Something for Nothing

The Collateral Source Rule and Gratuitous Payments or Services

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While taking into consideration the law of the particular state, policy considerations should provide skillful defense attorneys with arguments against the collateral source rule's application.

When a plaintiff has undergone substantial and expensive medical care as a result of a personal injury, compensatory damages always become a primary disputed area. Generally speaking, the collateral source rule allows a plaintiff to recover medical costs from a tortfeasor-defendant even when the plaintiff received some compensation toward those costs from an independent, or "collateral," source. Despite the well-established common law justification for the collateral source rule, the policy reasons supporting it in a variety of different contexts remain important and often discussed in tort law. One of the more unsettled scenarios to which the collateral source rule may apply involves a gratuitous payment or services rendered to a plaintiff. Although the collateral source rule can apply to gratuitous payments for services—at least under some circumstances—in a majority of United States jurisdictions, many policy-based arguments support rejecting the use of the rule in this context.

This article will provide a general overview of the historical development of the collateral source rule and its differing applications under various states' laws, analyze the potential problems presented by gratuitous payments or services, and discuss some scenarios under which the collateral source rule may or may not apply.

History of the Collateral Source Rule

The collateral source rule first appeared in American tort law in the United States Supreme Court decision *The Propeller Monticello v. Mollison*, 58 U.S. 152 (1854). In *The Propeller Monticello* decision, which dealt with an admiralty action, the U.S. Supreme Court ultimately concluded that the damage award to the plaintiff should not be reduced by the amount of the insurance proceeds that the plaintiff received. *Id.* at 155. The Court reasoned that under well-established common law principles collateral benefits could not be considered in determining the recovery to which a plaintiff was entitled. *Id.* at 156. This position was ultimately adopted by the Restatement (Second) of Torts: "Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although

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they cover all or a part of the harm for which the tortfeasor is liable." Restatement (Second) of Torts §920A (1979).

As a matter of policy, some courts have held that the justification for the collateral source rule is that "the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons." *Wills v. Foster*, 229 Ill. 2d 393, 412, 892 N.E.2d 1018, 1029 (Ill. 2008) (quoting *Arthur v. Catour*, 216 Ill. 2d 72, 295 Ill. Dec. 641, 833 N.E.2d 847 (Ill. 2005)). However, scholars have long recognized the problems with the collateral source rule—namely, that it potentially permits plaintiffs to land windfalls and unintentionally may punish tortfeasors too much. *See* Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort's Soul*, 48 U. Louisville L. Rev. 1, 8–9 (2009). Some scholars also have argued that the collateral source rule violates the basic tort principle of making a plaintiff whole by clearly sanctioning double recovery. *Id.* at 18.

Procedurally, the collateral source rule is rooted in evidence and implicates a fact-finder's consideration of the damages to which a plaintiff is entitled. Specifically, the rule is an evidentiary doctrine that prohibits a tortfeasor-defendant from introducing evidence of a plaintiff's receipt of benefits from a collateral source for the same injuries for which the plaintiff alleges that the tortfeasor-defendant is liable. *Simmons v. Cobb*, 2006 Pa. Super. 222, 906 A.2d 582, 585 (Pa. Super. Ct. 2006) (quoting *Collins v. Cement Express, Inc.*, 301 Pa. Super. 319, 447 A.2d 987, 988 (Pa. Super. Ct. 1982)) (emphasis added).

Not surprisingly, the way that courts in various states apply the collateral source rule varies among the states in a number of ways, including whether the collateral source rule applies to any potential claim by a plaintiff, whether it applies only to payments made by insurers, as opposed to other third parties, and if the collateral source rule does apply, whether a right of subrogation exists. In fact, across the United States, different jurisdictions have taken very different approaches to applying the collateral source rule.

For example, in 1987, Alabama abrogated the collateral source rule by enacting Code of Alabama §12-21-45. The Supreme Court of Alabama clarified how this new provision applied and confirmed that the state had abrogated the collateral source rule in *Senn v. Alabama Gas Corp.*, 619 So. 2d 1320 (Ala. 1993). Similarly, Ohio passed legislation in 1987 that required courts to reduce a plaintiff's compensatory damage award by the amount of collateral benefits received; however, the Supreme Court of Ohio subsequently declared the statute unconstitutional in *Sorrell v. Thevenir*, 1994-Ohio-38, 69 Ohio St. 3d 415, 633 N.E.2d 504 (Ohio 1994). *See* Christian D. Saine, Note, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 Case W. Res. L. Rev. 1075 (1997). Ohio law now provides that unless an insurer in question has a right of subrogation, the collateral source rule does not apply. *See* Ohio Rev. Code Ann. §2315.20(A) (2004). Conversely, the majority of the states have adopted the collateral source rule, albeit with some limitations depending on the specific circumstances.

Although these are only a few examples of how the general purpose of the collateral source rule varies among the states, a number of more precise issues arise in the context of its application. One particular scenario that invokes policy arguments from both perspectives—and, accordingly, results in varying applications among the states—is the use of the collateral source rule in the context of gratuitous payments or services rendered to the plaintiff.

Application of Collateral Source Rule to Gratuitous Payments or Services

The majority of states apply the collateral source rule to gratuitous payments or services in the same manner as they apply it to other types of collateral payments such as insurance benefits. The states that clearly hold that the collateral source rule applies to these payments include, among others, Arizona, Arkansas, California, Georgia, Hawaii, Kansas, Maine, Maryland, Massachusetts, Mississippi, North Carolina, South Carolina, Tennessee, Wisconsin, and Wyoming. These jurisdictions appear to reason that regardless of the source of the payment, in a damages calculation a tortfeasor should never profit because of a payment received by a plaintiff from a third party. In many of these states the courts emphasize that the collateral source rule applies equally to gratuitous medical services and to benefits paid to a plaintiff. *See*, *e.g.*, *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 243, 201 N.W.2d 745, 752 (Wis. 1972). The underlying reason, according to the courts, is that a plaintiff who has been injured is entitled to the reasonable value of his or her related medical costs. The test is the reasonable value of the medical care, not the actual expenses, so whether or not there is an actual charge associated with the medical care is immaterial. *Id.* An additional reason for this view is that "the recovery has a penal effect on a tortfeasor and the tortfeasor should not get the advantage of gratuities from third parties." *Id.*

Of the states that apply the collateral source rule to gratuitous payments, however, some apply it more circumspectly than others. *Compare Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 595–96, 686 S.E.2d 176, 189 (S.C. 2009) ("In this case, the value of [the plaintiff's] free medical treatment is necessary to the determination of the amount of damage [defendant] inflicted upon [plaintiff] in rescinding his policy."), *and Guyote v. Mississippi Valley Gas Co.*, 715 F. Supp. 778, 780 n.1 (S.D. Miss. 1989) ("The determination of whether an injured party could recover from the tortfeasor the value of medical care for which he incurred no expense is a question of state law. Today, the prevailing view is that such damages are recoverable."), *with Hoeflick v. Bradley*, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (Ga. Ct. App. 2006) ("The collateral source rule applies to payments made by various sources, including insurance companies, beneficent bosses, or helpful relatives."), *and Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 387, 560 S.E.2d 246, 251 (Va. 2002) ("If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers." (quoting Restatement (Second) of Torts §920A (1979)).

Still other states require additional proof when deciding whether they will apply the collateral source rule to gifts or gratuitous services. For example, under Louisiana law, "a claim for sitting expenses rendered gratuitously by nonprofessional family mem-

bers without a doctor's orders must be viewed with close scrutiny. The need for the services must be shown, the reasonableness of the fee must be established, and the extent and duration of the services must be proven." *Tanner v. Fireman's Fund Ins. Companies*, 589 So. 2d 507, 515–16 (La. Ct. App. 1991), *writ denied*, 590 So. 2d 1207 (La. 1992), *and writ denied*, 590 So. 2d 1207 (La. 1992) (quoting *Williams v. Campbell*, 185 So. 683 (La. Ct. App. 1938)).

Defense counsel have several policy-based arguments that they can consider using as part of the overall defense of cases.

Some states expressly modify by statute and delineate how the collateral source rule applies to gratuitous payments or services. New York, for example, enacted a statute that explicitly provides that a defendant can admit a collateral source of payment as evidence for the purpose of reducing a damages award based on the amount of a collateral payment and takes premiums into account by specifying that the calculation should "minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits." N.Y. C.P.L.R. §4545(a) (McKinney 2012). However, the statute carves out an exception for gratuitous payments: "[v]oluntary charitable contributions received by an injured party shall not be considered to be a collateral source of payment that is admissible in evidence to reduce the amount of any award, judgment or settlement." *Id.* at §4545(b).

Other states offer less exacting direction. For example, Colorado's statute reduces a damage award by the amount that a plaintiff "has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained," unless the plaintiff received the compensation as the result of a contract "entered into and paid for by or on behalf of such person." Colo. Rev. Stat. Ann. §13-21-111.6 (2012). Although a straightforward reading of the statute's language supports the conclusion that the collateral source rule does not apply to gratuitous payments or services, Colorado courts have held that it is not necessary for a plaintiff to have made direct payments or provided consideration for a contract to have benefited from it within the meaning of the Colorado contract exception to the collateral source rule. *Tucker v. Volunteers of America Colorado Branch*, 211 P.3d 708 (Colo. App. 2008). The Colorado courts have not settled whether the "contract exception" to the general rule that a fact-finder should consider collateral benefits when determining the amount of a plaintiff's recovery subsumes the rule.

Finally, states such as Iowa, Nevada, and New Hampshire do not appear to have addressed whether the collateral source rule applies to gratuitous payments or services. In those states, defense counsel should argue that the collateral source rule does not cover those benefits. Rather, a plaintiff must have paid some consideration for a collateral benefit for the rule to cover the situation.

Potential Litigation Scenario: Receiving a Product Free of Charge

Despite the already complex and varying ways that courts apply the collateral source rule to gratuitous payments or services, the complexity increases when a plaintiff receives something other than medical care from a family member, a donation from a charity, or a private or a public insurance write-off. Consider this scenario, for example: a plaintiff files a product liability lawsuit against a product manufacturer claiming that the manufacturer's product caused a serious, chronic, but treatable medical condition or disability. The market cost of the treatment that the plaintiff needs to control the condition, which is a medication manufactured and sold by an entirely different company, is very large, amounting to several thousand of dollars each month. Fortunately for the plaintiff, by virtue of a need-based program sponsored by the pharmaceutical manufacturer, the plaintiff receives the medication every month free of charge, with no discernible "quid pro quo." In short, the plaintiff receives the medication at no cost, and he or she does not have to provide anything in exchange. Under this hypothetical, should a court allow the plaintiff to introduce evidence of the value of the medication as part of his or her claimed damages? What about the value of the medication that the plaintiff may receive in the future?

Arguments Against Applying the Collateral Source Rule

Several policy-based arguments support eliminating applying the collateral source rule to gratuitous payments or services, particularly when a plaintiff has not paid any consideration, monetary or otherwise, for the benefit received, as in the above-described hypothetical fact pattern.

First, the plaintiff clearly would receive a double recovery, at least for the reasonable value of any medication received before a trial. And unquestionably, the plaintiff does not need a compensatory damages award for benefits for which the plaintiff never paid, and would never pay, to become "whole." This argument strengthens when the manufacturer of the product—the source of the gratuitous benefit—either cannot or will not seek subrogation from the plaintiff for the value of the benefits. And, the plaintiff and the provider of the medicine have not contracted for the medicine. In sum, under this scenario a compensatory damages award that includes the cost of the product that the plaintiff received for free would produce an inequitable result.

Second, applying the collateral source rule in this specific context does not necessarily further the policy underpinning the collateral source rule itself—that a tortfeasor should not benefit from payments made to a plaintiff by independent sources. Clearly, the plaintiff in the hypothetical fact pattern has not paid consideration for this collateral benefit—the free medicine, and damages recovered by the plaintiff for the actual cost of the drug would be a pure windfall. Requiring the tortfeasor to pay the cost of a treatment that the plaintiff never has absorbed would have an unintentional punitive aspect that tort law principles neither have contemplated

nor would consider equitable, particularly at the expensive rate of the hypothetical scenario offered in this article.

A third, albeit admittedly less persuasive argument is that as a matter of policy the collateral source rule should not apply to nonfungible compensation. The collateral source rule is "aimed at preventing a tortfeasor from benefitting from a third party's *payment* to the injured party." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 929 n.9 (3d Cir. 1999) (emphasis added). *See also Nigra v. Walsh*, 2002 Pa. Super. 113, 797 A.2d 353, 356 (Pa. Super. Ct. 2002) ("Generally, '[t]he collateral source rule provides that *payments from a collateral source* shall not diminish the damages otherwise recoverable from the wrongdoer.'" (quoting *Johnson v. Beane*, 541 Pa. 449, 664 A.2d 96, 100 (Pa. 1995) (emphasis added))). It should be noted, though, that jurisprudence may support the application of the collateral source rule to goods and services in addition to just fungible payments. *See*, *e.g.*, *Kagarise v. Shover*, 218 Pa. Super. 287, 289, 275 A.2d 855, 856 (1971) ("'The collateral source rule may be described as the judicial refusal to credit to the benefit of the wrongdoer money or services received in reparation of the injury caused which emanate from sources other than the wrongdoer.'" (quoting *Feeley v. United States*, 337 F.2d 924, 926 (3d Cir. 1964)). Under the hypothetical scenario, however, the tortfeasor could assert that the plaintiff should not recover the reasonable value of the product that he or she received for free because the plaintiff received it directly from the product's manufacturer, which rendered the value of the product irrelevant.

Although each particular state's law will affect the outcome of a defendant's attempts to prevent a court from applying the collateral source rule to gratuitous payments or services that a plaintiff received before a trial, defense counsel have several policy-based arguments that they can consider using as part of the overall defense of cases. In those jurisdictions where the collateral source rule perhaps does not apply to gratuitous payments or services, defense counsel should consider filing a motion in limine. Even when a defendant cannot circumvent the collateral source rule entirely, a court can compel a plaintiff to establish the real need for gratuitous payments or services and their reasonable values. For example, in the litigation scenario provided in this article, a court should not allow the plaintiff simply to offer evidence of the list or retail cost of the medication. Rather, the plaintiff should have the burden of proving the reasonable value of the drug in the geographic area where the plaintiff lives and what the value would mean to a person with a similar socioeconomic background if the person had to purchase it. Using these principles will assist defense counsel to mitigate the amount of a plaintiff's compensatory damages.

Dealing with the collateral source rule as it applies to future—as opposed to past—damages, however, is more complicated. While defense counsel can make a strong argument that the collateral source rule should not apply to the medication that a plaintiff received free of charge up to the date of a trial, the argument's strength may diminish regarding *future* free medication. For example, a tortfeasor probably could not establish how long the gratuitous arrangement would last, even if the laws of evidence permitted it. Moreover, although a product's cost may decrease over time, a tortfeasor would have difficulty establishing this point. It seems less likely, therefore, that a motion in limine to exclude evidence of the reasonable cost of the medication from the date of judgment forward would succeed.

Conclusion

The collateral source rule, although an established common law principle, continues to evolve. Policy considerations, such as double recovery by plaintiffs and the potential for undue punishment of defendants, support arguments against applying the collateral source rule in a number of contexts. Moreover, certain circumstances present additional justification for these policy-based arguments, including scenarios in which a plaintiff receives gratuitous payments or services—particularly when the independent source of the payment or benefit probably would not seek subrogation. In light of these policy considerations, and depending on the law of the particular state, skillful defense attorneys should be able to argue against the collateral source rule's application in such situations. FD