

# Enduring Doctrine: The Collateral Source Rule In Wisconsin Injury Law

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# **ENDURING DOCTRINE: THE COLLATERAL SOURCE RULE IN WISCONSIN INJURY LAW**

*When the common law collateral source rule first arose in the area of tort law over one hundred years ago, only a minority of individuals maintained health insurance coverage to protect against loss in the event that a negligent actor injured them. Today, however, the vast majority of Americans are covered. Because of this change in the landscape of insurance coverage, many jurisdictions have abrogated or greatly eroded the collateral source rule under the belief that the rule no longer holds a justified role in personal injury litigation. Wisconsin, however, continues to follow the common law form of the rule and recently rejected legislation that would have effectively abrogated it. Wisconsin is not alone; many jurisdictions still adhere to the common law collateral source rule, and find support from many voices in the legal community. This support is grounded in the belief that the rationales that have long said to justify the rule still maintain their significance. This Comment agrees with them and argues that, while the collateral source rule may have its shortcomings, the many justifications for the common law form of the rule remain crucially valid today and are significantly overlooked by the suggested alternatives.*

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## I. INTRODUCTION

The collateral source rule has long been a fixture in Wisconsin law.<sup>1</sup> The rule dictates that “if an injured party receives compensation for [his or her] injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay.”<sup>2</sup> Opponents of the rule have long called for its reform and even its abrogation—calls that have only grown louder since the passage of the Patient Protection and Affordable Care Act at the federal level in 2010.<sup>3</sup> Efforts were recently made in the Wisconsin legislature to abrogate the rule in personal injury litigation, and while the bill failed, proponents of the change have vowed to renew these efforts in the next legislative session.<sup>4</sup> This Comment opposes such proposals in the immediate future, advocating instead for the continued adherence to the common law form of the collateral source rule in Wisconsin.

For a better understanding of the collateral source rule, consider the following hypothetical. Imagine you are involved in an automobile accident, with two different scenarios arising in the aftermath. In scenario #1, you are a negligent driver who caused the accident. The other driver, who was of no fault at all, sustained injuries that amount to \$100,000 in medical expenses. Because the injured driver had health insurance coverage, his or her insurer paid \$60,000 of the medical expenses as part of a negotiated rate of coverage. Still seeking full compensation from you (the negligent driver), the injured driver sues in search of a money judgment for the full \$100,000 in medical bills accrued over the course of his or her injury. At trial, the injured driver introduces evidence of the \$100,000 in medical expenses. You wish to introduce evidence that \$60,000 of the plaintiff’s bills were already paid by the plaintiff’s insurer. The court, however, refuses to admit the evidence, and the jury returns a judgment against you for \$100,000 in damages. You, the defendant, are upset because in your mind the plaintiff only needed a \$40,000 judgment to be made whole again. Providing the plaintiff with an additional \$60,000

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1. *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 26, 302 Wis. 2d 110, 736 N.W.2d 1.

2. *Collateral-Source Rule*, BLACK’S LAW DICTIONARY (10th ed. 2014).

3. *See infra* Part VI.B.

4. *See infra* Part V.C.

in damages amounts to a double recovery, of sorts, in which the plaintiff is getting a large sum of money that is entirely undeserved.

In scenario #2, you are now the injured driver in the car accident, incurring a loss of \$100,000 in medical expenses due to the negligence of another driver. You had the foresight to purchase health insurance, for which you have paid years' worth of premiums in order to have the best coverage available in the market. As a result of possessing this coverage, your insurer pays \$60,000 towards your \$100,000 in medical bills. Still seeking full compensation for your damages, you file suit against the negligent driver. At trial, you offer into evidence the medical bills making up the \$100,000, but the court also allows the defendant to admit into evidence how much of those bills were paid by your insurer. The jury, after noting that you would only need an additional \$40,000 to pay the balance of your medical bills, awards you a judgment of only \$40,000. You are upset because you believe it should be of no concern to the injured driver nor the jury what arrangements you had the good sense to make ahead of time to have the payment of your medical bills aided by a third party. In many ways, you believe you are actually being punished for your efforts since without this insurance you would have received at least the additional \$60,000. As a policyholder, you paid years' worth of premiums in order to be covered, the total of which reaches well into the thousands of dollars. And now that you actually use this coverage, you are not seeing all of the benefits that you originally believed you contracted for when purchasing the policy.

The two scenarios outlined above represent the dichotomy that exists under the collateral source rule. Scenario #1 portrays the rule in action in a jurisdiction that follows the traditional, common law form of the rule. Scenario #2 portrays a jurisdiction that has abrogated the rule completely. The modern trend, as part of the broader tort reform movement of the last several decades, is to move away from the collateral source rule<sup>5</sup>—a rule that has existed in the United States since the beginning of the nineteenth century—and follow the latter scenario.<sup>6</sup> Wisconsin has consistently adhered to the rule for roughly one hundred years,<sup>7</sup> but the

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5. See discussion *infra* Part V.B.

6. See discussion *infra* Part II; see also Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 741 (1964).

7. See discussion *infra* Part III.

recent proposal of legislation seeking to abrogate the rule has cast a brighter light on the topic in the state than in previous years.<sup>8</sup>

The collateral source rule is one of crucial significance to tort law,<sup>9</sup> specifically in the personal injury context because it relates directly to each and every individual in society—all of whom are potential plaintiffs, defendants, and jurors in a civil lawsuit for damages. This Comment argues that Wisconsin should continue its strong adherence to the traditional, common law form of the rule, despite calls for reform. Notwithstanding the rule's shortcomings and the changing landscapes of both tort law and the insurance market,<sup>10</sup> the primary justifications and rationales of the collateral source rule remain incredibly viable and continue to outweigh alternatives seen elsewhere.

Part II of this Comment provides an overview of what the collateral source rule is, its origin in American tort law, and the different forces that have influenced the rule's development in state legislatures. Part III provides a history of Wisconsin's treatment of the rule and hopes to provide a thorough update on where the state's case law currently rests, specifically as the rule pertains to personal injury litigation. Part IV examines the core rationales and justifications that helped lead to the creation of the rule, as well as its maintenance. This part also alludes to the fact that these rationales seek to contribute to the greater goals of tort law.

Part V dives into the primary criticisms of the collateral source rule and modern reforms. Part V also examines the two most commonly found alternatives to the traditional rule and points out their deficiencies. This part also explores the recently proposed, yet failed, legislation in Wisconsin that sought to abrogate the collateral source rule and the special interests influencing and fueling that proposal.

Part VI argues that the criticisms of the rule, its alternatives, and the proposed reforms in Wisconsin greatly overlook the rationales that underlie the collateral source rule. This part concludes that the alternatives to the rule do little to undermine those rationales and, due to the buoyancy of those rationales, the collateral source rule must maintain its current form in Wisconsin law. Part VI also explores what effect, if any, recent federal healthcare reform may have on the value of the rule and purports that, once again, any effect that healthcare reform would

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8. See discussion *infra* Part V.C.

9. See discussion *infra* Part IV.

10. See *infra* notes 140, 145.

have on the collateral source rule would ultimately fail to erode its total value.

This Comment, as a whole, does not aim to provide a truly exhaustive exploration and analysis of the collateral source rule across the country but instead aims more narrowly to examine the current state of the rule in Wisconsin, and to help determine what value remains of it for the state. The Comment ultimately concludes that the collateral source rule continues to possess immense value for the State of Wisconsin and should be maintained in its traditional, common law form amid falling into the crosshairs of special interest groups proposing reform.

## II. BACKGROUND

For more than a century, courts throughout the United States have applied the collateral source rule to affect the amount of money a plaintiff may receive in a tort action.<sup>11</sup> The rule dictates that a plaintiff's recovery against a defendant-tortfeasor may not be reduced by any payments or benefits conferred by sources other than the defendant.<sup>12</sup> If a plaintiff receives compensation for injuries from a third party, the defendant will nonetheless be liable to the plaintiff for the total cost of the plaintiff's medical care.<sup>13</sup> "In other words, the tortfeasor is not given credit for payments or benefits conferred upon the injured person by any person other than the tortfeasor or someone identified with the tortfeasor (such as the tortfeasor's insurance company)."<sup>14</sup>

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11. See Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 MCGEORGE L. REV. 965, 969 (2012); Larry D. Warren & Nathan L. Mechler, *Paid or Incurred and the Collateral Source Rule Across the Country*, 59 FED'N DEF. & CORP. COUNS. Q. 203, 206 (2009); *Unreason in the Law of Damages: The Collateral Source Rule*, *supra* note 6, at 741.

12. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b, c (AM. LAW INST. 1979). These payments may be from sources such as insurance policies, employment benefits, gratuities, and social legislation benefits. *Id.*

13. *Id.*

14. *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 26, 302 Wis. 2d 110, 736 N.W.2d 1. Generally, however, where an agreement exists between the plaintiff and their third party collateral source for subrogation, the collateral source rule does not apply. See Ann S. Levin, Comment, *The Fate of the Collateral Source Rule After Healthcare Reform*, 60 UCLA L. REV. 736, 747–48 (2013). Subrogation occurs when an insurance company seeks reimbursement from a tortfeasor for medical expenses that it paid on behalf of its insured, the plaintiff. *Id.* "Where subrogation is allowed, the insurance company can either seek reimbursement from a tortfeasor directly or assert a right to part of an award that the plaintiff recovers from a tortfeasor." *Id.* It is the contract agreed upon prior to the accident between the insurer and its insured that provides this right of subrogation to the insurer. *Id.*

The collateral source rule is “considered to serve both as a rule of evidence and as a rule of damages.”<sup>15</sup> As a rule of evidence, it bars the admission of evidence that the plaintiff received benefits from a collateral source as compensation for any part of the loss.<sup>16</sup> As a rule of damages, a jury is prevented from subtracting from a money judgment any amount repaid to the plaintiff already from an outside source.<sup>17</sup> Accordingly, the traditional form of the rule has prevented the subtraction of benefits “received through health insurance, federal medical programs, worker’s compensation payments, welfare benefits, and even gratuitous benefits” from a plaintiff’s damage award.<sup>18</sup>

In an action for personal injuries, the injured plaintiff may seek damages for the reasonable value of medical care provided.<sup>19</sup> As part of the traditional collateral source rule, the “reasonable value” is the amount billed for the plaintiff’s medical services and not the lesser amount ultimately paid by the plaintiff’s health insurance company at a reduced rate.<sup>20</sup> Issues arise today,<sup>21</sup> however, due to the now-common practice of medical providers negotiating with health insurance companies to provide care to insured individuals at a rate lower than the billed charge.<sup>22</sup> As exemplified in the introduction to this Comment, an insured plaintiff’s medical bills may amount to \$100,000, yet his or her insurer only pays \$60,000 to the medical care provider due to a negotiated rate.<sup>23</sup> The plaintiff may still recover damages for the billed \$100,000, rather than the \$60,000 actually paid by his or her insurer. This extra \$40,000 is often referred to as *phantom damages* since no one ever paid the medical expenses, or is even obligated to, yet the plaintiff receives the full price billed by the medical provider.<sup>24</sup>

#### A. *Special Interest Influence on the Collateral Source Rule*

Those most affected by the collateral source rule have played the

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15. Warren & Mechler, *supra* note 11, at 206.

16. *Id.*

17. *Id.*

18. *Id.*

19. Ellsworth v. Schelbrock, 2000 WI 63, ¶ 15, 235 Wis. 2d 678, 611 N.W.2d 764.

20. Levin, *supra* note 14, at 744–45.

21. An example would be phantom damages.

22. Levin, *supra* note 14, at 744–45.

23. *See supra* Part I.

24. *See* Andrew C. Cook, *Wisconsin Supreme Court Rules Plaintiffs Entitled to Receive “Phantom Damages,”* FEDERALIST SOCIETY: STATE COURT DOCKET WATCH, Spring 2012, at 1.

greatest role in shaping its reform or, in turn, maintaining it in its common law form. The lobbying efforts of groups representing lawyers, doctors, insurers, businesses, and others have been largely behind any changes to the rule in the recent decades, often as a segment of the broader tort reform effort seen in the last half-century.<sup>25</sup>

The original common law rule with no modification benefits both plaintiffs and their attorneys because it makes the size of tort awards larger than in the absence of the rule and, in turn, a larger attorney's share under their respective percentage of an award.<sup>26</sup> Defense attorneys may benefit as well because they are likely, for instance, to have substantially more billable hours when the potential award to the plaintiff is higher.<sup>27</sup> The primary lobbying group representing plaintiff attorneys is the American Association for Justice,<sup>28</sup> whose stated mission is, in part, "to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in America's courtrooms, *even when taking on the most powerful interests.*"<sup>29</sup> Such a position speaks to attorneys seeking the largest recovery possible for plaintiffs under the traditional, plaintiff-friendly form of the rule, as opposed to the "powerful interests" further discussed below who seek to protect likely defendants from such suits.

One of the powerful interests on the other side of the fight are the insurers of defendants, who benefit from a modified collateral source rule that precludes recovery under certain circumstances because such modifications could greatly reduce the size of awards to plaintiffs, lowering the amount the insurers could be liable for on behalf of the defendant insured.<sup>30</sup> A primary lobbying organization representing insurers is the National Association of Mutual Insurance Companies (NAMIC),<sup>31</sup> whose stated goal is the advocacy of insurers' interests on key legislative and regulatory initiatives.<sup>32</sup> The NAMIC's official position

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25. See generally David Schap & Andrew Feeley, *The Collateral Source Rule: Statutory Reform and Special Interests*, 28 CATO J. 83, 92–94 (2008).

26. *Id.* at 92.

27. *Id.*

28. See *Mission & History*, AM. ASS'N FOR JUST., <https://www.justice.org/who-we-are/mission-history> [<http://perma.cc/ZN3X-6RCN>] (last visited Dec. 22, 2014) (previously known as the Association of Trial Lawyers of America).

29. *Id.* (emphasis added).

30. Schap & Feeley, *supra* note 25, at 92.

31. See NAT'L ASS'N MUTUAL INS. COMPANIES, <http://www.namic.org/pac/default.asp> [<http://perma.cc/KNV7-KSX2>] (last visited Aug. 21, 2015).

32. *NAMIC Vision & Mission*, NAT'L ASS'N MUTUAL INS. COMPANIES,

on collateral source reforms states that it “supports allowing collateral source payments at trial or offsetting the amount paid to plaintiffs by collateral sources, less the amount paid by the plaintiff to secure the benefit.”<sup>33</sup> Meaning, the group supports an erosion, and even abrogation, of the rule.

Additionally, corporations and the business community as a whole, to the extent that they purchase insurance that protects them in cases of tort lawsuits brought against them, benefit from erosions to the collateral source rule as well.<sup>34</sup> If insured, a reduction to the rule would likely lower insurance premiums for these groups as a response to market forces because plaintiffs’ judgments paid by defendants’ insurers would be reduced.<sup>35</sup> And of course, if the business is uninsured, any judgments against it in favor of injured plaintiffs would be reduced by any amount paid by a collateral source on the plaintiff’s behalf.<sup>36</sup> Medical care providers, like the business community, also benefit from erosions to the rule in that tort awards against them would be lessened, such as doctors, who are particularly at risk of becoming defendants in a malpractice suit.<sup>37</sup> The major organization lobbying on behalf of doctors is the American Medical Association,<sup>38</sup> which calls for federal tort reform in the area of the collateral source rule by accounting for the “mandatory offset of collateral sources of plaintiff compensation” in medical liability.<sup>39</sup> Both of these groups—medical care providers and the general business community—benefit from an eroded collateral source rule as potential defendants and as insurance premium payers.

Ultimately, the push from these many different sources of influence for tort reform and the erosion of the collateral source rule culminated in

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<http://www.namic.org/aboutnamic/visionMission.asp> [<http://perma.cc/TH7G-BVPS>] (last visited Dec. 22, 2014).

33. *Collateral Source Reforms*, NAT’L ASS’N MUTUAL INS. COMPANIES, <http://www.namic.org/issues/collateralSource.asp> [<http://perma.cc/D6YA-J2K9>] (last visited Dec. 22, 2014).

34. Schap & Feeley, *supra* note 25, at 93.

35. *See id.*

36. *See id.*

37. *Id.* In Wisconsin, these medical groups have been successful. *See* WIS. STAT. § 893.55(7) (2013–2014).

38. Schap & Feeley, *supra* note 25, at 96.

39. *H-435.978 Federal Medical Liability Reform*, AM. MED. ASS’N, <https://www.ama-assn.org/ssl3/ecom/PolicyFinderForm.pl?site=www.ama-assn.org&uri=/resources/html/PolicyFinder/policyfiles/HnE/H-435.978.HTM> [<https://perma.cc/B2BW-VGRC>] (last visited Dec. 22, 2014).

1986 with the creation of the American Tort Reform Association (ATRA).<sup>40</sup> ATRA's mission statement brazenly states that it is an organization set out to fix a justice system that, to paraphrase, has been compromised by aggressive personal injury lawyers who systematically recruit clients to target certain defendants as profit centers for massive suits.<sup>41</sup> ATRA's official position on the collateral source rule—an area in which the organization devotes significant focus and effort—is to permit “the admissibility of evidence of collateral source payments at trial or requiring awards to be offset by the amount paid to plaintiffs by collateral sources, less the amount paid by the plaintiff to secure the benefit.”<sup>42</sup> Meaning, the group supports the erosion and even abrogation of the rule.

### III. THE COLLATERAL SOURCE RULE IN WISCONSIN

“The collateral source rule is a well-established rule of law in Wisconsin.”<sup>43</sup> The state has long recognized it,<sup>44</sup> and the Supreme Court

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40. See Schap & Feeley, *supra* note 25, at 96.

41. *Mission*, AM. TORT REFORM ASS'N, <http://www.atra.org/about/mission> [<http://perma.cc/N2PR-Z8S5>] (last visited December 22, 2014). The relevant portions of the ATRA's mission statement in full reads:

Today, America's \$246 billion civil justice system is the most expensive in the industrialized world. Aggressive personal injury lawyers target certain professions, industries, and individual companies as profit centers. They systematically recruit clients who may never have suffered a real illness or injury and use scare tactics, combined with the promise of awards, to bring these people into massive class action suits. They effectively tap the media to rally sentiment for multi-million-dollar punitive damage awards. This leads many companies to settle questionable lawsuits just to stay out of court. These lawsuits are bad for business; they are also bad for society. They compromise access to affordable health care, punish consumers by raising the cost of goods and services, chill innovation, and undermine the notion of personal responsibility. The personal injury lawyers who benefit from the status quo use their fees to perpetuate the cycle of lawsuit abuse. They have reinvested millions of dollars into the political process and in more litigation that acts as a drag on our economy. Some have compared the political and judicial influence of the personal injury bar to a fourth branch of government.

*Id.*

42. *Collateral Source Rule Reform*, AM. TORT REFORM ASS'N, <http://www.atra.org/issues/collateral-source-rule-reform> [<http://perma.cc/9FGM-YX76>] (last visited Dec. 22, 2014).

43. *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 26, 302 Wis. 2d 110, 736 N.W.2d 1 (citing *Thoreson v. Milwaukee Suburban Transp. Co.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972); *Merz v. Old Republic Ins. Co.*, 53 Wis. 2d 47, 191 N.W.2d 876 (1971); *McLaughlin v. Chi., Milwaukee, St. Paul & Pac. Ry. Co.*, 31 Wis. 2d 378, 143 N.W.2d 32 (1966)).

44. *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 39, 116 N.W. 633, 634 (1908).

of Wisconsin formally adopted it in 1921 in *Cunnie v. Superior Iron Works Co.*<sup>45</sup> Since then, the court has confirmed its application of the traditional form of the collateral source rule,<sup>46</sup> with *Leitinger v. DBart, Inc.* serving today as the state's clearest endorsement of the rule.<sup>47</sup> In *Leitinger*, the plaintiff sued for damages from a personal injury, and at trial the parties argued over the reasonable value of the plaintiff's medical services.<sup>48</sup> "The health care provider billed [the plaintiff] \$154,818.51 for the treatment rendered, but as a result of negotiated discounts" between the provider and insurer, "the health care provider accepted \$111,394.73 from [the plaintiff's] health insurance company."<sup>49</sup>

At the circuit court level, "the jury was presented only with evidence of the amount actually paid for the medical treatment rendered," ignoring the collateral source rule.<sup>50</sup> The jury awarded the plaintiff \$111,394.73 for his medical expenses—the exact amount that was paid by his insurer.<sup>51</sup> On appeal, the court of appeals reversed the judgment of the circuit court, concluding that "the fact finder should not be allowed to consider 'payments made by outside sources on the plaintiff's behalf, including insurance payments.'"<sup>52</sup>

The question presented to the Supreme Court of Wisconsin on review was "whether, in light of the collateral source rule, evidence of the amount actually paid by a plaintiff's health insurance company for the plaintiff's medical treatment is admissible in a personal injury action for the purpose of establishing the reasonable value of the medical treatment rendered."<sup>53</sup> The court ultimately held such evidence inadmissible, being prohibited by the collateral source rule.<sup>54</sup>

Then-Chief Justice Shirley Abrahamson, speaking for a 5–2 majority of the court, began her analysis by summarizing the collateral source rule as "help[ing] claimants recover the 'reasonable value of the medical

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45. 175 Wis. 172, 187, 184 N.W. 767, 772 (1921).

46. Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 245 (2009).

47. See *Leitinger*, 2007 WI 84, ¶ 75.

48. *Id.* ¶¶ 2–3.

49. *Id.* ¶ 3.

50. *Id.* ¶ 12.

51. *Id.* ¶ 13.

52. *Id.* ¶ 17 (quoting *Leitinger v. Van Buren Mgmt., Inc.*, 2006 WI App 146, ¶ 17, 295 Wis. 2d 372, 720 N.W.2d 152).

53. *Id.* ¶ 4.

54. *Id.* ¶ 75.

services, without limitation to the amounts paid.”<sup>55</sup> The court held that the collateral source rule prohibits parties in a personal injury action from introducing evidence of the amount actually paid by the injured person’s health insurance company to prove the reasonable value of the medical treatment.<sup>56</sup>

The court agreed with the plaintiff that two Supreme Court of Wisconsin decisions regarding the collateral source rule governed the present case: *Ellsworth v. Schelbrock*<sup>57</sup> in 2000 and *Koffman v. Leichtfuss*<sup>58</sup> in 2001.<sup>59</sup> These cases, the court noted, reaffirmed “the vitality of the collateral source rule” in Wisconsin.<sup>60</sup> In *Ellsworth*, the court reasoned that Wisconsin’s tort law “applies the collateral source rule as part of a policy seeking to ‘deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor.’”<sup>61</sup> In a further affirmation of Wisconsin’s adherence to the collateral source rule, the court held in *Koffman* that the rule applied to payments that have been reduced by contractual arrangements between insurers and health care providers.<sup>62</sup> The court reasoned that this “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.”<sup>63</sup>

Most recently in 2012, the court reaffirmed its adherence to the doctrine and expanded its reach in *Orlowski v. State Farm Mutual Automobile Insurance Co.*<sup>64</sup> The plaintiff in *Orlowski* was injured in an automobile accident caused by an underinsured driver and recovered damages up to the limits of the underinsured driver’s insurance.<sup>65</sup> The plaintiff also had health insurance coverage that paid a portion of her

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55. *Id.* ¶ 27 (alteration in original) (quoting *Lagerstrom v. Myrtle Werth Hosp.-Mayo Health Sys.*, 2005 WI 124, ¶ 56, 285 Wis. 2d 1, 700 N.W.2d 201).

56. *Id.* ¶¶ 28–29.

57. 2000 WI 63, 235 Wis. 2d 678, 611 N.W.2d 764. In *Ellsworth*, the court found that the collateral source rule applied to medical assistance benefits; thus, the defendant was not allowed to introduce evidence of the amount actually paid. Instead, the plaintiff could introduce the amount that was billed by the medical providers. *Id.* ¶ 2.

58. 2001 WI 111, 246 Wis. 2d 31, 630 N.W.2d 201.

59. *Leitinger*, 2007 WI 84, ¶ 35.

60. *Id.*

61. *Ellsworth*, 2000 WI 63, ¶ 7 (quoting *Am. Standard Ins. Co. v. Cleveland*, 124 Wis. 2d 258, 264, 369 N.W.2d 168, 172 (Ct. App. 1985)).

62. *Koffman*, 2001 WI 111, ¶ 2.

63. *Id.* ¶ 31.

64. 2012 WI 21, 339 Wis. 2d 1, 810 N.W.2d 775.

65. *Id.* ¶¶ 6–7.

medical expenses, as well as an automobile insurance policy that included underinsured motorist coverage.<sup>66</sup> After an arbitration panel ruled that the collateral source rule did not apply to this sort of claim due to a lack of precedent on the specific issue and after moving through the lower courts,<sup>67</sup> the specific issue before the supreme court was whether the collateral source rule allows the recovery of written-off medical expenses in a claim under an insured's underinsured motorist coverage.<sup>68</sup> The court reaffirmed its prior decisions that "an injured party is entitled to recover the reasonable value of medical services, which, under the operation of the collateral source rule, includes written-off medical expenses."<sup>69</sup> The court held that the distinction between insurance policies for negligence and underinsured motorist cases did not justify diverging from its precedent and constraining the collateral source rule's application.<sup>70</sup> This is the farthest the court has extended the rule to date and reflects the state's strong adherence to the rule.

#### IV. RATIONALES OF THE COLLATERAL SOURCE RULE

Rationales for the collateral source rule that arose from its natural development, as well as many of the goals underlying the broader area of tort law, led to the creation of the common law rule and continue to support it today.<sup>71</sup> There are, of course, legitimate criticisms to the rule,<sup>72</sup> and the *Restatement (Second) of Torts* admits there is the possibility of a double recovery, or any sort of excess damages, to the plaintiff.<sup>73</sup> Despite criticism,<sup>74</sup> many tort law experts have long viewed the potential drawbacks of the rule to be undoubtedly outweighed by its goals and

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66. *Id.*

67. *Id.* ¶¶ 8–11. At the trial court, the arbitration decision was modified to award the plaintiff the full value of medical expenses, which included any amounts deducted due to payments from collateral sources. After the defendant appealed, the court of appeals certified the case to the supreme court out of concern that the trial court's decision was in conflict with the supreme court's past precedent. *Id.* ¶¶ 10–11.

68. *Id.* ¶¶ 8, 12.

69. *Id.* ¶ 4.

70. *Id.* ¶ 23. Despite the arbitration panel being reversed by the Wisconsin Supreme Court, I must admit that my father, Attorney Paul F. Poehlmann, served on the panel. If it serves as any consolation to him (which I'm sure it does not), I would have ruled as the arbitration panel did.

71. *See generally* RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (AM. LAW. INST. 1977).

72. *See discussion infra* Part V.A.

73. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (AM. LAW. INST. 1977).

74. *See infra* Part V.A. for more on the rule's criticisms.

justifications.<sup>75</sup> This Comment will focus on four major rationales of the collateral source rule: restoration, unjust enrichment, deterrence, and incentive to mitigate.

#### A. *Restoration of the Plaintiff*

Courts often justify the traditional application of the collateral source rule as providing the most precise form of restoration in the plaintiff,<sup>76</sup> meaning the award that will make a plaintiff financially whole again in light of the injuries suffered.<sup>77</sup> When courts are applying the collateral source rule, it follows that “the injured party should be made whole by the tortfeasor, not by a combination of compensation from the tortfeasor and collateral sources.”<sup>78</sup> Meaning, those sources are beyond the concern of the tortfeasor. Additionally, recoverable medical expenses may exist beyond that of the amount paid by the collateral source, so “[t]he collateral source rule allows the plaintiff to seek recovery for the reasonable value of medical services without consideration of payments made by the plaintiff’s insurer . . . .”<sup>79</sup> If a jury is presented with evidence of exactly what the plaintiff requires to pay off any remaining medical bills, it will likely award damages of only that amount.<sup>80</sup> The damage award the plaintiff receives from the defendant is often incomplete, especially when future medical costs and attorney fees are taken into consideration.<sup>81</sup> This reasoning reflects the belief that using the billed charges, rather than what was actually paid by the collateral source, best measures the need for making the plaintiff whole again.

#### B. *Unjust Enrichment*

Another rationale for the collateral source rule is the law’s desire to prevent unjust enrichment.<sup>82</sup> While one may recognize that its operation

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75. Todd, *supra* note 11, at 977; *see also* RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (AM. LAW. INST. 1977).

76. Levin, *supra* note 14, at 756.

77. Bozeman v. State, 2003–1016, p. 19 (La. 7/2/04); 879 So. 2d 692, 704.

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

79. Leitinger v. DBart, Inc., 2007 WI 84, ¶ 29, 302 Wis. 2d 110, 736 N.W.2d 1 (quoting Koffman v. Leichtfuss, 2001 WI 111, ¶ 46, 246 Wis. 2d 31, 630 N.W.2d 201).

80. Such as in *Leitinger*, 2007 WI 84, for example.

81. Todd, *supra* note 11, at 974; *see also id.* at 977 (“Critics characterize this justification of the rule as misguided because it seeks to remedy the tort system’s shortcomings through the oblique and confusing mechanism of the collateral source rule.”).

82. *See* F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 485 (2006). “Unjust enrichment” is defined as “The retention of a

has the potential to provide the plaintiff with a double recovery or phantom damages,<sup>83</sup> advocates of the rule argue that this result is an acceptable one given the alternative of the defendants receiving such a windfall themselves.<sup>84</sup> The *Restatement (Second) of Torts* argues:

[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. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself.<sup>85</sup>

When a choice must be made between providing a windfall to the plaintiff or to the defendant, the more culpable defendant should not receive the benefit of the plaintiff's foresight.<sup>86</sup> Fairness dictates that "[t]he collateral source rule ensures 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."<sup>87</sup> The purpose of the rule "is not to provide the injured person with a windfall, but rather to prevent the tortfeasor from escaping liability because a collateral source has compensated the injured person."<sup>88</sup> "The injured person, not the tortfeasor, benefits from the collateral source."<sup>89</sup>

### C. Incentive to Mitigate

A further justification for the collateral source rule is to provide incentive for individuals to mitigate their risks by purchasing insurance.<sup>90</sup>

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benefit conferred by another, who offered no compensation, in circumstances where compensation is reasonably expected." *Unjust Enrichment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

83. Cook, *supra* note 24, at 1.

84. *Voge v. Anderson*, 181 Wis. 2d 726, 733, 512 N.W.2d 749, 752 (1994).

85. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (AM. LAW. INST. 1977). The *Restatement* continues, "If 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." *Id.* (referring to gratuitous services or government-funded services).

86. Linda J. Gobis, Note, *Lambert v. Wrensch: Another Step Toward Abrogation of the Collateral Source Rule in Wisconsin*, 1988 WIS. L. REV. 857, 862 (1988).

87. *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 32, 302 Wis. 2d 110, 736 N.W.2d 1.

88. *Id.* ¶ 34.

89. *Id.*

90. See Levin, *supra* note 14, at 753–54 (citing RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (AM. LAW. INST. 1977) ("If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements,

Potential increased recovery at trial, as a result of the collateral source rule, encourages parties to purchase insurance—something public policy greatly desires.<sup>91</sup> Some courts believe that “a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift.”<sup>92</sup> This investment is premised on a contractual obligation that insurers have to pay, and they have therefore assumed the loss as a business risk.<sup>93</sup> While the insured plaintiff may not have intended to bargain for any sort of windfall in the event of an injury, the benefits that they receive as a result of the injury are simply the result of this contractual agreement.<sup>94</sup> Public policy and the courts have respected this agreement and reason that the collateral source rule serves as an incentive for all to enter into such agreements.<sup>95</sup>

#### D. Deterrence

A principal goal of the collateral source rule is to deter the harmful behavior of a tortfeasor, as it is the belief of courts that the greater the amount of damages levied against a defendant will most discourage that defendant from negligently harming others in the future.<sup>96</sup> Courts are concerned that “reducing the recovery by the monies paid by a third party would hamper the deterrent effect of the law.”<sup>97</sup> It is asserted that to best deter a tortfeasor’s negligent conduct, he or she should be fully responsible for the entire amount of damages billed as a result of his or her tortious conduct.<sup>98</sup>

Although the prevalence of insurance coverage is argued to lessen the deterrent impact of damages,<sup>99</sup> there continues to be evidence that tort

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the law allows him to keep it for himself.”)).

91. Gobis, *supra* note 86, at 862.

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

93. Gobis, *supra* note 86, at 862.

94. *Id.*

95. Todd, *supra* note 11, at 982. As Todd points out, some commentators believe this rationale of the collateral source rule to be a weak one, generally reasoning that the rule plays little to no role in an individual’s decision to obtain insurance. *Id.*; see also Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 533–34 n.46 (1991) (calling the rationale “silly”). Todd goes on to add that the vast majority of scholars and judges alike view the rationale as a legitimate basis for the collateral source rule. Todd, *supra* note 11, at 982.

96. Levin, *supra* note 14, at 750–51.

97. *Bozeman v. State*, 2003-1016, p. 13 (La. 7/2/04); 879 So. 2d 692, 701 (quoting *Suhor v. Lagasse*, 2000-1628 p. 9 (La. App. 4 Cir. 9/13/00); 770 So. 2d 422, 427).

98. See *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 33, 302 Wis. 2d 110, 736 N.W.2d 1.

99. See *infra* Part VI.B. (discussing healthcare reform and its effect on the collateral

judgments do deter undesirable conduct.<sup>100</sup> Advocates of the collateral source rule argue that the deterrent goal of the rule lies at the heart of the fault basis of tort law and to overlook this goal would encourage undesirable conduct.<sup>101</sup> It is further argued that if the collateral source rule were abrogated, the tort system would be deprived of the opportunity to correct the wrongdoer and deter further injurious conduct of the individual tortfeasor and others participating in tortious activity.<sup>102</sup> This rationale for the rule lies at the core of tort law and remains an indispensable justification regardless of whether a tortfeasor is actually aware of the collateral source rule.

## V. THE COLLATERAL SOURCE RULE IN THE AGE OF TORT REFORM

The common law collateral source rule originated at a time when health insurance and public health benefits did not exist,<sup>103</sup> and recent changes in the way health care is provided and paid for has led many states to review the fairness and necessity of the rule.<sup>104</sup> Such review, in conjunction with the rule's general criticisms, has led a number of states to modify or abrogate the rule in attempts to account for today's economic realities.<sup>105</sup>

### A. Criticisms of the Collateral Source Rule

The collateral source rule's treatment of damages has been heavily criticized for having the potential to create a windfall for plaintiffs.<sup>106</sup> This is due, in large part, to the fact that because the jury would be unaware of any collateral payments, it might award medical damages that are higher than the amount the plaintiff or the collateral source actually paid for the

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source rule (CSR)).

100. L. Timothy Perrin, Comment, *The Collateral Source Rule in Texas: Its Impending Demise and a Proposed Modification*, 18 TEX. TECH L. REV. 961, 989 (1987).

101. *Id.* at 989–90.

102. Lawrence P. Wilkins, *A Multi-Perspective Critique of Indiana's Legislative Abrogation of the Collateral Source Rule*, 20 IND. L. REV. 399, 402–03 (1987).

103. Benjet, *supra* note 46, at 211.

104. *Id.*

105. *Id.*

106. See generally *Unreason in the Law of Damages: the Collateral Source Rule*, *supra* note 6 (constituting one of the earliest calls for reform and erosion of the rule, primarily attacking the core rationales of the rule as insufficient); see also Jacobsen, *supra* note 95, at 523 (criticizing the rule for neglecting the role of the jury in tort cases in which the collateral source rule is invoked).

medical care (phantom damages).<sup>107</sup> Additionally, opponents argue that the rule allows for the possibility that a tortfeasor may pay a judgment even though the plaintiff has already been partly or completely compensated for the injuries suffered.<sup>108</sup> “Thus, double recovery is possible[,] and the plaintiff can be put in a better position than before the tort occurred.”<sup>109</sup>

The potential for excessive damage awards brings about the criticism that the collateral source rule conflicts with the compensatory role of tort law.<sup>110</sup> A primary purpose of tort law is to make plaintiffs whole again after an accident occurs or to put plaintiffs in the same condition as before an accident.<sup>111</sup> “The collateral source rule, however, requires a [tortfeasor] to pay even though plaintiffs have already been compensated.”<sup>112</sup> Recovering under such circumstances is more alike to punitive damages, and punitive damages do not compensate but rather punish to discourage other similar offenses.<sup>113</sup>

A third criticism of the collateral source rule is that it conflicts with the damage mitigation principle of tort law.<sup>114</sup> The *Restatement (Second) of Torts*, in describing mitigation, provides:

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.<sup>115</sup>

Under the collateral source rule, the plaintiff may receive a benefit as a result of the tortfeasor’s conduct, while not having their judgment reduced by this same benefit.<sup>116</sup> “Therefore, the rule contravenes the

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107. Levin, *supra* note 14, at 744.

108. Gobis, *supra* note 86, at 860 (when subrogation rights do not exist for the collateral source).

109. *Id.*

110. *Id.*

111. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 2, 7 (5th ed. 1984).

112. Joseph M. Engl, Comment, *Gratuitous Nursing Services Rendered by Extended Family Members and Other Third Parties: Can Injured Parties Receive Reimbursement Under Wisconsin’s Collateral Source Rule?*, 85 MARQ. L. REV. 1003, 1008–09 (2002).

113. See KEETON ET AL., *supra* note 111, at 9.

114. Gobis, *supra* note 86, at 861.

115. RESTATEMENT (SECOND) OF TORTS § 920 (AM. LAW. INST. 1977).

116. Gobis, *supra* note 86, at 861.

mitigation principle because receipt of benefits from a collateral source does not act to mitigate damages.”<sup>117</sup>

A majority of the criticism surrounding the rule focuses on the damages awarded to plaintiffs but overlooks the effect of the rule on the fact finder.<sup>118</sup> As previously stated,<sup>119</sup> the rule withholds certain information relevant to the calculation of the plaintiff’s damages.<sup>120</sup> Withholding information such as the actual amount paid for medical expenses diminishes the jury’s traditional role of deciding all contested issues of fact, including damages.<sup>121</sup> Traditionally, the jury has been viewed as having adequate discretion for handling the assessment of damages.<sup>122</sup> It is argued that “the collateral source rule significantly limits the exercise of this discretion by withholding relevant information from the jury.”<sup>123</sup> Although the jury may overcompensate the victim, it does so unwittingly.<sup>124</sup>

In Wisconsin, justices of the supreme court have raised much of these criticisms in dissent of decisions that either upheld or expanded the reach of the rule. In 2000 and 2001, then-Justice Diane Sykes dissented in two cases<sup>125</sup> that the correct reward of medical damages is what is truly incurred by the plaintiff in the treatment of his or her injuries, “not an artificial, higher amount based upon what the plaintiff might have incurred if he or she had a different sort of health plan or no health plan at all.”<sup>126</sup> Less than a decade later, then-Justice Patience Roggensack wrote a lengthy dissent in *Leitinger v. DBart*, arguing that the court extended the collateral source rule too far when it ruled that parties are prohibited in personal injury actions from introducing evidence of the amount actually paid by the person’s health insurer.<sup>127</sup> She argued that the majority had unnecessarily expanded the evidentiary component of

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117. *Id.*

118. For a more thorough analysis of this criticism, see Jacobsen, *supra* note 95.

119. *See supra* Part II.

120. *See Warren & Mechler, supra* note 11, at 206.

121. *See generally* Linn v. Garcia, 531 F.2d 855, 860 (8th Cir. 1976).

122. Vanskike v. Union Pac. R.R. Co., 725 F.2d 1146, 1150 (8th Cir. 1984).

123. Jacobsen, *supra* note 95, at 524–25.

124. *Id.* at 525.

125. *See Koffman v. Leichtfuss*, 2001 WI 111, ¶ 67, 246 Wis. 2d 31, 630 N.W.2d 201; *Ellsworth v. Schelbrock*, 2000 WI 63, ¶ 23, 235 Wis. 2d 678, 611 N.W.2d 764.

126. *Koffman*, 2001 WI 111, ¶ 69; *see also Ellsworth*, 2000 WI 63, ¶ 31.

127. *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶¶ 77–78, 302 Wis. 2d 110, 736 N.W.2d 1 (Roggensack, J., dissenting).

the collateral source rule, creating a new category of damages and usurping the jury's fact-finding function.<sup>128</sup>

*B. Alternatives to the Common Law Collateral Source Rule*

Statutes reforming the collateral source rule vary widely,<sup>129</sup> but nearly all possess the goal of eliminating the potential for excessive recovery by the plaintiff.<sup>130</sup> Throughout the United States, forty-two jurisdictions have enacted some form of legislation that restricts the rule.<sup>131</sup> Within these jurisdictions, “[e]ven where the rule has been applied generally, collateral source damages are often limited in health care liability cases as part of broader tort-reform legislation.”<sup>132</sup> States that have diverged from the common law approach to the rule pay more attention to payments by the plaintiff's health insurer, whether the same insurance plan calls for subrogation, and whether the plaintiff paid premiums to contract for the benefits he or she received at the time of the injury.<sup>133</sup> The overall result of the divergence from the common law rule across the country has, in general, led to two alternative approaches for measuring personal injury damages accurately.<sup>134</sup>

One option is to subtract from charged medical bills the amount that the plaintiff's insurer has paid (or another collateral source), including amounts written off.<sup>135</sup> This has the result of abrogating the collateral source rule entirely, viewing medical expenses already paid or discounted by collateral sources as not constituting harm suffered by the plaintiff, and therefore would not be included in any damage calculation used to make the plaintiff whole again.<sup>136</sup> Florida, for example, has a statute under which a court must reduce an award of economic damages by “all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources.”<sup>137</sup>

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128. *Id.*

129. Benjet, *supra* note 46, at 211.

130. *Id.*

131. *Id.*

132. *Id.*

133. Levin, *supra* note 14, at 756.

134. *Id.* at 757.

135. *Id.*

136. *Id.*

137. FLA. STAT. ANN. § 768.76(1) (West 2014). Other states abrogating, or significantly eroding, the collateral source rule include: Alabama (ALA. CODE § 12-21-45 (LexisNexis 2014)) (allowing evidence of medical or hospital expenses that have been or will be paid or reimbursed); Alaska (ALASKA STAT. § 9.17.070 (2014)) (allowing for a post-verdict reduction

States that have taken this first approach and effectively abrogated the rule reason that payments from a collateral source adequately restore a victim to whole.<sup>138</sup> Some state supreme courts, however, have actually found their state's statutes completely abrogating the rule in this general manner as improper under their state constitutions.<sup>139</sup> For example, in New Hampshire the state's attempt at abrogating the rule was held to discriminate arbitrarily in favor of health care providers as a class, thereby violating equal protection guarantees of the New Hampshire Constitution.<sup>140</sup> Additionally, a shortcoming to this approach is that it completely overlooks the cost and effort exerted by a plaintiff in obtaining the collateral source payment.<sup>141</sup> If the collateral source was something like an insurance provider, for which the plaintiff had to pay premiums for a length of time, then a damage award reflecting only the medical expenses paid would result in a plaintiff not truly have been made whole. Thus, if insurance premiums were considered necessary to make the plaintiff whole, the collateral source rule would compensate a plaintiff more adequately than this alternative option.

A somewhat softer alternative than total abrogation of the collateral source rule is to allow damage awards to be reduced by payments made by collateral sources but then to offset that reduction by the amount the plaintiff paid in something such as insurance premiums.<sup>142</sup> While this

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by amounts received or to be received from collateral sources that do not have subrogation rights); Arizona (ARIZ. REV. STAT. ANN. § 12-565 (2014)) (abrogating the collateral source rule in medical malpractice suits but retaining the common law rule in all other contexts); Idaho (IDAHO CODE § 6-1606 (2014)) (prevents double recovery due to collateral source payments but only when those collateral sources are not those for which the plaintiff contracted for); Maine (ME. REV. STAT. ANN. tit. 24, § 2906(2) (2015)) (abrogating the collateral source rule in medical malpractice suits, but retaining the common law rule in all other contexts); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09(d) (West 2014)) (abrogating the collateral source rule in medical malpractice suits but retaining the common law rule in all other contexts); New York (N.Y. C.P.L.R. LAW § 4545 (LexisNexis Supp. 2014)) (partially abolishes the collateral source rule); North Dakota (N.D. CENT. CODE § 32-03.2-06 (2013)) (eliminates the collateral source rule only to the extent that it prevents double recovery for payments from sources such as Social Security benefits); Texas (TEX. CIV. PRAC. & REM. CODE ANN § 41.0105 (West 2014)) (abrogating the collateral source rule).

138. See Benjet, *supra* note 46, at 211.

139. See Carson v. Maurer, 424 A.2d 825 (N.H. 1980); see also O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995).

140. Carson, 424 A.2d at 836.

141. Levin, *supra* note 14, at 758.

142. *Id.* Other states follow some form of this approach. See, e.g., Connecticut (CONN. GEN. STAT. ANN. § 52-225a(a)-(b) (West 2015)) (reducing damages awards by collateral source payments if no subrogation exists but offsetting it by the amount of premiums paid as of the date the court enters judgment); Indiana (IND. CODE ANN. § 34-44-1-2 (LexisNexis

approach would still abrogate the rule and be unwelcomed by plaintiffs,<sup>143</sup> it would still provide an additional recovery for premium payments and shows greater respect for the plaintiff's efforts in securing insurance coverage<sup>144</sup>—something tort law always seeks to encourage.<sup>145</sup>

One problem with this middle-ground approach is how to calculate the amount of premium payments a plaintiff should receive as part of his or her overall damage award<sup>146</sup>—a problem responded to inconsistently across the states following it.<sup>147</sup> Minnesota resolves this issue by accounting for the premiums paid in the two years before the lawsuit,<sup>148</sup> while Connecticut calculates the amount the plaintiff paid in premiums during the years in which the plaintiff received care related to the injury.<sup>149</sup> In either alternative to the common law rule, plaintiffs that have the foresight to obtain something like insurance coverage are still much worse off and defendants better off.

### C. Proposed Legislation in Wisconsin

In early 2013, the Wisconsin Assembly and Senate introduced mirror bills aimed at reforming the Wisconsin law governing collateral source payments in personal injury cases.<sup>150</sup> The proposed change would have

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2014)) (allowing into evidence proof of collateral source payments, proof of subrogation obligations, and proof of the cost of securing the collateral benefits; such consideration is not automatic, however, and must be introduced into evidence); Michigan (MICH. COMP. LAWS ANN. § 600.6303 (West 2014)) (reducing damages awards by collateral source payments if no subrogation exists but offsetting it by the amount of premiums paid); Minnesota (MINN. STAT. ANN. § 548.251 (West 2015)) (reducing damages awards by collateral sources payments if no subrogation exists but offsetting it by amount of premiums paid in the two-year period before the lawsuit); Montana (MONT. CODE ANN. § 27-1-308 (2015)) (reducing damages awards over \$50,000 by collateral source payments if no subrogation exists but offsetting it by the amount of premiums paid in the five years preceding the judgment should such evidence be admitted); Nebraska (NEB. REV. STAT. § 44-2819 (2014)) (reducing damages awards post-judgment by collateral source payments if no subrogation exists but offsetting it by the amount of premiums paid); New Jersey (N.J. STAT. ANN. § 2A:15-97 (West 2015)) (reducing damages awards by collateral sources payments if no subrogation exists but offsetting it by amount of premiums paid during the policy period which the benefits are payable); Ohio (OHIO REV. CODE ANN. § 2315.20 (LexisNexis 2014)) (reducing damages awards by collateral sources payments if no subrogation exists but offsetting it by amount of premiums paid).

143. See *Arneson v. Olson*, 270 N.W.2d 125, 128 (N.D. 1978).

144. Levin, *supra* note 14, at 758.

145. See *supra* notes 25–29.

146. Levin, *supra* note 14, at 759.

147. *Id.*

148. MINN. STAT ANN. § 548.251 (West 2015).

149. CONN. GEN. STAT. ANN § 52–225a(c) (West 2015).

150. See Assemb. B. 29, 101st Leg. Reg. Sess. (Wis. 2013); S.B. 22, 101st Leg. Reg. Sess.

allowed the fact finder to consider evidence of collateral source payments and evidence of the injured person's obligations of subrogation or reimbursement resulting from those collateral source payments.<sup>151</sup> This change had the "purpose of rebutting the presumption that billing statements and invoices that are patient health care records state the *reasonable value* of the health care services provided to the injured person."<sup>152</sup> The legislation failed to advance out of a Senate Joint Resolution in April of 2013,<sup>153</sup> but similar legislation is likely to reappear in 2015–2016 session.<sup>154</sup>

According to Wisconsin's Government Accountability Board, the groups that lobbied in support of the legislation to reform the collateral source rule, as well as those that opposed it, made the Assembly Bill the ninth-most-lobbied bill in the first six months of 2013.<sup>155</sup> Some of the lobbying groups that acted in support of the legislation included the Wisconsin Defense Counsel,<sup>156</sup> which advocates on behalf of defendants in civil litigation matters,<sup>157</sup> as well as the Wisconsin Medical Society,<sup>158</sup> a group advocating for physicians and medical care providers.<sup>159</sup>

A primary opponent of the legislation was the Wisconsin Association for Justice, the state's chapter of the national American Association for Justice.<sup>160</sup> A press release by the organization released just after the

(Wis. 2013).

151. See Assemb. B. 29; S.B. 22.

152. S.B. 22 (emphasis added); see also Assemb. B. 29.

153. *WCJC Legislative Tracking Report 2013–2014*, WIS. CIV. JUST. COUNCIL, INC., <http://www.wisciviljusticecouncil.org/tracking-report/> [<http://perma.cc/X7JA-52N9>] (last updated Mar. 26, 2014).

154. See Andrew Cook, *Wisconsin Legislative Update*, 12 WIS. CIV. TRIAL J. 6 (2014). After personal inquiry, the relevant State Senate and Assembly committees' report that, as of July 1, 2015, no such legislation has been discussed in the current session.

155. *G.A.B. Releases Detailed Lobbying Report for First Six Months of 2013*, GOV'T ACCOUNTABILITY BOARD: STATE OF WIS. (Sept. 12, 2013), <http://gab.wi.gov/node/2946> [<http://perma.cc/TU3C-7GWL>].

156. Cook, *supra* note 154, at 6. The WDC was previously known as the Civil Trial Counsel of Wisconsin. *Id.*

157. *About the Wisconsin Defense Counsel*, WIS. DEF. COUNS., <http://www.wdc-online.org/about-wdc/> [<http://perma.cc/2HRC-9NEB>] (last visited Aug. 19, 2015).

158. *Lobbying Tracker*, WIS. MED. SOC'Y, <https://www.wisconsinmedicalsociety.org/policies/assembly-bill-29/> [<http://perma.cc/F7LF-3ADP>] (last visited Dec. 22, 2014).

159. *About Us*, WIS. MED. SOC'Y, <https://www.wisconsinmedicalsociety.org/about-us/> [<https://perma.cc/W9SP-AUMA>] (last visited Aug. 21, 2015).

160. Press Release, Wisconsin Association for Justice, *New Legislation Encourages Premium Theft* (Feb. 15, 2013), <https://www.wisjustice.org/docDownload/439771>

introduction of the legislation denounced the bill for discriminating “against responsible Wisconsinites who have planned ahead and purchased health insurance. By allowing in evidence of amounts paid by someone else, people with health insurance could recover less money for their medical care than people without insurance. That is wrong.”<sup>161</sup> The release went on to conclude that the bill actually “penalizes people who have worked hard and bought health insurance,” stressing that “[t]he bill rewards bad behavior and encourages premium theft.”<sup>162</sup>

Despite the failed legislative effort of 2013, the fight over reforming, maintaining, or abrogating the collateral source rule in Wisconsin tort law is unlikely to be finished. There is significant discussion from groups that lobbied for the legislation that efforts be renewed beginning in the 2015–2016 legislative session.<sup>163</sup> Those opposed to any erosion of the collateral source rule will likely be ready to renew their strong support for the common law rule and continue to argue for its preservation.<sup>164</sup>

## VI. THE CASE AGAINST REFORMING THE COLLATERAL SOURCE RULE IN WISCONSIN

Wisconsin tort law should refrain from making any significant erosion to the collateral source rule as it applies in the personal injury context in the immediate future. The alternatives to the common law collateral source rule outlined earlier in this Comment,<sup>165</sup> including the proposed legislation in Wisconsin,<sup>166</sup> fly in the face of tort law’s many goals. While these alternatives may lessen the risk of providing double recovery or phantom damages to the plaintiff, they ignore many of the core rationales and justifications for the rule that continue to require its existence.

### A. *Overlooked Rationales of the Collateral Source Rule*

Eliminating the collateral source rule would likely result in the inequitable benefit of defendants.<sup>167</sup> The alternatives not only fail to

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[<https://perma.cc/PP7C-MQRM>].

161. *Id.* (quoting then-President Attorney Jeff Pitman).

162. *Id.*

163. *See generally* Cook, *supra* note 154, at 6. The Wisconsin Defense Council, for one, wrote in the spring of 2014 that the “WDC will continue to work on the collateral source legislation in 2015–2016 . . . .” *Id.*

164. *See generally* Todd, *supra* note 11, at 973–74.

165. *See supra* Part V.B.

166. *See supra* Part V.C.

167. *See* Hubbard, *supra* note 82, at 485.

prevent a defendant from receiving a windfall, they actually encourage such a result. By allowing the consideration of collateral source payments on behalf of the plaintiff, a defendant would consistently be given a significant break in any judgment made against him or her when a collateral source payment occurred. As the Supreme Court of Wisconsin reasoned in *Leitinger v. DBart*, the tortfeasor should not be given a credit for benefits conferred upon the victim simply because that person had the foresight to make wise arrangements, such as maintaining insurance.<sup>168</sup> Tort law has long reasoned that a benefit directed to the injured party should not become a windfall for the wrongdoer instead respecting the strategic and positive planning of the injured party.<sup>169</sup>

This benefit, arising out of the efforts of a plaintiff, should be protected by contract law as well. The plaintiff deserves to reap the benefit of his or her bargain by contracting with his or her insurance company, or whatever other outlet the plaintiff received collateral support from.<sup>170</sup> “Allowing a tortfeasor to benefit from an injured party’s [bargain] contravenes the contract principles of promoting the parties’ intent and limiting third-party beneficiary rights.”<sup>171</sup> In many ways an insured plaintiff is actually punished for having this foresight, as previously suggested.<sup>172</sup>

Opponents of the collateral source rule often disregard the argument that it would result in unjust enrichment in defendants instead contending that potential overcompensation of a plaintiff goes against the corrective notions of tort law.<sup>173</sup> These corrective notions of tort law advocate that damages are supposed “to return the plaintiff as closely as possible to his or her condition before the accident.”<sup>174</sup> Tort law is frequently inconsistent on this goal, however, as exemplified by the three different types of damages that often make up judgments: economic, noneconomic, and punitive.<sup>175</sup> While economic damages relate directly to the stated

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168. 2007 WI 84, ¶ 28, 302 Wis. 2d 110, 736 N.W.2d 1.

169. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (AM. LAW INST. 1977).

170. Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 Kan. J. L. & Pub. Pol’y 57, 62–65 (2005).

171. Todd, *supra* note 11, at 975. Here the tortfeasor.

172. See Press Release, *supra* note 160.

173. Marshall & Fitzgerald, *supra* note 170, at 57; see also *supra*, Part IV.A on restoration as a goal of tort law and rationale for the traditional collateral source rule.

174. MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 679 (7th ed. 2001).

175. Todd, *supra* note 11, at 972.

“make-whole” goal of tort law, many experts argue that noneconomic damages (such as pain and suffering) do not relate to this goal, due in large part to their imprecision and airy nature.<sup>176</sup> Additionally, punitive damages, which are intended for deterrence and retribution, are unrelated to any goal of making the plaintiff whole again.<sup>177</sup> The possibility of overcompensating a plaintiff through the collateral source rule is no more inconsistent with the make-whole doctrine of tort law than awarding that same plaintiff noneconomic and punitive damages.<sup>178</sup>

The collateral source rule, in fact, is perfectly consistent with the concepts of deterrence, retribution, and economic efficiency. Ensuring that defendants pay the full measure of damages for tortious behavior is advanced by the rule, and any abrogation of it could very well result in under-deterrence from engaging in the tortious behavior.<sup>179</sup> If a plaintiff’s insurer provided payments toward medical expenses, the plaintiff’s insurance would essentially serve as a subsidy for the defendant’s tortious behavior.<sup>180</sup> The relationship between law and economics makes plain the concept that if a tortfeasor is not liable for the damages he or she causes, he or she will over-engage in that activity. In fact, states with diluted versions of the rule have been correlated to increased vehicular deaths, as drivers may exhibit a slightly lower degree of care when they face less than the full costs of the accidents they cause, and an increase in infant mortality, as physicians may be exercising less care when liability for malpractice costs is reduced.<sup>181</sup> Full compensation deters not only the injury-causing behavior by increasing the costs of it but also helps

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176. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into “Punishment”*, 54 S.C. L. REV. 47, 60 (2002); Martin V. Totaro, Note, *Modernizing the Critique of Per Diem Pain and Suffering Damages*, 92 VA. L. REV. 289, 310 (2006).

177. Avihay Dorfman, *What is the Point of the Tort Remedy?*, 55 AM. J. JURIS. 105, 142 (2010).

178. Todd, *supra* note 11, at 972–73.

179. See RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (AM. LAW INST. 1977); Levin, *supra* note 14, at 750–51.

180. Todd, *supra* note 11, at 973.

181. Schap & Feeley, *supra* note 25, at 86. However, this is less meaningful in Wisconsin due to WIS. STAT. § 893.55 (2013–2014), which heavily shields medical care providers from medical malpractice actions by making it much harder procedurally on plaintiffs to bring suits. By presenting the second statistic from the Schap and Feeley article, I do not intend to accuse doctors of intentionally caring less in such situations but simply present the statistical connection between mortality rates and potential negligence.

individuals realize the “optimal scale of activity” that balances risk-taking activity with its true cost.<sup>182</sup>

Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit argues in favor of the collateral source rule out of overall efficiency.<sup>183</sup> Judge Posner provides a helpful account for why law and economics ultimately favor the common law rule due to efficiency:

If an accident insurance policy entitles me to receive \$10,000 for a certain kind of accidental injury and I sustain that injury in an accident in which the injurer is negligent, I can both claim the \$10,000 from the insurance company and obtain full damages (which, let us assume, are \$10,000) from the injurer, provided I did not agree to assign my tort rights to the insurer (subrogation). To permit the defendant to set up my insurance policy as a bar to the action would result in under-deterrence. The economic cost of the accident, however defrayed, is \$10,000, and if the judgment against him is zero, his incentive to spend up to \$10,000 (discounted by the probability of occurrence) to prevent a similar accident in the future will be reduced. Less obviously, the double recovery is not a windfall to me. I bought the insurance policy at a price presumably equal to the expected cost of my injury plus the cost of writing the policy. The company could if it wished have expected from coverage accidents in which the injurer was liable to me for the cost of the injury, or it could have required me to assign to it any legal rights that I might have arising from an accident.<sup>184</sup>

A balancing of the economic factors described above—a lack of under-deterrence in the tortfeasor and an injured party’s investment in insurance—reflect the practicality behind maintaining the rule, the sense in which these justifications have not weakened amid a changing society.<sup>185</sup> The common law collateral source rule remains a crucial rule of both tort and evidence law and remains a necessary doctrine in order to best promote the goals of Wisconsin law. The rationales that underlie the rule, as well as the economic reasoning that supports it, continue to outweigh any of its shortcomings. It is because of these rationales and

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182. Christian D. Saine, Note, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 CASE W. RES. L. REV. 1075, 1085 (1997). “Optimal scale of activity” can be described as meaning the balance of the marginal social cost and marginal social benefit. Keith N. Hylton, *A Duty in Tort Law: An Economic Approach*, 75 FORDHAM L. REV. 1501, 1507 (2006).

183. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 200–04 (6th ed. 2003).

184. *Id.* at 200.

185. See discussion *supra* notes 183–84.

economic incentives that support Wisconsin adherence to its traditional, common law form and ignore any calls for its erosion or abrogation.

*B. Effect of Health Care Reform on the Collateral Source Rule*

Much has been written in recent years on the potential effect that recent healthcare reform may have on the future landscape of tort recovery and the collateral source rule. Passage at the federal level of the Patient Protection and Affordable Care Act (ACA) in 2010<sup>186</sup> followed on the heels of legislative reforms in states such as Massachusetts, Hawaii, Maine, and Washington, with each policy imposing similar mechanisms aiming to provide healthcare coverage to all residents.<sup>187</sup> Stated very generally, the ACA serves to provide all Americans with health insurance in two major ways. First, by forcing the expansion of employer-based policies, as employers are compelled under the law to offer health insurance plans to individuals working full-time hours for companies employing fifty or more individuals.<sup>188</sup> Second, the ACA next attempts to provide universal health care through a mandate that all individuals possess insurance coverage.<sup>189</sup> Aside from certain exceptions, should an individual fail to obtain health insurance he or she will be subjected to a financial penalty.<sup>190</sup>

Many believe these initiatives and reforms have the potential to completely undermine the core rationales of the collateral source rule—mainly due to the fact that the rule originated at a time when few to no plaintiffs had health insurance,<sup>191</sup> and these reforms rely on the ambitious goal of all potential plaintiffs being insured.<sup>192</sup> One rationale of the rule that could be undermined is the incentive that it gives individuals to purchase insurance and the rewarding of a plaintiff's foresight for doing so.<sup>193</sup> Those supporting the position that healthcare reform undermines

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186. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 §§ 1501–11 (2010) (codified at 42 U.S.C. § 18091 (Supp. V 2011)) [hereinafter Affordable Care Act].

187. See Roger Stark, *What Works and What Doesn't: A Review of Health Care Reform in the States*, WASH. POL'Y CTR. FOR HEALTHCARE 2–3 (Aug. 2008), <https://www.washingtonpolicy.org/sites/default/files/StateHealthCareReforms.pdf> [http://perma.cc/UJY8-BLUV].

188. See 26 U.S.C. § 4980H (2012).

189. See Affordable Care Act, §§ 1501–11.

190. See 26 U.S.C. § 5000A(b) (2012).

191. See Levin, *supra* note 14, at 742.

192. See Affordable Care Act, §§ 1501–11.

193. See Todd, *supra* note 11, at 982.

the justifications of the rule would likely argue that because of the individual mandate in the ACA, the government provides the incentive to purchase insurance by imposing a financial penalty on individuals who fail to do so.<sup>194</sup> Additionally, if the government compels every potential plaintiff to purchase health insurance or forces his or her employer to provide it, it may be argued that no reward for any foresight would be in order.

Despite these arguments, the rationales of incentive and rewarding foresight still serve as adequate support to the collateral source rule in the face of healthcare reform. The individual mandate requiring health insurance has a significant gap because Americans still have the individual choice of not purchasing health insurance and facing a relatively small penalty.<sup>195</sup> It is far from known today just how successful the reform will actually be at reaching its ultimate goal of having all Americans covered with health insurance. The more Americans that choose to face the penalty in lieu of coverage, the more justified maintenance of the common law collateral source rule would be. Additionally, there are several other concerns that remain to be settled in regard to the ACA, such as how much job loss, if any, will result from the employer mandate due to employers seeking to avoid employing fifty full-time workers, thus sidestepping the ACA's requirement of employers with fifty or more full-time workers to provide insurance to workers and leaving individuals to again face the choice of either obtaining coverage or facing the penalty.<sup>196</sup>

The ACA and other reforms also fail to undermine the support to the collateral source rule that favors rewarding the contract-relationship between the insured and his or her insurer. Opponents of the rule reason that because health insurance will be compulsory, the relationship

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194. See 26 U.S.C. § 5000A(a)–(b) (2012).

195. STAFF OF THE WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 89 (2010) (“The relatively small penalty and the prospect of loose enforcement create a big potential problem: If many younger and healthier people decide to pay the fine instead of buying coverage, rates will increase for those who do buy it.”).

196. Glenn Kessler, *Is Obamacare a 'job killer'?*, WASH. POST, Feb. 26, 2014, <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/02/26/is-obamacare-a-job-killer/> [<http://perma.cc/EM56-PZ27>] (concluding that the jury is still out on the overall effect that the looming employer-mandate will have on job loss, as well as the effect it has already had as employers prepare for the 2015 and 2016 impositions of the policy, depending on the size of the employer).

between the parties takes on far less meaning.<sup>197</sup> However, even if the healthcare reforms are hugely successful, this theory ultimately fails because it ignores an important aspect of this new healthcare landscape: Individuals are still able to contract for the best possible coverage or plan for themselves.<sup>198</sup> Such effort on the part of the individual to find him or herself the best coverage available can still be rewarded under the collateral source rule, even in light of healthcare reform, as one form of insurance bargained for can certainly provide greater financial outcomes for a plaintiff, be it through actual coverage, lower premium payments, or some other result.

Finally, the deterrence rationale remains a major justification of the collateral source rule because the ACA makes little effort to deter negligent behavior on behalf of tortfeasors.<sup>199</sup> Eroding the collateral source rule reduces the defendant's liability and allows the defendant to escape the full cost of harming a victim. If everyone is insured and the collateral source rule is abrogated to allow only for the amount of medical expenses actually paid, tortfeasors would not be deterred in the slightest from any risk-taking behavior. Ultimately, recent healthcare reform will do little to undermine the most significant rationales of the common law collateral source rule.

## VII. CONCLUSION

After exploring the collateral source rule—its role, common criticisms, core rationales, the available alternatives, and Wisconsin's own treatment of it—this Comment concludes Wisconsin was right in rejecting the 2013 bill and should reject any similar legislation that is again proposed in the coming session to ensure that the state maintain its adherence to the common law form of the rule. While the primary criticisms about the shortcomings of the rule are valid, these negatives pale in comparison to the strong rationales that continue to firmly support the rule today. The rationales of restoration, unjust enrichment, mitigation, and deterrence help to advance the greater goals of tort law while at the same time rewarding a plaintiff's foresight in seeking out a collateral source and respecting his or her right to contract.

An argument often put forth by the rule's opponents is that because the rule came about during a time when most of the population lacked

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197. Todd, *supra* note 11, at 983.

198. See 26 U.S.C. § 5000A(f) (2012). The ACA does not preclude such contracting.

199. Todd, *supra* note 11, at 986.

health insurance coverage, the rule is no longer necessary because a majority of the country now has health insurance, as well as recent healthcare reform.<sup>200</sup> Because recent healthcare reform has the goal of universal coverage of all Americans, it is argued that the many rationales of the common law collateral source rule are now undermined.<sup>201</sup> The changes in the healthcare landscape, however, greatly overlook the rationales that underlie the rule and fail to accept the reality that the changes in the healthcare market do little to degrade those rationales. They remain intact and will continue to advance the goals of tort law should the traditional form of the collateral source rule endure any efforts at tort reform in Wisconsin.

The Supreme Court of Wisconsin has consistently adhered to the common law rule, doing so throughout many different decades and with many different compositions of justices on the court. Throughout this entire time, the court and the state legislature have not been ignorant to the reforms to the collateral source rule that other jurisdictions across the country have enacted. Wisconsin's government has instead rejected any such change, ultimately believing that adhering to a strong form of the rule is what is best for the state and its citizens. Such a position on the issue must resist any change in the future because, by doing so, the goals of Wisconsin law will continue to be advanced. In order to best protect injured plaintiffs, their rights, and the many goals of the law, Wisconsin should continue its adherence to the common law collateral source rule.

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200. *See supra* Part VI.B.

201. *See id.*

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