liberty Mutual Ins., 920 F. Supp. 908, 921 (N.D. Ill. 1996) (reviewing juries' measurement of compensatory damages based on amount of special damages presented as evidence).

389. *Wicks v. Cuneo-Henneberry Co.*, 150 N.E. 276, 278 (Ill. 1925) (stating the Illinois rule that payment of a medical bill is prima facie evidence that the amount paid is reasonable).

390. *Arthur*, 833 N.E.2d at 854.

391. *Covington v. George*, 597 S.E.2d 142, 144 (S.C. 2004).