RHETORIC, REALITY & THE WRONGFUL ABROGATION OF THE COLLATERAL SOURCE RULE IN PERSONAL INJURY CASES.

Lori A Roberts

Available at: https://works.bepress.com/lori_roberts/2/

Lori A. Roberts*

Abstract:

There are few certainties in litigation, but one that any injured plaintiff with health care insurance can rely on is that a defendant-tortfeasor will argue that the plaintiff’s health care bills are “illusory” and that the plaintiff will recover a “windfall” if he is allowed to recover the full amount of those bills as economic damages. The issue addressed in this Article, whether the difference between the billed rate for medical care and the actual amount paid by a plaintiff’s insurer is a collateral source benefit, has garnered much national attention recently as nearly every state’s judiciary and legislature vie to create law that will govern their jurisdiction. Much of the case law and legislation cited in this Article has been published within the last year and showcases the considerable disparity among the states regarding a plaintiff’s ability to recover the amount billed by his health care provider in personal injury cases. This Article highlights that despite its inaccuracy, framing an insured plaintiff’s medical bills as “illusory” and a plaintiff’s recovery of that amount as a “windfall” gain has become a pervasive rhetorical device advanced by defendant tortfeasors – and insurance liability carriers – to influence courts and legislatures to abolish the collateral source rule in personal injury cases. This Article demonstrates that while application of the collateral source rule is still mostly assured in the absence of legislation directing the judiciary otherwise, the unsavory social and legal implications of the labels “windfall” and “illusory” are embedded in many court opinions. States’ legislatures are influenced by this same rhetoric to pass legislation abrogating the collateral source rule in personal injury cases, often responding directly to the policy concerns of illusory medical bills and windfall gains that are highlighted in court opinions. The result is that a body of tort legislation abrogating the collateral source rule is being created based on the implications associated with these labels, rather than reality.

Word count, including footnotes: 16,989

INTRODUCTION

A lie told enough times becomes the truth
- Vladimir Lenin

There are few certainties in litigation, but one that any injured plaintiff with health care insurance can rely on is that a defendant tortfeasor will argue that the plaintiff’s health care bills are “illusory” and that the plaintiff will recover a “windfall” if he is allowed to recover the full amount of those bills as economic damages. This strategy is repeated so often, it’s cliché:
Ms. Lopez slipped and fell at a grocery store, suffering various injuries. Her medical bills totaled $59,700. Ms. Lopez’s health care providers were contractually bound to accept significantly reduced amounts by her health care insurer as full payment and satisfaction for those bills. Accordingly, the health care providers “wrote-off” approximately $42,000 and the health care insurer paid the remaining balance of $16,837. Before trial, the defendant tortfeasor moved in limine to prohibit Ms. Lopez from presenting evidence of the amount of the medical bills above what was actually paid by her health care insurer, and accepted by the healthcare providers in satisfaction of billings. The defendant tortfeasor argued that Ms. Lopez should only be able to present evidence of the $16,837 because the medical bills reflecting $59,700 “had nothing to do with anything because they were largely illusory or phantom” since neither she nor her medical insurer actually had to pay them. The defendant tortfeasor argued that recovery of the $59,700 would be a “windfall” gain to Ms. Lopez.

Like many states without legislation on point, the court in Lopez reasoned that the negotiated rate differential – the difference between the billed rate for medical care and the actual amount paid by the insurer as negotiated between the medical provider and the insurer - was a collateral source benefit, and applied the common law collateral source rule. Specifically, the Arizona Court of Appeals reasoned that the collateral source rule was well established, and without legislative modification it was bound to apply the doctrine. In doing so, the court permitted Ms. Lopez to recover the entire amount billed to her by her health care providers as economic damages, despite the defendant tortfeasor’s characterization of the medical bills as

---

* Associate Professor of Law at Western State University College of Law. The Author wishes to extend deep gratitude for helpful comments and feedback on early versions of this Article from her colleagues, Dean Susan Etta Keller, Professor Paula Manning and Professor Edith Warkentine. The Author also wishes to acknowledge the outstanding research assistance of reference librarian, Scott Frey.

2 Id. at 207; Restatement (Second) of Torts: Apportionment of Liability § 920A (1979) (the collateral source rule provides that “[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.”); See infra n. 52-55 and accompanying text.
3 Lopez, 212 Ariz. at 208.
illusory and the plaintiff’s recovery of that amount as a windfall. While the Arizona court did not adopt the defendant’s characterizations of the plaintiff’s medical bills as “illusory” or the plaintiff’s recovery of that amount as a “windfall,” the skillful rhetoric, through repetition to courts and legislatures, is transforming these inaccurate labels into facts in many other states.

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

Like Arizona, some jurisdictions consider the negotiated rate differential to be a collateral source benefit and apply the common law collateral source rule. In some of these states the

\[4\] Id.

\[5\] Some, but not all, states distinguish policy reasons for applying the collateral source rule to the negotiated rate differential in circumstances where the plaintiff’s insurance was private health care insurance versus Medicaid or a state-welfare type insurance. See generally 77 A.L.R.3d 366 (1977). This Article is limited to analyzing the application of the collateral source rule to cases where the injured plaintiff’s medical bills were satisfied by private health insurance paid for by the plaintiff or by a third party on behalf of the plaintiff, not the tortfeasor, thus contractually incurring personal liability for her healthcare providers charges. In particular, this Article only addresses the calculation of that portion of a plaintiff’s economic damages that are covered by plaintiff’s private health insurance. This Article does not address instances where Medicaid or other welfare type insurance satisfied the plaintiff’s health care bills, where a beneficiary incurs no personal liability for charges to the health care plan. For a discussion regarding policy implications involved in application of the collateral source rule where plaintiff is insured by Medicaid or a state-welfare insurance, see Guillermo Gabriel Zorogastua, Comment, Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs, 55 U. KAN. L. REV. 463 (2007)
The legislature has confirmed the applicability of the collateral source rule to these medical bills that were satisfied by write-offs and payments by plaintiff’s private health insurance in personal injury cases. In other states however, Ms. Lopez would have been limited to recovery of only $16,837 as economic damages. In these states, the legislatures have passed “tort reform” legislation that has modified or abolished the collateral source rule in personal injury cases and limited economic damages only to the amount the medical care provider accepted from plaintiff’s health care insurer as satisfaction for the medical bills. A review of these legislative hearings reveals a recurring effort by liability insurance carriers to influence the legislatures to consider actual medical bills as misleading assessments of a plaintiff’s damages, and to recognize economic recovery in excess of a health care insurer’s payment as a windfall. While persuasion though skillful language choices is a routine and revered tool in the practice of law, when, through such use and repetition misleading rhetoric is relied upon by courts and legislatures as fact, the resulting rule of law is flawed.

---

6 The term “tort reform” itself has been subject to debate. See e.g. Kelner, Joshua, Anatomy of an Image: Unpacking the Case for Tort Reform, 31 U. DAYTON L. REV. 243 (2006) (“tort reform” is a misnomer); See also Tort Deform, The Civil Justice Defense Blog, http://www.Tortdeform.com (accessed August 1, 2011) (blog "confronts and transcends the arguments put forth by the tort 'reform' movement, working to ensure that all Americans can access the courts.").

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

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

Part III of this Article examines the tension between the legislature and the judiciary regarding the application of the collateral source rule to a plaintiff’s recovery of the negotiated rate differential in personal injury cases. What emerges is evidence that a body of law is being created based in part on the implications associated with these labels, rather than reality. This rhetoric is influencing courts and legislatures to wrongly abrogate the collateral source rule as it applies in personal injury cases. I conclude that the negotiated rate differential is a collateral
source benefit to a privately insured plaintiff and with application of the collateral source rule, economic damages including the “reasonable value of medical services” should be calculated by the amount charged by the health care provider. Neither the judiciary nor the legislature should abolish the collateral source rule in this context based on false notions that the medical bills are “illusory” or that plaintiffs will be recovering “windfalls.” This conclusion acknowledges the need for legislative and judicial safeguards to ensure that health care providers are not engaging in fraudulent pricing schemes aimed at gouging liability insurers, and is also based on an appreciation of the realities of personal injury recovery. This conclusion also recognizes that persuasion though skillful language choice is a common and respected practice among lawyers. However, when inflammatory labels are repeated so regularly that they gain a legitimacy that is relied upon by courts and legislatures, the terminology should be re-examined to ensure that rules of law are not, as here, being supported on rhetoric alone.

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

As part of a plaintiff’s economic damages in a personal injury case, an injured plaintiff is generally entitled to recover for the “reasonable value” of the medical services incurred by the plaintiff due to defendant’s tortuous conduct.⁸ There is considerable disparity, however, between jurisdictions regarding how to calculate the reasonable value of medical services when a plaintiff’s private health care insurer satisfies plaintiff’s medical bills by negotiating discounts

⁸ See AM. JUR. 2d Damages § 396, at 358 (2003) (a plaintiff is entitled to recover both economic and non-economic damages.)
and then paying the medical care provider only a small fraction of the actual billed cost. In the absence of contrary legislation, many states consider this negotiated rate differential to be a collateral source benefit and apply the common law collateral source rule, allowing the plaintiff to recover the amount billed by the health care provider without regard to what the plaintiff’s health insurer actually paid. A few states applying the common law collateral source rule do not consider the negotiated rate differential to be a collateral source benefit, and therefore, even with application of the collateral source rule still technically intact, in those jurisdictions a plaintiff is only able to recover the amount paid by his health insurer to satisfy the medical bills. Other states have legislatively modified the collateral source rule, or abolished it all together. The states that have modified the collateral source rule have done so in a myriad of ways, resulting in numerous versions of its practical application. For example, in some jurisdictions the collateral source doctrine has been altered exclusively in cases of medical

10 Id.
11 See e.g. Fischer v. Steffen, 2011 WI 34 (ruling that a plaintiff is not able to recover the total amount billed by the insurer, but rather only the amount actually paid by the insurer and accepted by the health care provider as satisfaction of those medical bills.)
12 See Infra n. 96 and accompanying text.
13 See e.g. ALASKA STAT. § 09.17.070 modified the common-law collateral source rule by allowing the court to reduce an injured party's jury award to reflect un-subrogated collateral source payments in certain situations, thereby limiting the circumstances in which a victim can receive double recovery while enhancing the chances that a tortfeasor may not be held fully accountable; New York's C.P.L.R. § 4545(a)-(c) is applicable to all actions for personal injury or wrongful death and requires a verdict to be reduced where any collateral source payments have been made. Only life insurance, Medicare and collateral sources entitled by law to a lien against the plaintiff's recovery are specifically excluded; New Jersey's collateral source statute, N.J. STAT. ANN. § 2A:15-97, permits the court to deduct any “duplicative award” from a plaintiff's recovery.
malpractice.\textsuperscript{14} Some states have modified the doctrine in all civil actions,\textsuperscript{15} and others have modified or abolished it specifically in actions for personal injury.\textsuperscript{16} And while some jurisdictions limit the admissibility of the medical bills, others permit the bills into evidence but compel a post-trial set-off against an award of compensatory damages for the collateral source payment.\textsuperscript{17} Still others allow both the amount paid and the amount billed into evidence allowing a jury to decide the reasonable value of medical services.\textsuperscript{18} With all of these variations, the one unifying theme advanced by defendants and insurance liability carriers in nearly every

\textsuperscript{14} See e.g., ALA. CODE § 6-5-545 (2008); ARIZ. REV. STAT. ANN. § 12-565 (2007); CAL. CIV. CODE § 3333.1 (2008); DEL. CODE ANN. TIT. 18, § 6862 (2008); MASS. GEN. LAWS CH. 231, § 60G (2008); ME. REV. STAT. ANN. TIT. 24, § 2906 (2007); NEB. REV. STAT. § 44-2819 (2007); OKLA. STAT. TIT. 63, § 1-1708.1D (2007); 40 PA. CONS. STAT. § 1303.508 (2007); R.I. GEN. LAWS § 9-19-34.1 (2007); S.D. CODIFIED LAWS § 21-3-12 (2008); UTAH CODE ANN. 78-14-4.5 (2007); WIS. STAT. § 893.55 (2007); See James J. Watson, Annotation, Validity and Construction of State Statute Abrogating Collateral Source Rule As To Medical Malpractice Actions 74 A.L.R. 4th 32 (1989) (collection and analysis of state and federal cases that discuss the construction and validity of state statutes that abrogate the collateral source rule in medical malpractice lawsuits.)

\textsuperscript{15} ALASKA STAT. § 9.17.070 (MICHIE 2000); MINN. STAT. § 548.36 (2000); N.D. CENT. CODE § 32-03.2-06 (2001).

\textsuperscript{16} COLO. REV. STAT. 13-21-111.6 (1997); CONN. GEN. STAT. 52-225A (1991); FLA. STAT. ANN. 768.76 (WEST 1994); IDAHO CODE 6-1606 (MICHIE 1998); IND. CODE 34-44-1-2 (1998); IOWA CODE 668.14 (1998); MICH. COMP. LAWS 600.6303 (2000); MONT. CODE ANN. 27-1-308 (2000); N.J. STAT. ANN. 2A:15-97 (West 2000); N.Y. C.P.L.R. 4545(c); See also Jamie L. Wershbale, Tort Reform in America: Abrogating the Collateral Source Rule Across the States, 75 DEF. COUNS. J. 346 (2008) (“While current modifications to the collateral source rule vary nationwide, the reforms so far apply primarily to medical malpractice actions. Yet, the underlying rationale for reforming the collateral source rule--preventing plaintiff windfalls and decreasing insurance rates--applies in all personal injury actions. As the rationale is valid in all tort actions, it is difficult to understand why legislatures and courts across the nation have yet to abolish application of the collateral source rule across the board…. Given the current state of the law and insurance rates, it appears that the ultimate logical conclusion is complete abrogation of the collateral source rule in all tort actions.”)

\textsuperscript{17} See e.g. Goble v. Frohman, 901 So. 2d 830, 832-33 (Fla 2005); Slack v. Kelleher, 140 Idaho 916, 104 P.3d 958, 967 (Idaho 2004); NEB. REV. STAT. ANN. § 44-2819 (West 1976) (evidence of collateral source payments are not admissible in personal injury action, but such payments may be taken as a credit against any judgment rendered.)

\textsuperscript{18} See Robinson v. Bates, 112 Ohio St. 3d 17 (2006) (holding that the jury may determine that the reasonable value of medical services is the amount originally billed, the amount accepted as payment, or some amount in between).
jurisdiction that has addressed this issue – either through judicial application of the common law or legislative modification – is the rhetoric of the “illusory” nature of medical bills and “windfall” gains by plaintiffs and when a plaintiff has private health insurance.

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

A. ILLUSIONS AND WINDFALLS

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

- George W. Bush, Rochester, N.Y., May 24, 2005

Panic over perceived frivolous lawsuits reached a feverish pitch in the 1980s and spawned tort reform legislation nationwide in various forms, including limits on punitive damages, caps on attorneys’ fees, non-economic damages and even economic damages.19 Much

---

19 See Geoff Boehm, Debunking Medical Malpractice Myths: Unraveling the False Premises Behind “Tort Reform”, 5 YALE J. HEALTH POL’Y L. & ETHICS 357, 362-63 (2005) (addressing the unfounded rhetoric of lobbyists in medical malpractice tort reform legislation and arguing that
of this legislation was directed at medical malpractice cases and was fueled by society’s concern regarding increasing health care costs and an out of control legal system with a perceived proliferation of “frivolous” litigation and accompanying mega-jury awards that was driving doctors from the practice of medicine.\textsuperscript{20} The push for tort reform was primarily advanced by insurance liability carriers seeking to limit their financial exposure to liability.\textsuperscript{21} In retrospect, many studies have demonstrated that the rhetoric was unfounded.\textsuperscript{22} Such legislation has saved insurance carriers billions of dollars, arguably little of which has been passed along to the public.\textsuperscript{23}

A more recent trend has been to expand tort reform to include the abrogation of the collateral source rule in personal injury cases. As shown below, the labels “windfall” and “illusory” are powerful and when attached to a financial recovery, offer strong negative connotations that influence courts and legislatures. Defendant tortfeasors, and the insurance

\textsuperscript{20} Id.; See also Five Myths About Medical Negligence, November 2009 www.justice.org/medicalnegligence.
\textsuperscript{21} Id.
\textsuperscript{22} See Boehm, supra n. 19 at 9 (discussing the unfounded rhetoric of tort reform lobbyists.)
\textsuperscript{23} Id. (demonstrating that tort reform in the medical malpractice arena has failed to bring down insurance rates and that insurance companies themselves never promised a any savings would be passed along to the public), citing J. Robert Hunter & Joanne Doroshow, CJ&D, \textit{Premium Deceit: The Failure of “Tort Reform” to Cut Insurance Prices} (2002), http://insurance-reform.org/PremiumDeceit.pdf (accessed August 1, 2011); See also Katherine Baicker and Amitabh Chandra, \textit{Defensive Medicine and Disappearing Doctors}, 28 \textit{REGULATION}, 24 (Fall 2005) (finding that "when the number or size of malpractice payments rises, there is very little accompanying increase in the malpractice premiums paid by physicians." " A closer look at available data suggests that some of the rhetoric surrounding this debate may be misleading. First, increases in malpractice premiums do not seem to be the driving force behind increases in premiums.")
liability carriers paying the damages, advance this rhetoric to take advantage of an injured plaintiff’s foresight and prudence in carrying private health insurance and insert themselves as the beneficiary of plaintiff’s private contractual relationship with a third party, the plaintiff’s health insurance company.

A windfall is defined as receipt of financial gain that was not expected and not the result of something the recipient did. Finding a $100 bill while walking down the street would be a classic example. In contrast, a marketplace gain by freely negotiating parties is typically not a windfall, as the term is properly used. The label however can be attached to any financial gain, thereby associating negative connotations. Indeed, labeling a financial gain as a windfall is inflammatory; it paints the pecuniary interest as undeserved and undesirable, evoking feelings of

24 The New American Webster Dictionary, 3d Ed. 1995; See also Eric Kades, Windfalls, 108 YALE L.J. 1489 (1999) (“In common usage, a windfall is a "casual or unexpected acquisition or advantage," or an "unexpectedly large or unforeseen profit."’) Kades also notes the word’s origin stems from medieval England “when commoners were forbidden to chop down trees for fuel. However, if a strong wind broke off branches or blew down trees, the debris was a lucky and legitimate find” citing William Morris & Mary Morris, Morris Dictionary of Word and Phrase Origins, 605 (1977).

25 Christine Hurt, The Windfall Myth, GEO. J. L. & PUB. POL., forthcoming (University of Illinois Law & Economics Research Paper No. LE09-02, 2009). Professor Hurt’s taxonomy of windfalls in popular and legal discourse classifies various types of economic gains and “argues against the temptation to label private gains as windfalls that are subject to recapture,” concluding that this often reflects a misunderstanding of the term and a misunderstanding of the appropriateness of law to “redistribute luck by redistributing windfalls.” She identifies various categories where this term is used in both legal discourse and poplar culture, including Classic Windfalls (a “benefit that is not earned, but not prohibited by law, such as treasure falling from the sky”) Wrongful Windfalls (a “gain not earned by either the provision of capital or services or warranted to compensate for a loss or harm… fraudulent misrepresentation, mistake or unconscionably”), Gratuitous Windfalls (where a “payor intends a benefit upon the recipient, although the recipient did not provide any type of consideration), Illegal Windfalls (a “willful increase to wealth that violate criminal or civil laws) and Earned Windfalls (an economic benefit that is the return on some action by the beneficiary). Professor Hurt argues that the term Earned Windfall, a return on effort or investment, is not a windfall at all, but rather are gains flowing from contract and property right, but due to popular contempt is mischaracterized as an Illegal or Wrongful Windfall.
envy and greed.\textsuperscript{26} Moreover, the societal assumption is that if one party is receiving a windfall, another party is suffering an unjust financial loss and therefore, the windfall should be duly abolished.\textsuperscript{27} Due to these negative connotations, a benefit from a legitimate and useful investment, particularly one such as private medical insurance that society wants to encourage citizens to purchase, should not be arbitrarily termed a windfall.

The implications of misusing this label in legal discourse are significant because “windfall” gains are disfavored in our legal system.\textsuperscript{28} When laws are not in place to prevent perceived windfalls, regulators often step in to “correct this loophole by promulgating new laws tailored to the situation that produced the unlawful windfall.”\textsuperscript{29} Thus, classifying any financial recovery as a windfall, even when it is not, will prompt the legislature to respond.\textsuperscript{30} For example, a “windfall profit” is “a profit that occurs suddenly as a result of an event not controlled by the company or person realizing the gain from the event.”\textsuperscript{31} This type of profit, often the result of unforeseen circumstances in the market, has prompted legislators to enact laws to tax these profits at a higher rate, or confiscate them all together.\textsuperscript{32} Similarly, punitive damages are sometimes termed a windfall gain\textsuperscript{33}, and while they are accepted in tort law as a necessary

\begin{footnotes}
\item[26] \textit{Id.}
\item[27] \textit{Id.} (comically noting that “[o]nce an economic gain is spotted that seems suspiciously large or too easily earned, then like the ‘pod people’ in Invasion of the Body Snatchers, the observer must point and alert the public that this ‘windfall’ gain deviates from an acceptable baseline.”)
\item[28] \textit{Id.; See also} Kades, supra n. 24 (exploring how courts have “used and abused the windfall label. . . courts frequently find windfalls where none exists by overlooking important ways in which parties make plans”)
\item[29] \textit{Hurt, supra} n. 25.
\item[30] \textit{Id.}
\item[31] \textit{Id.}
\item[32] \textit{Id.}
\item[33] Catherine M. Sharkey, \textit{Punitive Damages as Societal Damages }113 \textit{Yale L. J.} 347 (2003).
\end{footnotes}
consequence for deterrence and punishment, many state statutes have enacted legislation to cap these types of damages.\textsuperscript{34}

One source of society’s “outrage, indignation and envy” associated with a windfall that prompts a legislative response is the notion that windfalls are a zero-sum game; if one party is receiving a windfall then another party must be assuming an excess loss.\textsuperscript{35} This perception that a windfall is a zero-sum calculation is particularly biting when society is perceived to be on the paying end.\textsuperscript{36} Thus, regardless of the arguable economic efficacy of the collateral source rule\textsuperscript{37},

\begin{footnotesize}
\textsuperscript{34} Id.; Daniel Kahneman, David Schkade, Cass R. Sunstein, \textit{Assessing Punitive Damages}, 107 Yale L. J. 2071 (1998); \textit{See also} American Tort Reform Association, http://www.atra.org/show/7343 (accessed August 1, 2011) (states with punitive damage limits.)

\textsuperscript{35} Hurt, supra n. 25.

\textsuperscript{36} Furthering the perception that society at large is paying for unjustifiable financial gains that could be reduced with the abolition of the collateral source rule, some financial studies support this view. \textit{See} Manfred H. Ledford, Ph.D, \textit{A Suggested Role for Collateral Sources of Indemnification in Tort Reform Legislation}, \textit{Business Law Brief} (Fall 2005) (explaining a micro-economic model that demonstrates that collateral source rules are economically inefficient, with “claimants receiving windfalls at the expense of the rest of society.” His model analyzes un-subrogated collateral source benefits, specifically life insurance policies paid to surviving claimants in wrongful death cases, and suggests that permitting these benefits to offset a claimant’s award would result in “a more equitable and economically efficient solution.” His analysis suggests that a plaintiff should not even be permitted to recover the expenses he incurred to obtain the benefits, such as policy premiums. While acknowledging the apparent inequity since “had the premiums not been paid, there would have been more disposable income available to the plaintiff…[and] by not recognizing this type of expense, decedent/plaintiff would appear to be penalized for the responsible act of providing such protection …”, he concludes that it does “just the opposite in producing a less than equitable solution for society in general.” He argues a benefit is insured to plaintiff simply by the “sense of security [in] owning the benefit.”); \textit{But see} 2 Dan B. Dobbs, \textit{Law of Remedies} § 8.6(3) at 496 (2d ed. 1993) (“If the collateral source rule were abolished, the plaintiff would have paid for security and not for the opportunity for double recovery. He has paid for more only because the law, by allowing for double recovery, in effect requires him to pay for more.”)


\end{footnotesize}
where the party assuming the excess loss is – or is perceived to be - the consuming public, the outcry for a legislative response is particularly strong.\textsuperscript{38}

Defense litigants and lobbyists advocating for abolition of the collateral source rule in personal injury actions also often characterize the amount billed to a plaintiff by a medical care provider as “illusory”\textsuperscript{39}; they are “phantom” or “fantasy”\textsuperscript{40} bills by medical care providers. The obvious connotation is that these medical bills are fictional and have no consequences in reality, except seemingly to gouge the liability carriers. The term assumes that health care providers’ contracts with patients – the contract every patient signs while they sit in the doctors waiting room, prior to seeing the doctor, confirming that they are personally responsible for all bills, regardless of insurance - are unenforceable and simply a front for a fraud on liability carriers in case of litigation involving the patient and a tortfeasor. Using this term to characterize a plaintiff’s health care bill takes advantage of society’s acute outrage over medical care costs and exploits the extent of mistrust associated with health care costs and billing.\textsuperscript{41}

\textsuperscript{38} Hurt, supra n. 25.
\textsuperscript{39} See generally infra n. 51-126 and accompanying text.
\textsuperscript{40} Remsza v. Midwest Security Insurance Co. (Wis. Ct. App. 2006) (in this unpublished Wisconsin Court of Appeals opinion, the court noted the defendant’s contention “that the billed amounts were “fantasy billing[s]” and therefore the amount actually paid was admissible to allow the jury to determine the reasonable value of the medical services); This same terminology was repeated the following year in Leitinger v. Dbart, Inc., (2007) (holding that the collateral source rule prohibited a defendant in a personal injury action from introducing evidence of the amount actually paid by the plaintiff’s health care insurer to prove the reasonable value of the medical treatment, the court noted defendant’s argument that “the amounts billed by health care providers are “fantasy,” “arbitrary,” and “random” figures that have no correlation to the reasonable value of the medical services actually provided.”)
\textsuperscript{41} Doug Masson, Masson’s Blog, A Citizen’s Guide of Indiana Law, HB 1255 – Collateral Source Payments, http://www.masson.us/blog/ (accessed August 1, 2011) (blogging that “the sticker price on a medical bill is often as reliable an indicator of its actual price as the sticker price on a car.”)
Defined in general usage, the term illusory means an “erroneous perception of reality; An erroneous concept or belief; The condition of being deceived by a false perception or belief.” In legal discourse, it is often used to describe an unenforceable or unlawful action, often based on deceit or fraud. For example, an illusory promise is one that courts will not enforce under contract principles, and an illusory contract is one with no consideration. The Illusory-Transfer Doctrine is a property principle where an inter vivos gift is unenforceable under the law if the donor retains so much control that there is no good-faith intent to relinquish the transferred property during the conveyor’s lifetime. In insurance law, the Doctrine of Illusory coverage requires an insurance policy to be interpreted so that it is not merely a delusion to the insured. An illusory trust refers to an arrangement that gives the outward impression of being a trust, but is not in fact so because of powers retained in the settlor. In all, the illusory label connotes a transaction that is not real and should not be upheld by the law.

---

42 See generally Lynch v. State, 2 So. 3d 47, 61 (Fla. 2008) (court explained, through dicta, that consent that is induced through fraud or deceit is illusory as a matter of law); See also U.S. v. Horton, 334 F. 2d 153, 155 (Conn. 1964) (explaining that if a prosecutor induces a guilty plea by an illusory promise, the conviction would not stand because it would have been procured by deceit).


44 See Black’s Law Dictionary 370 (9th ed. 2009) (defined illusory contract as “[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation”).

45 See e.g. Newman v. Dore, 275 N.Y. 371 (N.Y. 1937) (court held that the deceased's trust conveyance was not valid because it was illusory; the deceased's never intended to divest himself of his property and the evidence illustrated that he was unwilling to divest himself of his property even when he was near death.)

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

47 Coosa River Water, Sewer & Fire Protection Authority v. South Trust Bank, 611 So.2d 1058, 1062 (Ala.1993) (court held “a settlor may retain powers over the administration of the trust, but
B. EVIDENCE OF RHETORICAL THEMES IN CASE LAW AND LEGISLATIVE NOTES ADDRESSING RECOVERY OF THE NEGOTIATED RATE DIFFERENTIAL

With certain exceptions, benefits received by a plaintiff from a source wholly independent of the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.\textsuperscript{48} This common law doctrine, known as the collateral source rule, is largely meant to “encourage citizens to purchase and maintain insurance for personal injuries and other eventualities [and] courts consider insurance a form of investment, the benefit of which become payable regardless of any other possible source of funds.”\textsuperscript{49} The doctrine further ensures that the defendant tortfeasor will bear the full economic burden of the injury he causes and serves as an efficient deterrent for similar behavior in the future.\textsuperscript{50} As a practical matter, the collateral source doctrine serves as both a rule of evidence, prohibiting introduction at trial of any evidence of payments by a collateral source, and also a rule of damages, permitting an injured party to recover full compensatory damages from a tortfeasor irrespective of the payment of those damages by a collateral source, not the tortfeasor.\textsuperscript{51}

The Restatement (Second) of Torts reflects this doctrine, providing that payments made by a collateral source to an injured party are not credited against a tortfeasor’s liability.\textsuperscript{52} This


\textsuperscript{49} Helfend v. Southern California Rapid Transit District, 2 Cal. 3d 1 (1970)


\textsuperscript{51} Ytreberg, 77 A.L.R 3d 415.

\textsuperscript{52} \textit{RESTATEMENT (SECOND) OF TORTS: APPORTIONMENT OF LIABILITY} § 920A (1979) (the collateral source rule provides, "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.") But see \textit{RESTATEMENT (SECOND) OF TORTS},
rule applies to benefits including insurance policies, employment benefits, gratuities and social legislation benefits. Comment b to Section 920A suggests that given the choice between a “double recovery” for the plaintiff and a “windfall” to the defendant, the benefit should be afforded to the injured plaintiff. The comment provides:

“Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff’s injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself...”

§ 911 titled "Value" (the chapter discussing "Damages" seemingly limits a plaintiff’s medical damages claim to the amount the health care insurer actually paid, but only in a limited context – where a plaintiff “sues for the value of his services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages” – and is generally not applicable to a plaintiff’s recovery in a personal injury action. Comment h is titled "Value of services rendered" and states:

The measure of recovery of a person who sues for the value of his services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages, is the reasonable exchange value of the services at the time and place. This may be distinct from and may be either greater or less than an amount that would be given for harm resulting from the loss of time by the injured person. (See § 924).

... When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him. A person can recover even for an exorbitant amount that he was reasonable in paying in order to avert further harm. (See § 919).”

(emphasis added)

54 See also AM. JUR. 2d Damages § 396, at 358 (2003) (generally, "a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of medical and nursing services reasonably required by the injury," and "recovery is not necessarily limited to expenditures actually made or obligations incurred for medical care.")
This common law doctrine can, of course, be altered by statute and many states have chosen to do so with respect to its application to personal injury recovery. Regardless of whether a state has legislatively modified the collateral source rule or applies it in its common law form, the rhetorical themes of “illusory” medical bills and “windfall” recoveries are often aimed at the collateral source rule; sometimes with persuasive effect. The result is that while courts generally apply the common law collateral source rule absent statutory modification, the inaccurate rhetoric is embedded in those judicial opinions and then repeated to the legislatures as a cry for a legislative response. The rhetoric then influences the legislatures to wrongfully abrogate the application of the collateral source rule in personal injury cases.

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

Most state courts applying the common law collateral source rule hold that the negotiated rate differential is a collateral source benefit and allow injured plaintiffs to recover the full amount of reasonable medical expenses billed, including amounts written off from the bills pursuant to contractual rate reductions. As illustrated below, court opinions often evince that

---

during litigation when arguing about the amount of recoverable compensatory damages, the
defendant alluded to policy concerns regarding the “illusory” nature of medical bills or a
“windfall” recovery to plaintiff. Interestingly, plaintiffs often do not challenge the term
“windfall,” but rather respond that a “windfall” is permissible in the particular situation. 57
Plaintiff’s often cite to the Restatement (Second) of Torts to support their argument, even though
the Restatements (Second) of Torts does not even use the term “windfall” to refer to plaintiff’s
economic gain at all, but rather only uses that term to refer to defendant’s gain if the collateral

rule is founded on the principle that it is better the plaintiff receive a windfall in the form of
double recovery for his bills, than the defendant escape, in whole or in part, liability for his
wrongdoing.”); Acuar, 531 S.E. at 321-23 (“[t]o the extent that such a result provides a windfall
to the injured party, we have previously recognized that consequence and concluded that the
victim of the wrong rather than the wrongdoer should receive the windfall.”)
source rule were not applied.\textsuperscript{58} Courts rarely effectively analyze this terminology either. Instead, the rhetoric is apparently set forth by the defendants, and simply noted by the courts.\textsuperscript{59}

In some cases, courts adopt an apologetic tone in rejecting defendants’ argument regarding the illusory nature of the plaintiff’s medical bills and the windfall that will fall on plaintiffs. For example, the appellate court in Arizona noted defendants’ concerns regarding illusory medical bills and plaintiff’s windfall recovery, but held that while “[L]egislature may limit or abandon the collateral source rule in various areas, as it did in the medical malpractice arena … absent any such limiting statute or supreme court authority suggesting that the collateral source rule does not control in a personal injury situation, it is applicable.”\textsuperscript{60} In \textit{Lopez}, the court even quoted portions of the defendant tortfeasor’s motion to exclude the plaintiff’s actual medical bills and oral argument describing the “illusory” and “phantom” nature of plaintiff’s medical bills.\textsuperscript{61} The court did not adopt the terminology in its holding, but, seemingly powerless to do anything otherwise, it permitted plaintiff’s “windfall,” using that term, “because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer.”\textsuperscript{62}

\begin{thebibliography}{9}
\bibitem{58} \textit{Id.}; \textit{See also supra} n. 54-55 (Restatement (Second) of Torts § 920A, comm. b provides that given the choice between a “double recovery” for the plaintiff and a “windfall” to the defendant, the “benefit” should be afforded to the injured plaintiff.)
\bibitem{59} \textit{See e.g.} Rose v. Via Christi Health System Inc., 113 P.3d 241 (Kan 2005); Moorhead v. Crozier Chester Medical Center, 765 A.2d 786 (Ps. 2001) (noting, but not analyzing, that the portion of the plaintiff’s medical bills that were written off were “illusory” and recovery of that amount would provide plaintiff with a “windfall”)
\bibitem{60} \textit{Lopez}, 212 Ariz at 207.
\bibitem{61} \textit{Id.} at 199.
\bibitem{62} \textit{Id.} at 207 (citing \textit{Acuar v. Letourneau}, 531 S.E.2d 316, 323 (Va. 2000)}
\end{thebibliography}
Like Arizona, the state of California also has no legislation altering the common law collateral source rule in personal injury cases and until recently there were seemingly conflicting opinions from the Courts of Appeals on this issue. The California Court of Appeals in *Howell v. Hamilton Meats & Provisions, Inc.* was the first California case to analyze these negotiated rate differentials under the collateral source rule. In *Howell*, the California Court of Appeals departed from a line of California state precedent that had limited recovery of medical expenses by plaintiffs in personal injury cases to the amount actually paid by the plaintiff’s health insurance carrier based on the courts’ reasoning that the negotiated rate differential was not a collateral benefit in personal injury cases. California plaintiffs were permitted to present evidence of the amount originally billed by medical providers, and post-trial the court would reduce any medical expense award reflecting that billed amount, so long as the defendant was able to prove that the medical provider actually accepted that reduced amount. In *Howell*, the

---

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


66 Previously, the California Court of Appeals had addressed the issue without reference to the collateral source doctrine and ruled that the proper measure of damages is the amount actually paid for medical services pursuant to a contractually agreed-upon rate, rather than the face amount of original billings. See *Haniff*, 200 Cal. App. 3d at 641, *See also Nishihama*, 93 Cal. App. 4th at 306; *See also 2 Dan B. Dobbs, The Law of Torts*, § 380 (Supp. 2005), at 134 n.23.25 (“If confined to their facts, both [*Hanif* and *Moorhead*] could be interpreted narrowly. *Hanif* involved a Medi-Cal (Medicaid) public assistance plaintiff and might be limited to such cases.”)

67 *Id; See also Cabrera v. Rojas Properties Inc.*, 192 Cal. App. 4th 1319 (2011); see also *Greer v. Buzghelia*, 141 Cal. App. 4th 1150 (2006). *Howell* distinguished *Hanif*, noting that the plaintiff in *Hanif* was a Medicare beneficiary and, as such, had no legal obligation to pay the amount originally billed by the medical provider. It also refused to follow *Nishihama* by noting that *Nishihama* opinion did not conduct an analysis of the collateral source rule.

68 See *id.*
plaintiff’s automobile was hit by defendant’s truck when the truck driver made an illegal turn. At trial, the plaintiff was awarded $189,978.63 in compensatory damages, the full amount billed by her medical care providers. The defendant argued that the award should be reduced to $59,691.73 because that was the amount the plaintiff’s medical insurer actually paid. The medical care providers wrote off the remaining $130,286.90 pursuant to a negotiated contract between the medical care provider and plaintiff’s medical insurer. The trial court agreed and reduced Howell’s jury award to $59,691.73. The California Court of Appeals reversed, finding that Howell was entitled to the full-billed amount of $189,978.63. The Court of Appeals ruled that the amount of medical expenses written off by the medical providers was to be awarded to the plaintiff, affirming that the write-off was a “collateral benefit” of plaintiff’s insurance policy. The court reasoned that the amount of financial obligation for a plaintiff insured under a health care plan remains the total amount charged by the provider under its usual and customary rates, not merely the discounted amount actually paid.

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

---

70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Id. at 686.
76 Id.
77 Howell v. Hamilton Meats & Provisions, Inc., ___ Cal. 4th ___ (2011) (insert example of rhetoric from opinion when it is published.)
In this appeal, plaintiff complains that she did not receive a sufficient windfall recovery for medical expenses that she never paid and never will pay... Plaintiff seeks to use a tort injury as a profit making proposition... by arbitraging the actual cost of medical services versus a “list” price that is never paid.\

The Defendant Amici continued, characterizing plaintiff’s medical bills as illusory, irrelevant evidence:

the plaintiff should never have been allowed to introduce irrelevant evidence of inflated “prices” for medical services that were never paid or charged to her... Plaintiff’s evidence of illusory medical charges – charges never paid or to be paid by plaintiff nor anyone on her behalf...\

The Plaintiff, Howell, responded that healthcare providers are not only entitled to, but do, collect their usual and customary rates saying “the demonstrable and much publicized reality is that healthcare providers hound patients to the gates of financial Hell, including bankruptcy, for unpaid charges.” Howell did not let the “windfall” label slip by either; it reminded the court that the benefits of write-offs and pre-negotiated rates did not “fall from the sky” but rather were contracted and paid for by the plaintiff.\

Illinois also applies the common law collateral source rule, extending liability to the entire amount billed by the plaintiff’s health care providers, but the rhetoric is noted in this jurisdiction as well. For example, in Arthur v. Catour, the plaintiff sustained an injury to her leg

---

79 Id.
81 Id. at 26
while attending an auction at a farm.\(^{82}\) She incurred over $19,355.25 in medical bills for treatment of her injuries, but because of her health insurer's contractual agreements with her healthcare provider, only about $13,577.97 was required to pay off the medical bills.\(^{83}\) The court noted that "[t]he purpose of compensatory tort damages is to compensate the plaintiff for [her] injuries, not to punish defendants or bestow a windfall upon plaintiffs"\(^{84}\) and defendants argument “that because plaintiff was never obligated to pay the full amount billed, the amount paid by her insurer is the true measure of her damages.” However, in reversing the lower court, the court of appeals concluded she was not limited to recover only the amount paid by her insurer.\(^{85}\) In doing so, the court squarely addressed the issue of whether “difference between the amount charged and the amount paid was “illusory.”\(^{86}\) The court noted:

> Although "discounting" of medical bills is a common practice in modern healthcare … it is a consequence of the power wielded by those entities, such as insurance companies, employers and governmental bodies, who pay the bills. While large "consumers" of healthcare such as insurance companies can negotiate favorable rates, those who are uninsured are often charged the full, undiscounted price. \textit{In other words, simply because medical bills are often discounted does not mean that the plaintiff is not obligated to pay the billed amount.}\(^{87}\)

At least one state applying the common law collateral source has recently ruled that it does not always entitle a personal injury victim to receive medical expenses already paid by the plaintiff’s private health insurer. In \textit{Fischer v. Steffen}, a Wisconsin plaintiff sustained injuries in


\(^{83}\) Id.


\(^{85}\) Id.

\(^{86}\) Id.

\(^{87}\) Id. (emphasis added; internal citations omitted.)
a car accident.\textsuperscript{88} The plaintiff’s insurance policy paid the policy limit of $10,000 to the plaintiff for medical expenses and waived it’s right to subrogation.\textsuperscript{89} At trial, the plaintiff was awarded $21,000 for pain and suffering, as well as $12,157 for reasonable medical expenses, which the court reduced by $10,000, the amount the plaintiff previously received his insurer.\textsuperscript{90} The Wisconsin Supreme Court began by noting that the plaintiff would recover a windfall if the collateral source rule were applied by stating the policies that grounded the collateral source rule: “(1) to deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor, and (2) to allow the injured party, not the tortfeasor, to benefit from a windfall that may arise as a consequence of an outside payment.”\textsuperscript{91} Plaintiffs argued that the defendant paid $10,000 less than the full damages the defendant caused and that the defendant should not benefit from the plaintiffs' insurance policy.\textsuperscript{92} The Plaintiff also contended that its insurer’s subrogation claim should revert to them, not the defendant.\textsuperscript{93} Defendant countered that because the plaintiff’s insurer waived its right to subrogation, it created a windfall recovery for plaintiff.\textsuperscript{94} Noting concern that ruling for the plaintiff would allow an injured party to receive a “windfall,” the court affirmed the court of appeals holding that the collateral source rule did not apply.\textsuperscript{95}

\textbf{B. RHETORICAL THEMES OF ILLUSORY MEDICAL BILLS AND WINDFALL GAINS IN STATES WITH LEGISLATION MODIFYING OR ABOLISHING THE COLLATERAL SOURCE RULE IN PERSONAL INJURY CASES}

\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
Absent statutory modification, application of the collateral source rule is mostly assured. As shown in the previous section, courts often repeat the labels set forth by the defendant characterizing the medical bills as illusory and the plaintiff’s financial gain as a windfall with little acknowledgment of those labels as mere rhetoric. However, there has been an increasing trend among states to legislatively limit an injured plaintiff’s recovery to the actual amount of medical expenses paid by the plaintiff’s health insurer.\(^96\) As demonstrated below, many legislatures recent actions appear to be direct responses to the judicial opinions, suggesting that the courts’ references to this rhetoric are restrained calls to the legislatures to act. While some legislative action has been unsuccessful, and other House Bills are still pending or postponed, legislative notes evince the rhetoric directed at this issue is being inherited from the judiciary.

For example, the Colorado legislature partially negated the collateral source rule by requiring a trial court, following a damages verdict, to adjust the plaintiff’s award by deducting compensation or benefits that the plaintiff received from collateral sources other than the tortfeasor.\(^97\) One part of the statute, however, provided for a “contract exception” and retained the collateral source rule for certain benefits.\(^98\) In affirming application of the collateral source in cases where benefits were provided to the plaintiff due to a contract, the Colorado statute provided that “the verdict shall not be reduced by the amount by which [the injured plaintiff] has

\(^{96}\) \textit{See A Review of State Law Modifying The Collateral Source Rule: Seeking Greater Fairness In Economic Damages Awards}, 76 DEF. COUNSEL J. 210, 211 (2009) (The legislatures of twenty eight (28) states have either abolished or modified the collateral source rule in some context. These states are as follows: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, West Virginia. Fourteen of these states that have completely abolished the rule: Alaska, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, New York, North Dakota, Ohio, and Oregon.)


been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person.”

Applying this statute in a personal injury case where plaintiff’s medical bills were satisfied by discounts and payments made by plaintiff’s health insurance in *Volunteers of America Colorado Branch v. Gardenswartz*, the Colorado Supreme Court in November of 2010 held “the common law collateral source rule remains in full force and effect” and the tortfeasor was not entitled to offset proceeds resulting from the plaintiff’s insurance. Addressing the reality of the medical bills, the court noted:

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

The court further justified plaintiff’s “windfall” by reasoning:

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

In response to this Supreme Court ruling, the Colorado legislature attempted to completely abrogate the collateral source rule. A House Bill was introduced in early 2011,

---

99 *Colo. Rev. Stat.* § 13-21-111.6
100 *Volunteers of America v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010)
101 *Gardenswartz*, 242 P.3d 1080, quoting *Catour*, 803 N.E.2d at 649 (emphasis added)
102 *Gardensworth*, 242 P.3d 1080, citing *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1074 (Colo. 1992) (“To the extent that either party received a windfall, it was considered more just that the benefit be realized by the plaintiff in the form of double recovery rather than by the tortfeasor in the form of reduced liability.”).
103 Colorado House Bill 11-1106 proposed amending *Colo. Rev. Stat.* § 13-21-111.6 (3) to read: “In any action by any person or a legal representative to recover economic damages,
and provided that the legislation was necessary because “[a]ccording to the holding in Volunteers of America v. Gardenswartz, Colorado's contract exception under the collateral source rule allows an injured party to receive compensatory damages above the amount paid by his or her insurance.”

The Bill specifically provided that “[i]n an action by a person or a legal representative to recover economic damages, the recoverable damages for reasonable and necessary medical or health care, treatment, or services shall include only those amounts actually paid by or on behalf of the injured person to the providers.” While the Bill is currently “postponed indefinitely,” the rhetorical devices directed at the legislature are noteworthy. A lawyer from the Colorado Defense Lawyers' Association, also an amicus in Gardenswartz, testified in support of the Bill. The testimony included a discussion on “the history of medical expense recovery in Colorado... the current jury instructions in personal injury cases... [and] her opinion that actual damages, rather than the amount billed, should be recoverable.”

To make recoverable damages for reasonable and necessary medical or health care, treatment or services, shall include only those amounts actually paid by or on behalf of the injured person to the health care services providers who rendered care, treatment or services . . .”

104 Colorado House Bill 11-1106, Bill Summary states “The purpose of this bill is to restate and reaffirm the general assembly's intent that the common-law collateral source rule is abrogated and to indicate that a recent decision of the Colorado supreme court (Volunteers of America v. Gardenswartz) interpreting the statute on reduction of damages for payments from collateral sources is contrary to the general assembly's intent to prevent compensatory damage awards for medical expenses from exceeding the amount accepted by the health care service provider for treating the injured party.”

105 Summarized History for Bill Number HB11-1106 ( “03/29/2011 Senate Committee on Local Government Postpone Indefinitely”) (http://www.leg.state.co.us/CLICS/CLICS2011A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/36d1c35e97653a0b8725784800726334?OpenDocument)


107 Id.
her point, she distributed a chart showing examples of "phantom damages" from recent Colorado lawsuits. The chart detailed information from nine recent cases indicating the amount billed by providers for health care, the amount paid by health insurance to satisfy all charges, and the “Phantom Damages – the difference never paid or owed.”

Indiana also has modified the collateral source rule. The statute permits a defendant to introduce evidence of write offs or lowered payments made to satisfy medical bills in a personal injury action. Applying this statute, in *Stanley v. Walker*, the Indiana Supreme Court held that the plaintiffs medical bills could be introduced to prove the amount of medical expenses when there was no substantial issue that the medical expenses were reasonable, but the collateral source rule as codified in § 34-44-1-2, did not bar evidence of discounted amounts in order to determine the reasonable value of medical services. The court reasoned that because the defendant sought to submit evidence to the jury that would show that the amount accepted in satisfaction of the medical charges without referencing insurance, the evidence was admissible. In response to this judicial decision, the Indiana General Assembly attempted to overturn the Supreme Court's opinion by introducing Indiana House Bill 1255 that would have restored the collateral source rule and prohibited a court from admitting into evidence a write-off, discount or other deduction associated with a collateral source payment in a personal injury or wrongful death action.

---

108 Id.
109 Id.
110 *INDIANA STAT.* § 34-44-1-2.
111 Id.
112 906 N.E.2d 852 (Ind. Sup. Ct. 2009)
113 Id.
114 Indiana H.B. 1255 provides as follows: “In a personal injury or wrongful death action, the court shall allow the admission into evidence of: (1) proof of collateral source payments other than: (A) payments of life insurance or other death benefits; (B) insurance benefits for which the
Insurance Institute of Indiana, Indiana Department of Insurance, State Farm Insurance, Indiana State Medical Association, Indiana Hospital Association, Indiana Chamber of Commerce and Indiana Manufacturers Association spoke in opposition to the legislation and in support of the Stanley decision. The Indiana Manufacturer’s Association explained that the Bill is necessary due to “phantom damages [that] amount to a windfall profit for the plaintiff and especially for the personal injury attorney.” The Bill failed in the Senate Judiciary Committee.

In November 2009, Ohio House Bill 361 was introduced to in an attempt to overrule a May 2009 Ohio Supreme Court case that held that the amounts that were accepted as payment by health care providers by health insurers was admissible and did not violate the Ohio’s codification of the collateral source rule because such write-offs were not collateral source

plaintiff or members of the plaintiff's family have paid for directly; (C) payments made by: (i) the state or the United States; or (ii) any agency, instrumentality, or subdivision of the state or the United States; that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought; or (D) a write-off, discount, or other deduction associated with a collateral source payment. (2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and (3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family. It should be noted that these legislative actions fall outside of this article's survey period.”

115 Id.
116 Hearings in the Indiana legislature are typically not transcribed. See http://www.lib.ipfw.edu/1055.0.html (under "Committee and Floor Action; Votes"); "There are no printed hearings for Indiana General Assembly committees that meet during the session”; see also http://www.law.indiana.edu/lawlibrary/doc/inleghis.pdf (under "Hearings": "minutes only kept for study committees"). But see http://www.truckline.com/Communities/InsuranceTaskForce/Documents/ATRA%20Legislative%20Watch%20-%20Volume%2023%20-%20No%203.pdf ATRA, Legislative Watch, February 10, 2010 (H.B. 1255 changes this and will allow the injured party to collect for expenses he/she had no obligation to pay. These phantom damages amount to a windfall profit for the plaintiff and especially for the personal injury attorney. For additional information, please contact Ed Roberts of the Indiana Manufacturers Association at eroberts@imaweb.com.”
117 Legislative Updates: http://indianacourts.us/blogs/legislative/?m=2010&w=7
benefits at all. 118 Ohio House Bill 361 sought to prohibit defendants in personal injury and wrongful death cases from introducing evidence of medical charges or fees that were written off, negotiated or waived by the plaintiff’s medical service provider or hospital. 119 Testifying before the Ohio House Civil and Commercial Law Committee in opposition to House Bill 361, an insurance defense lawyer framed the issue like this: “A plaintiff’s perceived entitlement to a windfall for phantom damages is the actual issue.” The Ohio Association of Civil Trial Attorneys, an association of personal injury defense lawyers, opposed the proposed bill, testifying that “the amounts that are written off are simply amounts that disappear. If the OAJ’s proposed legislation is enacted, those amounts will be revived in the form of a windfall for plaintiffs.” 120 Ohio’s House Bill 361 is currently pending in the House Rules Committee. 121

Connecticut modified the collateral source rule by permitting the admissibility of evidence of collateral source payments and providing for awards to be offset by the amount paid by collateral sources less any amount paid by the claimant to secure the benefit. 122 In an attempt to repeal this statute, Connecticut, House Bill 6492 was introduced in 2011. 123 Lobbyist Susan

118 Jaques v. Manton, 125 Ohio St. 3d 342 (2010) (holding that evidence of write-offs is admissible to show the reasonable value of medical expenses.)
119 Testimony of Jamey Pregon in opposition to Ohio House Bill 361, on behalf of the Ohio Association of Civil Trial Attorneys, to the House Civil and Commercial Law Committee, January 19, 2010.
120 Position paper submitted to the Ohio State Bar Association in response to an earlier version of the proposed legislation, submitted as House Bill 361, Exhibit A “OACTA’s Position to the Proposed Legislation to Amend ORC 2317.421 as Submitted by the Ohio Association for Justice” to testimony of Jamey Pregon in opposition to Ohio House Bill 361, on behalf of the Ohio Association of Civil Trial Attorneys, to the House Civil and Commercial Law Committee, January 19, 2010.
121 http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_361
122 CONN. GEN. STAT. ANN. § 52.225a
123 Connecticut House Bill 6492 (2011) (“Statement of Purpose: To provide that evidence that a health care provider accepted, or an insurer paid, a reduced amount of reimbursement for medical care shall not be admissible for the purpose of determining economic damages in civil actions.”)
Giaccalone testified on behalf of the Insurance Association of Connecticut opposing the Bill arguing “[m]any times doctor's bills are cut because of insurance, because of a deal they've cut with the plaintiff. . . This [bill] would allow them to get a windfall, sending up charges, driving up settlement amounts. It should be for the jury to decide why the bill was what it is. They should hear the full evidence of what was actually paid and not what the phantom charges were, which is current practice.”\textsuperscript{124} The Insurance Association of Connecticut issued a statement to the Judiciary Committee, urging rejection of this Bill, the rhetoric was repeated: “prohibiting the introduction of evidence to show that medical expenses received were less than what was billed permits recovery for “phantom charges” …. allowing the recovery of such phantom charges creates an unearned windfall for claimants by forcing defendants to pay inflated economic damages based on inflated medical expenses.”\textsuperscript{125}

In 2003, the Texas Legislature passed House Bill 4 that abrogated the collateral source rule. That Bill 4 amended a section the Texas Civil Practice & Remedies Code §41.0105 which provided: “In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.”\textsuperscript{126} Subject to great confusion among practitioners and judges, the statute prevented a plaintiff from recovering medical bills that were discounted or “written off” by medical providers pursuant to an agreement with the plaintiff’s health care insurers.\textsuperscript{127} In 2011, Texas

\textsuperscript{125} Statement, Insurance Association of Connecticut, Judiciary Committee (March 9, 2011)
\textsuperscript{126} TEXAS CIVIL PRACTICE & REMEDIES CODE § 41.0105.
\textsuperscript{127} See, e.g., Mills v. Fletcher, 229 S.W. 3d 765, 769 (Tex. App. 2007); Matabon v Gries, 288 S.W.3d 471, 481 (Tex. App. 2009) (“[a]mounts that a health care provider subsequently writes off its bill do not constitute amounts actually incurred”).
House Bill 3281 proposed repealing this statute. Texas House Bill 3281 proposed requiring defendants to pay the amount of plaintiffs’ medical bills regardless of discounts or other write-offs as economic damages.\textsuperscript{128} Governor Rick Perry vetoed the bill, finding that “[t]he purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant’s actions. It should not be used to artificially inflate the recovery amount by claiming economic damages that were never paid and never required to be paid.”\textsuperscript{129}

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

II. THE POWER OF A “WINDFALL” AND THE ILLUSION OF “ILLUSORY” MEDICAL BILLS

\textit{In the name of “tort reform,” there has been a steady attempt to avoid what many consider to be the [collateral source] rule’s greatest evil: a windfall to the plaintiff} . . . \textsuperscript{130}

---

\textsuperscript{128} House Committee Report provides the background and purpose of Texas House Bill 3281 as: “The 78th Legislature passed legislation which added Section 41.0105 to the Civil Practices and Remedy Code. This section states that a plaintiff in a law suit may only recover those medical or healthcare expenses which they had already paid or incurred, but does not allow for any future costs that the claimant may incur. . . . C.S.H.B. 3281 would amend this part of the statute in order to clarify that claimants may recover medical or health care expenses incurred actually paid or incurred by or on behalf of the claimant.” Texas Legislature Online http://www.legis.state.tx.us/billlookup/text.aspx?LegSess=80R&Bill=HB3281

\textsuperscript{129} Governor Rick Perry, Veto Statement, issued on Friday, June 15, 2007.

As demonstrated above, the labels “windfall” and “illusory” have powerful legal and social implications, and these labels are commonly attached to an injured plaintiff’s recovery of her medical bills when those bills have been discounted and then satisfied by reduced payments from plaintiff’s private health insurance. The labels are noted in judicial opinions and repeated to legislators responding to the issue. In this section I argue that the labels are inaccurate, but with repetition they are becoming a legitimate piece of the conversation each time the issue is addressed.

As a precursor to this discussion, it must be noted that rhetoric has been synonymous with law for centuries; “[t]he ancient rhetorician Gorgias (in Plato’s dialogue of that name) defined rhetoric as the art of persuading the people about matters of justice and injustice in the public places of the state…”131 Rhetoric has generally been accepted in the practice of law because “legal storytellers use stories rhetorically in an attempt to persuade others to accept their version of what happened,” one of the main goals of lawyers in litigation.132 Since “law always operates through speakers located in particular times and places speaking to actual audiences about real people… [a]ll these things mark it as a rhetorical system,”133 and is conducive with the dictionary definition of the word rhetoric as “a skill in the effective use of speech.”134 Indeed, advocacy through skillful language choices is a routine and revered practice in litigation.135

132 Christine Metteer Lorillard, Retelling The Stories Of Indian Families: Judicial Narratives That Determine The Placement Of Indian Children Under The Indian Child Welfare Act, 8 WHITTIER J. CHILD & FAM. ADVOC. 191, 192 (Spring 2009); See also supra n. 7.
135 Supra n. 7.; See also Richard C. Waites and David A. Giles, Are Jurors Equipped To Decide The Outcome Of Complex Cases? 29 AM. J. TRIAL ADVOC. 19, 62 (Summer 2005) (“[c]areful
Even judges have emphasized the use of rhetoric allowed in their courtrooms. However, the danger in rhetoric is when a body of law is propped-up by the unsavory implications associated with certain labels, rather than reality.

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

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

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

Remarkably, rather than responding to the misleading nature of the terminology plaintiffs often argue that the “windfall” is permitted in certain circumstance. But recognizing plaintiff’s recovery as a type of windfall that the legal system permits propagates the false idea that the recovery is a windfall at all. Even the Restatements seem to support the characterization of plaintiff’s recovery in these situations as a type of permissible windfall, and courts rely on this stating “[t]o the extent that such a result provides a windfall to the injured party, we have

140 Hanif, 200 Cal. App. 3d at 635; Nishihama, 93 Cal. App. 4th at 298.
142 Id.
143 See e.g. Koffman v. Leichtfuss, 246 Wis. 2d 31 (2001) (“The rule is grounded in the long standing policy of that should a windfall arise as a consequence of an outside payment, the party to profit from that collateral source is ‘the person who has been injured, not the one whose wrongful acts caused the injury’”), Fischer, 2011 WI at 34 (“plaintiffs seem to be arguing that [the insurance company] has waived its subrogation claim and that under the collateral source rule a windfall created by a waived subrogation claim should inure to the plaintiffs, not to the defendant”)
previously recognized that consequence and concluded that the victim of the wrong rather than
the wrongdoer should receive the windfall.”144 While such logic may be appealing to plaintiffs
in the midst of litigation, it reinforces to the court, the legislature that is later reacting, and
citizens reading the news reports that plaintiffs are reaping an unjustified gain at the expense of
society.

Labeling the recovery of the negotiated rate differential as a “windfall” in personal injury
cases also defies basic contract principles because tortfeasors receive a discount on their liability
due to a third party contract to which they were not a party, nor an intended beneficiary.145 A
person generally obtains health insurance by entering into a contract with a health insurer and
maintains that insurance by paying premiums to the insurer.146 As part of the contract, the
insured typically must obtain care from a health care provider that is pre-selected by her
insurer.147 And as part of the contract between the health care provider and the insurer, the
health care provider discounts its medical bills to the insured.148 The insurer also negotiates
alternative rate contracts with the medical care providers.149 These discounted rates and write-
offs are one of the benefits that an insured receives as part of the contract with the health

144 Acuur, 531 S.E.2d at 323; But see infra n. 58.
145 See Marshall and Fitzgerald, supra, n. 37 (explaining the flawed logic of not applying the
collateral source rule as “the full payment of damages by a tortfeasor clearly should have no
effect on the wager made pursuant to a legally enforceable contract duly supported by valuable
consideration to which the tortfeasor is not a party.”)
146 See Michael K. Beard, The Impact of Changes in Health Care Provider Reimbursement
Systems on the Recovery of Damages for Medical Expenses in Personal Injury Suits, 21 AM. J.
TRIAL ADVOC. 453 (1998) (discussing the contractual nature of such agreements.); Mark A. Hall,
Carl E. Schneider, Patients as Consumers: Courts, Contracts, and the New Medical Marketplace,
106 MICH. L. REV. 643 (2008) (discussing the legal condition of the patient-as-consumer in
today's health-care market, in particular that insurers bargain for discounted rates for the people
they insure but uninsured people must contract to pay whatever a provider charges are generally
“charged prices that are several times insurers’ prices and providers’ actual costs”)
147 Id.
148 Id.
149 Id.
The discounts are shown on the benefit statements that an insured receives from his health care provider showing the original charges, the payments by the insurer, and the write-off taken by the health care provider. Health care providers are willing to provide steep discounts off their customary and regular medical charges to the insurers in return for a steady stream of patients referred to the health care provider by the insurer, as well as other contract benefits such as an expedited payment, pre-approvals, marketing and advertising.

Another piece of this contractual relationship between the health care insurer and the insured, an injured plaintiff, is that insurers often have a contractual right to subrogation from the plaintiff. This entitles the insurer to a lien and the right to reimbursement for damages the plaintiff receives in a personal injury case attributable to payments made by the insurer.

A right of subrogation extends only to amounts paid by the insurer and therefore the right to subrogation does not allow a health care insurer to recover the amount of the contractual write-off.

---

150 Id.
151 Id.
152 Health care providers gain significant administrative and marketing advantages from health insurers in return for discounting their rate "including a large volume of business, rapid payment, ease of collection, and occasionally advance deposits." LAWRENCE F. WOLPER, HEALTH CARE ADMINISTRATION: PLANNING, IMPLEMENTING, AND MANAGING ORGANIZED DELIVERY SYSTEMS, 553 (4th ed. 2004); WILLIAM O. CLEVERLEY & ANDREW E. CAMERON, ESSENTIALS OF HEALTH CARE FINANCE, 301 (6th ed. 2006) (discounting attracts new blocks of patients); Shahram Heshmat, Framework for Market-Based Hospital Pricing Decisions 10 (1993) ("In return for obtaining preferred status (which is designed to increase the volume of business), providers make their services more attractive to payers through means such as discounting . . . .")
153 44 AM. JUR. INSURANCE § 1768, 1774, 1777 (2007); See William S. Walton, Challenging The Recovery of Illusory Medical Expenses, 13 COM. TR. EV. 15 (2004); Steven B. Hantler, Victor E. Schwartz, Cary Silverman & Emily J. Laird, Moving Toward the Fully Informed Jury; See also BLACKS LAW DICTIONARY 1427 (6th ed., West 1990) (defining subrogation as “the substitution of one person in the place of another with reference to a lawful claim…. The right of one who has paid an obligation which another should have paid to be indemnified by the other.”)
The write-off can be significant and with no right to subrogation by the insurer, if plaintiff recovers this amount from the defendant tortfeasor, it is her gain that she has thoughtfully contracted for, and not meant to benefit the tortfeasor. Indeed, the tortfeasor and his liability carrier are not intended beneficiaries in any of these contractual relationships.

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

---

154 See Aetna Ins. Co. v. United Fruit Co., 304 U.S. 430 (1938) (insurer entitled by way of subrogation to no more than the amount they paid on the policy)
155 See e.g. Goble v. Frohman, 901 So. 2d 830, 831 (Fla. 2005) ($428,583.55 written-off, approximately 75% of the total billed medical expenses)
156 See Kades, supra n. 24 (“failure to consider subrogation has led numerous courts to object to the collateral benefits rule as a windfall…[though] problems arise when administrative and transactional costs make it infeasible for insurers to include or apply subrogation clauses. Then a plaintiff collecting from both an insurer and the defendant does reap a windfall. Often, however, it is an efficient windfall. Denying insured plaintiffs recovery from tortfeasors when subrogation fails would mean that some tortfeasors will never pay for the damage they do. That will lead potential injurers to take suboptimal precautions and thus to cause an excessive number of torts. Allowing double recoveries is particularly attractive when there is minimal concern that victims are inducing harms in order to reap supercompensatory windfalls.”)
the attorney under most contingency fee agreements, eat up much of the plaintiff’s recovery; to encourage settlement and claim back any amount, a health insurer may agree to lower its subrogation claim.

Defendant tortfeasors and the liability insurance companies advancing the misleading rhetoric are the ones with a true windfall when the collateral source rule is not applied. Fewer lawsuits may be brought where abrogation of the collateral source rule renders some legitimate personal injury litigation futile since receipt of collateral benefits defined in the statute makes pursuit of a claim not worth the time and expense involved. 157 Abolition of the collateral source rule in personal injury cases will likely result in many personal injury claims either going unfiled or settling early 158, a victory to liability insurance companies paying the tortfeasors defense costs and verdicts, but a serious policy concern with respect to injured citizens’ access to courts and the deterrent value of tort law. Moreover, personal injury lawyers paid on a contingency basis may necessarily make decisions regarding which cases to accept based on the potential recovery, and where recovery is limited because of collateral source payments, those prudent plaintiffs with the foresight to purchase health insurance become the least desirable clients. Where the plaintiff’s primary loss is pecuniary and has already been paid through her private health insurance, there is no financial benefit to the plaintiff or a lawyer working on a contingency basis

157 See Sorrell v. Thevenier, 69 Ohio St.3d 415 (1994) (finding an Ohio state statute abolishing the collateral source rule unconstitutional, the court noted that “certain tort victims will realize that R.C. 2317.45 could render their trip to court futile... [f]or these tort victims, like plaintiffs herein, R.C. 2317.45 undermines the right to a jury trial, a meaningful remedy and open courts.”)
158 Michael B. Kelly, What Makes the Collateral Source Rule Different?, 39 AKRON L. R. 1171, 1179-1180 (2006) (“Reforms to the collateral source rule could eliminate plaintiff’s recovery, however, if they undermine a plaintiff’s willingness to sue. By reducing, perhaps severely, the most easily proven aspect of damages, reforms to the collateral source rule may make a lawsuit seem like more hassle than it is worth. . . a plaintiff whose primary loss is pecuniary and who has recovered most of it via insurance may decide to waive the rest of the claim or to settle it quickly.”)
to file a lawsuit. The tortfeasors and liability carriers then have a lighter litigation load.

Finally, bills sent by medical care providers are not a sham for gouging liability carriers; they are real obligations that, but for a plaintiff’s private health care insurance, the patient would be responsible for satisfying.159 While the billed amount may not reflect the cost to the medical care provider for actually providing the service, the patient’s responsibility for the bill is real, and but for insurance, the patient would be responsible for satisfying that amount.160 That is, a privately insured patient actually incurs their medical providers full charges and only by virtue of this private contract that he entered into in advance is he spared from paying the full amount.161 While medical care providers often discount bills for uninsured patients, there is no legal obligation for them to do so.162 If a plaintiff does not have medical insurance coverage, he may seek to negotiate the bill himself, but he is liable for the entire amount billed, and harsh collection tactics are often directed at these patients.163

When a medical care provider treats a patient, it has an enforceable claim for payment for its services, regardless of the patient's insurance status.164 Indeed, the veracity of these medical bills is illuminated by the number personal bankruptcy filings in the United States due to debt resulting from medical bills: over 1.5 million Americans declare bankruptcy each year, and according to two research papers published in The American Journal of Medicine in 2011 and

159 See Catour, 3 N.E.2d at 647.
160 See Id.
161 See Id.
162 See George A. Nation III, Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured, 94 KENTUCKY L. J. 120 (2005)
163 See Id. at fn. 3.
164 See Mark Hall & Carl Schneider, Patients as Consumers: Courts, Contracts and the New Medical Marketplace, 106 MICH. L. REV. 643 (2008);
2009, more than half of all bankruptcies filed in the United States today are due to debt resulting from medical bills.\textsuperscript{165}

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

\section*{III. A PROPOSAL TO MAINTAIN APPLICATION OF THE COLLATERAL SOURCE RULE}

\textit{“How many legs does a dog have if you call the tail a leg? Four. Calling a leg a tail doesn’t make it a leg.”}\textsuperscript{166}

As demonstrated above, the labels “illusory” and “windfall” are tools skillfully used by defendant tortfeasors and insurance liability carriers to paint injured plaintiffs’ medical bills and economic damages with a coat of objectionable connotations. The use of this rhetorical device is a prominent legal strategy directed at the collateral source rule as applied to recovery of the negotiated rate differential in personal injury cases. And despite the inaccuracy of this terminology, with repetition, a body of law is being created based in part on the implications associated with these labels, rather than reality.

Economic damages to an injured plaintiff, including the “reasonable value of medical


\textsuperscript{166} Riddle attributed to Abraham Lincoln, and referenced by the Respondent, Howell, in his responsive brief (p. 27) to the California Supreme Court in \textit{Howell} in responding to the argument that appellant’s medical bills were not real, \textit{citing Arteaga v. Mukasey}, 511 F.3d 940, 942 (9th Cir. 2007)
services,” should be calculated by the amount charged by the health care provider. The negotiated rate differential is a collateral source benefit to an insured plaintiff, and neither the judiciary nor the legislature should abolish the common-law collateral source rule in this context based on the inaccurate notion that the medical care providers’ bills are illusory or that plaintiff will be recovering a windfall.

The tension between the legislature and the judiciary is demonstrated by the judiciaries’ near universal application of the doctrine, and the legislative response to those decisions. Without direction from the legislature regarding application of the collateral source rule in a personal injury case, the judiciary should not interfere with the private contractual relationship between a plaintiff and his health care insurer.167 Certainly, if abrogation of the collateral source rule is warranted in any circumstances, it is properly left to the legislature, but where the legislature steps into the arena of medical insurance benefits, the influences on the legislatures should be based on reality rather than rhetoric. There is no foundation in law to legislatively redistribute an economic gain earned via a legitimate financial investment, a freely negotiated contract between third parties, to the tortfeasor that caused the injury, or his insurer.

While many legislatures have stepped into the arena of how to calculate compensatory damages for the “reasonable value of medical services” where plaintiff’s medical bills were satisfied by plaintiff’s private health insurer are significantly lower amounts than the billed rate, the layers of complexity, and the time and expense necessary to fairly litigate the process is, as a

167 Bynum v. Magno, 106 Hawai‘i 81, 91-92 (2004) (contractual allowances or discounts are collateral benefits which belong to plaintiff and cannot inure to the benefit of a defendant absent specific statutory modification of the collateral source rule; “As a matter of contract law, the collateral source rule, and in deference to legislative prerogative, a court should not question the sufficiency of contractual consideration between plaintiff’s health insurers and medical providers in order to reduce a defendant’s liability”)
practical matter, almost overwhelming.\textsuperscript{168} For example, where evidence of discounts and write-offs are admissible, plaintiffs and defendants are required to expend considerable resources to gather and present evidence and witnesses to support the reasonable value of medical services. Because the discount procured by a health care provider arises out of a contractual relationship with health insurers and reflects a number of factors, both parties would have to produce documents and witnesses to testify to this information. This will necessarily prolongs trials and increases the costs associated with litigation, benefits generally in favor of the defendant.

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

\textsuperscript{168} See Danielle A. Daigle, \textit{The Collateral Source Rule in Alabama: A Practical Approach to Future Application of the Statutes Abrogating the Doctrine}, 53 \textit{ALA. L. REV.} 1249 (2002) (Addresses the inherent ambiguity in statutes abrogating the rule in civil actions, discusses the constructional difficulty posed by the Alabama legislature abrogating the rule.)
A reality of personal injury litigation is the behind-the-scenes negotiation that often occurs when a plaintiff does not have health care insurance. Most uninsured plaintiffs also negotiate their health care bills, and therefore legislation that fails to account for this possibility would end up providing a greater award to the uninsured plaintiff than the insured one. The “usual and customary” charges for medical care is paid in full by very few uninsured patients or health care insurers, and abolition of the collateral source rule will not account for the uninsured plaintiff’s private negotiations with a health care provider, which may result in the uninsured plaintiff actually pocketing a larger recovery than the insured plaintiff. For example, if a medical bill is $5000 but the plaintiff’s insurance company bargains the bill down to $1000, with abrogation of the collateral source rule, the insured plaintiff can only recover the amount paid by the insurance company, the $1,000. If the insurance company has a right of subrogation, the recovery for the medical bills are sent to the health care provider, and the plaintiff pockets nothing. The more fortunate uninsured plaintiff can recover the full $5000 that was billed to him by the health care insurer. The uninsured plaintiff may still negotiate the bill down, satisfy the bills with a significantly lower payment, and pocket the difference. Thus, the responsible plaintiff with the foresight to buy insurance and pay premiums over the course of many years may recover less than her uninsured counterparts. Perhaps an application of the “collateral source rule” would encourage people to acquire insurance. Certainly, the fact that they have done so should not benefit the people who injure them. And at the very least, an uninsured plaintiff should not end up with a greater recovery that the insured plaintiff simply by the fact that she is uninsured.

While outside the scope of this Article, this conclusion acknowledges that safeguards are necessary to ensure that health care providers are not perpetrating fraudulent pricing schemes for the sole purpose of inflating personal injury recoveries.\footnote{Such reassurances, while outside the scope of this article, are ripe for development though several checks already exist. \textit{See} The National Health Care Anti-Fraud Association has develop sophisticated computer systems to detect suspicious billing patterns. The Federal Bureau of Investigation (FBI) and the Office of the Inspector General (OIG) each have special agents to health-fraud projects. \textit{See} http://www.fbi.gov/ (accessed August 1, 2011)} Instead, the proper remedy for truly illusory medical bills – ones that are fictional, phantom, fantasy, and frauds meant only gouge liability carriers and rightfully not upheld under the law – is to ensure legal consequences for those medical care providers that are responsible for the health care billing fraud. The judicial and legislative responses should not be to assume that medical bills have no consequences to an insured plaintiff, and redirect to the defendant tortfeasor the legitimate financial benefit that the plaintiff contracted for with the health care insurer.

\textbf{IV. CONCLUSION}

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