

**LOUISIANA’S COLLATERAL SOURCE RULE:
ELIMINATING THE “WINDFALL” ARISING
FROM MEDICAL EXPENSE WRITE-OFFS**

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I. INTRODUCTION

The collateral source rule—a fundamental principle of United States' tort law since the mid-1800s¹—has fallen under attack in recent years.² As of 2009, “forty-two jurisdictions ha[d] enacted and retained some form of statute . . . restrict[ing] the collateral source rule.”³ Louisiana is one of the few jurisdictions that has not yet statutorily restricted its rule.⁴ While persuasive arguments are voiced by both supporters and opponents of the rule, Louisiana's acceptance of this Comment's proposal would strike a proper balance in the debate over the rule's existence.

The collateral source rule allows tort victims to recover full compensatory damages from tortfeasors irrespective of payments received from a third party for those same damages.⁵ The

1. See *The Propeller Monticello v. Mollison*, 58 U.S. 152, 155 (1854) (introducing the collateral source rule to United States law).

2. Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 210 (2009) (“[T]here is a growing trend to restrict, if not abolish, the rule.”); see also Jacob A. Stein, 2 *Stein on Personal Injury Damages Treatise* § 13:2 (3d. ed. 2016) (Westlaw) (stating that the collateral source rule “has received perhaps as much consideration from the courts and from legal scholars as any other rule of damages”).

3. Benjet, *supra* note 2, at 211.

4. *Bozeman v. State*, 2003-1016, p. 8–9 (La. 7/2/04); 879 So. 2d 692, 698.

5. Damages in Tort Actions Part III § 17.01 (LexisNexis 2015); see also *The*

“collateral source” is an independent entity that provides payment on behalf of the tort victim for injuries sustained in the tort.⁶ Insurers are common collateral sources. When a collateral source provides payment on behalf of a tort victim, the most equitable resolution occurs when that collateral source obtains reimbursement from the tortfeasor through rights of reimbursement or subrogation.⁷ Such a resolution provides balance among the three parties: the collateral source is compensated for the calculable amount of payments made; the tort victim does not receive a windfall—or double compensation,⁸ and the tortfeasor does not receive a windfall by obtaining a diminishment of damages owed.⁹

However, in the oft-occurring situation in which rights of reimbursement do not exist and subrogation does not take place,¹⁰ the collateral source rule allows tort victims to recover damages exceeding the amount of their actual economic loss resulting from the injury.¹¹ This is often referred to as “double recovery.”¹² For example, the rule allows tort victims to recover special damages in the amount of their medical expenses, even though those medical expenses were paid by a collateral source. Opponents of the rule argue that this double recovery results in a windfall in favor of the tort victim.¹³ In contrast, supporters of the rule argue that the policy motives behind the rule validate

Propeller Monticello v. Mollison, 58 U.S. 152, 155 (1854) (recognizing the United States Supreme Court's acceptance of the collateral source rule).

6. See *Collateral-Source Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

7. See also Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 MCGEORGE L. REV. 965, 989–90 (2012) (noting that the double-recovery effect of the collateral source rule disappears when an insurer exercises its subrogation right); see also *Subrogation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor.”).

8. See *Damages in Tort Actions Part III* § 17.01 (LexisNexis 2015); see Stein, *supra* note 2.

9. See *Damages in Tort Actions*, *supra* note 8; see Stein, *supra* note 2.

10. See also Jamie L. Wershbale, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 349–50 (2008) (noting that insurers often do not exercise subrogation rights due to “the difficulty in establishing that a damage award encompasses the particular collateral benefits paid out by the insurer, high administrative costs associated with seeking subrogation, and potential damage to the insurer's reputation resulting from subrogation actions”).

11. See *Damages in Tort Actions*, *supra* note 8.

12. See *id.*

13. See *infra* notes 58–60 and accompanying text.

double recovery.¹⁴

While this Comment does not dwell on this frequently debated aspect of the rule, it is important to note that legitimate arguments exist on each side of the debate over the rule's existence. More concerning and relevant to this Comment's purpose is that some jurisdictions, including Louisiana, allow tort victims to recover damages that neither the collateral source nor the victim pays or is liable to pay.¹⁵ This troubling application of the collateral source rule occurs when the victim's healthcare provider accepts a discounted payment from the collateral source to satisfy the debt for the tort victim's medical expenses. The gap between the original amount billed and the discounted payment is often referred to as a "write-off."¹⁶ In "write-off agreements, medical service providers write off a contractually agreed-upon amount, and Medicare, Medicaid, or a private insurance company pays only a portion of the original amount billed by the medical service provider."¹⁷ Due to the use of fee schedules—or lists of charges¹⁸ that an insurer will pay for medical services—by both private health insurers and Medicaid, write-offs are commonplace in the healthcare industry.¹⁹

Louisiana currently treats these write-offs as collateral source benefits. For example, consider the following hypothetical:

Mary is billed \$100,000 by her healthcare provider for surgery to repair a broken leg sustained in a car accident. The fee schedule used by Mary's private health insurer lists a reimbursement rate of \$60,000 for the surgical procedure to repair her leg. In turn, the healthcare provider admits Mary for surgery, performs the procedure, and accepts \$60,000 from her health insurer as full satisfaction of the expenses for the surgery. The write-off in this instance is the \$40,000 difference between the

14. See *infra* notes 53–56 and accompanying text.

15. See *infra* Section IV.A.2.

16. See Guillermo G. Zorogastua, *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, 465 (2007).

17. *Id.*

18. See *infra* Part III; see also *Fee Schedule*, FARLEX MEDICAL DICTIONARY (2009), <http://medical-dictionary.thefreedictionary.com/fee+schedule> (last visited May 12, 2017); see also LA. STAT. ANN. § 42:854 (2015) (defining a fee schedule as “[a] list of charges for health care services”).

19. See *Fee Schedule*, *supra* note 18 (“The Office of Group Benefits shall adopt and promulgate a schedule of maximum fees for medical and surgical services and professional services provided in hospitals.”).

amount originally billed by the healthcare provider (\$100,000) and the amount paid by the insurer to satisfy the debt for the surgery (\$60,000).

In most instances, Louisiana, like a number of other jurisdictions, categorizes write-offs as collateral source benefits.²⁰ These write-offs, like the \$40,000 listed in the above hypothetical, can be included in a Louisiana tort victim's special damages award. This means that if Mary were a Louisiana plaintiff she could recover the full \$100,000 *billed* by the healthcare provider. Other states, however, have limited tort victims' maximum recovery to the amount actually *paid* by the health insurer.²¹ Under this approach, Mary's potential recovery in the scenario above would be limited to \$60,000.

Given that the collateral source rule originated at common law, Louisiana courts look to other jurisdictions' application of the rule for guidance.²² Accordingly, this Comment applies the reasoning and methodology of other jurisdictions to provide suggestions for improving Louisiana's application of the rule. Part II of this Comment initially discusses the categories of damages available in tort, the purposes of those damages, and the collateral source rule's applicability to each category of damages. The part concludes by outlining the origins of the collateral source rule, both at common law and in Louisiana, and by discussing the policy reasons behind the rule's implementation. Part III explains how the use of fee schedules in the health insurance industry frequently results in write-offs. Part IV compares Louisiana's application of the collateral source rule in write-off situations with other jurisdictions' applications. Finally, Part V recommends that Louisiana declassify write-offs as collateral source benefits and proposes a statutory modification to the state's collateral source rule of evidence to effectively handle this declassification.

20. See, e.g., *Griffin v. La. Sheriff's Auto Risk Ass'n*, 1999-2944, p. 35-36 (La. App. 1 Cir. 6/22/01); 802 So. 2d 691, 714.

21. See *infra* Section IV.B.2.

22. See *La. Dep't of Transp. and Dev. v. Kansas City S. Ry. Co.*, 2002-2349, p. 11 (La. 5/20/03); 846 So. 2d 734, 742 ("Louisiana derives its collateral source rule from the common law; thus, we find persuasive other U.S. jurisdictions' application and interpretation of the collateral source rule.").

II. BACKGROUND OF COMPENSATORY DAMAGES AND THE INSTITUTION OF THE COLLATERAL SOURCE RULE

Before delving into a comprehensive analysis of the collateral source rule and its application in write-off situations, it is first necessary to understand the two categories of compensatory damages available to tort victims in litigation. This section introduces the two categories of compensatory damages available to tort victims in preparation for a later explanation of which category of damages the collateral source rule applies.

A. COMPENSATORY DAMAGES AND THEIR INTERACTION WITH THE COLLATERAL SOURCE RULE

In Louisiana, “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”²³ Every tort leads to some form of injury or damage to the victim.²⁴ Actual damages, also referred to as compensatory damages, are awarded to a tort victim in attempt to compensate a proven injury.²⁵ These damages serve to restore tort victims to their condition prior to the tort.²⁶ Once tort victims are restored to their previous condition, they are “made whole,” and the tortfeasor is understood to have paid the necessary reparation for his tort.²⁷ In contrast, punitive damages are not concerned with making victims whole; rather, they punish tortfeasors in an attempt to prevent similar conduct in the future.²⁸

There are two categories of compensatory damages: special and general.²⁹ Special damages are directly quantifiable, meaning that they “have a ‘ready market value,’ i.e., the amount of damages . . . can be determined with relative certainty.”³⁰ Examples of special damages include lost wages, lost future

23. LA. CIV. CODE ANN. art. 2315 (2017).

24. William Crawford, § 4.7 Damages, 12 La. Civ. L. Treatise, Tort § 4.7 (2d. ed.).

25. *Damages*, BLACK’S LAW DICTIONARY (10th ed. 2014).

26. *Bellard v. Am. Cent. Ins. Co.*, 2007-1335, p. 13 (La. 4/8/08); 980 So. 2d 654, 669 (La. 2008).

27. *See id.*

28. *See Mosing v. Domas*, 2002-0012, p. 8 (La. 10/15/02); 830 So. 2d 967, 974.

29. *Wainwright v. Fontenot*, 00-0492, p. 5 (La. 10/17/00); 774 So. 2d 70, 74.

30. *Id.* (citing Frank L. Maraist & Thomas C. Galligan, Jr., La. Tort Law § 7-2 (Michie 1996)).

earnings, and medical expenses.³¹ In contrast, “general damages are those which are inherently speculative in nature and cannot be fixed with mathematical certainty.”³² Examples of general damages include physical pain and suffering, emotional distress, and loss of enjoyment of life.³³

The collateral source rule applies only to special damages.³⁴ This limitation is necessary given that collateral sources provide payment only for expenses that have been incurred by the tort victim, which are therefore directly quantifiable.³⁵

B. ORIGINS OF THE COLLATERAL SOURCE RULE

To show the United States Supreme Court's institution of the collateral source rule, this section begins with an analysis of the seminal collateral source case. A discussion of the case in which the Louisiana Supreme Court embraced the rule follows.

1. COMMON LAW ORIGIN OF THE RULE

The United States Supreme Court first introduced the collateral source rule in its 1854 decision *The Propeller Monticello v. Mollison*.³⁶ The case arose from a collision between the tortfeasor's steam-propeller, *The Monticello*, and the tort victim's schooner,³⁷ *The Northwestern*.³⁸ The *Monticello* was found at fault for causing the collision, yet its owner claimed he was not liable for damages because the victim received payment from its own third-party insurer.³⁹ The Court rejected the argument,

31. *Varnado v. Dep't of Emp't and Training*, 95-0787, p. 28 (La. App. 1 Cir. 6/28/96); 687 So. 2d 1013, 1033 (citing *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986)).

32. *Wainwright v. Fontenot*, 00-0492, p. 6 (La. 10/17/00); 774 So. 2d 70, 74; (citing Frank L. Maraist & Thomas C. Galligan, Jr., *La. Tort Law* § 7-2 (Michie 1996) (internal quotations omitted)).

33. *See* 22 Am. Jur. 2d Damages § 42 (2017); *see also Varnado*, 95-0787, p. 28; 687 So. 2d at 1033 (citing *Memphis Comm. Sch. Dist.*, 477 U.S. at 306).

34. *See* Stein, *supra* note 2 at § 13:4 (citing *Smith v. Am. States Ins. Co.*, 586 N.W.2d 784 (Minn. Ct. App. 1998)).

35. *See id.*

36. *See The Propeller Monticello v. Mollison*, 58 U.S. 152 (1854); *see also* David M. Melancon & Kelly E. Brilleaux, *The Collateral Source Rule and Gratuitous Payments or Services*, FOR THE DEFENSE, Nov. 2012, at 42.

37. A schooner is “a sailing ship rigged with fore-and-aft sails on its two or more masts.” *Schooner*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/technology/schooner> (last visited Feb. 5, 2016).

38. *The Propeller Monticello*, 58 U.S. at 153.

39. *Id.* at 154–55.

noting that the tort victim's contract with a third-party insurer was a wager exclusively between those parties in "which the [tortfeasor] ha[d] no concern."⁴⁰ The Court held that the victim's receipt of payment from a collateral source, such as his own independent insurer, did not eliminate or reduce the tortfeasor's liability for damages caused by the collision.⁴¹ The Supreme Court also found it inequitable to reduce the tortfeasor's liability merely because the victim had the foresight to secure insurance from a collateral source independent of the tortfeasor.⁴²

2. LOUISIANA ORIGIN OF THE RULE

In 1962, the Louisiana Supreme Court embraced the collateral source rule in *Gunter v. Lord*.⁴³ In *Gunter*, the plaintiffs filed suit against the tortfeasor and the tortfeasor's insurer for injuries sustained in an automobile accident.⁴⁴ The plaintiffs sought damages for medical expenses under the general liability provision of the tortfeasor's insurance policy despite having been previously compensated under the medical payments provision of that *same policy*.⁴⁵ The court ruled that the tort victims could not recover twice *from the same insurer for the same medical expenses*.⁴⁶ However, the court was clear to establish its acceptance of the collateral source rule in different factual scenarios when it noted:

This is not to say, of course, that were the injured party wholly or partly indemnified for hospital or medical care by insurance effected and paid for by him or through some other source, and toward which the wrongdoer did not contribute, that the latter would benefit therefrom by a reduction of his damages in a suit by the injured party.⁴⁷

Thus, the Louisiana Supreme Court, like the United States Supreme Court in *The Propellor Monticello*, endorsed the application of the collateral source rule in limited situations

40. *The Propellor Monticello v. Mollison*, 58 U.S. 152, 155 (1854).

41. *See id.*

42. *See id.*

43. *See Gunter v. Lord*, 140 So. 2d 11 (La. 1962); *see also Bozeman v. State*, 2003-1016, pp. 18-20 (La. 7/2/04); 879 So. 2d 692, 697 n.4 (noting that *Gunter v. Lord* is the seminal case regarding Louisiana's acceptance of the collateral source rule).

44. *Gunter*, 140 So. 2d at 12.

45. *Id.*

46. *Id.* at 16.

47. *Id.*

where injured parties, due to their own initiative and without contribution from the tortfeasor, received indemnification⁴⁸ from a third-party for injuries sustained in tort.⁴⁹ Twenty-seven years later, in 1989, the Louisiana legislature enacted a collateral source rule of evidence, which will be discussed later in this Comment.⁵⁰

C. COMPETING INTERESTS OF THE COLLATERAL SOURCE RULE: RESOLVING THE WRITE-OFF ISSUE CAN SERVE AS A COMPROMISE

The collateral source rule has become a controversial topic in recent years.⁵¹ While the general trend throughout the country is to abrogate, or at least limit, its application,⁵² the rule is not without its merits. Louisiana courts often cite three policy motives for applying the rule: (1) to deter tortious conduct, (2) to encourage individuals to secure a collateral source of coverage by purchasing private insurance or pursuing alternative forms of reimbursement, and (3) to prevent tortfeasors from benefitting from tort victims' independent and proactive action of securing a collateral source of coverage.⁵³ Additionally, proponents of the rule argue that because a windfall to some party is inevitable, the injured party should receive the benefit.⁵⁴ Moreover, supporters argue that the rule allows tort victims to pay attorneys, who are likely retained on a contingency fee basis,⁵⁵ and still recover enough damages to be adequately compensated for their injuries.⁵⁶

48. *Indemnify*, Cornell U. L. Sch. Legal Info. Inst., <https://www.law.cornell.edu/wex/indemnify> ("To indemnify another party is to compensate that party for losses that that party has incurred or will incur as related to a specified incident. . . . A common example of indemnification happens with [regard] to insurance transactions. This often happens when an insurance company, as part of an individual's insurance policy, agrees to indemnify the insured person for losses that the insured person incurred as the result of accident or property damage.").

49. *Gunter v. Lord*, 140 So. 2d 11 (La. 1962).

50. *See infra* Section IV.A.

51. *See Benjet, supra* note 2 and accompanying text.

52. *See Benjet, supra* note 2.

53. *See La. Dep't of Transp. & Dev. v. Kansas City S. Ry. Co.*, 2002-2349, p. 7 (La. 2003); 846 So. 2d 734, 739.

54. *See Benjet, supra* note 2.

55. *Contingent Fee*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court. Contingent fees are [usually] calculated as a percentage of the client's net recovery.").

56. *See Daena A. Goldsmith, A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799, 802

In contrast, opponents of the rule—riding a strong wave of momentum from the tort reform movement⁵⁷—continue to present persuasive arguments for abrogating or restricting the rule. The primary criticism of the rule is its inconsistency with the primary goal of tort law, which is to place victims in the position they would have been in had the tort not occurred.⁵⁸ Specifically, opponents argue that allowing victims to recover payments from both the collateral source and the tortfeasor grants victims double recovery and places them in a better position than they would have been in had the tort not been committed.⁵⁹ Opponents argue that this practice incentivizes litigation, wastes judicial resources, and raises insurance premiums.⁶⁰

Even those who wish to abolish the rule's applicability to write-offs can acknowledge that the rule promotes legitimate and important policy goals when applied in situations like those contemplated in *The Propeller Monticello* and *Gunter*.⁶¹ Resolving the write-off issue is one method of maintaining the rule's general applicability and preserving its policy concerns, while striking a compromise between supporters and opponents of the rule. A law student eloquently described this potential compromise in a recent law review publication:

Resolving the write-off issue . . . can balance the strengths and weaknesses of the rule and serve as a practical compromise between retaining the strict common law rule and completely abandoning [it].⁶²

This Comment's proposal does not advocate for a complete abrogation of Louisiana's collateral source rule; rather, it seeks to maintain the rule's general applicability while discontinuing its

(1988).

57. See Rachel M. Janutis, *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943, 944 (2006) (referring to the tort reform movement as a development beginning in the mid-1970s, in which professional and insurance interest groups began advocating for "legislative measures aimed at limiting the availability of relief and the amount of relief in personal injury actions").

58. J. Zachary Balasko, *A Return to Reasonability: Modifying the Collateral Source Rule in Light of Artificially Inflated Damage Awards*, 72 WASH. & LEE L. REV. ONLINE 16, 24 (2015).

59. See *id.*

60. See Goldsmith, *supra* note 56, at 803.

61. Balasko, *supra* note 58.

62. *Id.*

application to written-off medical expenses.

III. FEE SCHEDULES IN THE HEALTH INSURANCE INDUSTRY: HOW WRITE-OFFS COME INTO PLAY

The frequent appearance of write-offs is often a direct result of the health insurance industry's use of fee schedules. A fee schedule is a list of reimbursement values that private health insurers and Medicaid pay healthcare providers for care provided to their insureds.⁶³ The rates of reimbursement listed in the fee schedule represent the maximum the insurer will pay for the care provided to its insured.⁶⁴ When a healthcare provider renders care to an insured patient, the provider contractually agrees to accept the reimbursement rate on the insurer's fee schedule as full payment for the care provided.⁶⁵ "In many instances, the reimbursement offered by insurers is less than that [billed] by health care providers."⁶⁶ The difference between the amount billed by the healthcare provider and the amount paid by the health insurer is what is commonly referred to as a write-off.⁶⁷ The following Medicaid fee schedule illustrates this practice by listing the maximum reimbursement rates for emergency medical care provided in an ambulance to a person covered by Medicaid in Louisiana.⁶⁸

63. See *Fee Schedules*, *supra* note 18 ("Managed care organizations and other medical insurance providers publish lists representing the maximum charges they will reimburse for the same services.").

64. *Id.*

65. Douglas Rallo, *Insurance Write-Offs and the Collateral Source Rule: If Part of a Tort Plaintiff's Medical Bill Has Been Written Off Under an Agreement With the Provider and the Plaintiff's Insurer, Can the Plaintiff Still Recover the Full Billed Amount?*, 38 TRIAL 42 (Sept. 2002).

66. *Id.*

67. *Id.*

68. *Ambulance Fee Schedule Page*, LOUISIANA DEPARTMENT OF HEALTH & HOSPITALS, http://www.lamedicaid.com/provweb1/fee_schedules/AMB_Index.htm (Dec. 2014). The Medicaid fee schedule is geographically categorized by Medicare regions. *Id.*

Ambulance Fee Schedule

Updated December 2014

Emergency Ground Ambulance Effective August 1, 2012

Code	Description	Medicare Region							
		1	2	3	4	5	6	7	8
A0429	Basic life support	167.24	161.86	167.24	167.24	167.24	167.24	167.24	167.24
A0425	Mileage, per statute mile	6.64	6.64	6.64	6.64	6.64	6.64	6.64	6.64
A0427	Advanced life support, level 1	319.89	320.27	319.18	320.34	320.19	320.09	319.42	320.53
A0433	Advanced life support, level 2	319.89	320.27	319.18	320.34	320.19	320.09	319.42	320.53
A0434	Specialty care transport	319.89	320.27	319.18	320.34	320.19	320.09	319.42	320.53
A0382	Basic life support disposable supplies	7.06	1.76	15.98	13.15	13.15	13.15	15.98	4.38
A0398	Advanced life support routine disposable supplies	4.77	17.29	17.06	17.06	16.93	17.06	18.30	16.15
A0394*	ALS specialized service disposable supplies	24.81	24.81	24.81	24.81	24.61	24.81	24.81	24.81
A0422	Oxygen and supplies	55.16	55.16	55.16	55.16	54.30	55.16	55.16	55.16

*A0394 is only payable when determined as medically necessary.

This fee schedule lists reimbursement values for numerous services depending on the region where the care was provided. For example, in Medicare Region 1, the maximum reimbursement value a healthcare provider could receive in 2012 for basic life support provided to a patient covered by Medicaid was \$167.24.⁶⁹ Thus, a provider who billed \$367.24 for the same care would only obtain \$167.24 from Medicaid, resulting in a \$200.00 write-off.

The use of fee schedules is commonplace in the health insurance industry, which results in frequently occurring write-offs. Thus, the classification or non-classification of write-offs as collateral source benefits has major implications on the amount of damages available in litigation.

IV. THE COLLATERAL SOURCE RULE IN ACTION

The collateral source rule is often utilized in litigation. This part begins with an illustration of Louisiana's general application of the rule before comparing Louisiana's application of the rule in write-off situations with that of other jurisdictions.

A. LOUISIANA'S APPLICATION OF THE RULE

Louisiana's collateral source rule is codified in article 409 of the Louisiana Code of Evidence, which reads as follows:

In a civil case, evidence of furnishing or offering or promising to pay expenses or losses occasioned by an injury to person or damage to property is not admissible to prove liability for the injury or damage nor is it admissible to mitigate, reduce, or avoid liability therefor. This Article does not require the exclusion of such evidence when it is offered solely for

69. *Ambulance Fee Schedule Page*, *supra* note 68.

another purpose, such as to enforce a contract for payment.⁷⁰

The rule prevents tortfeasors from attempting to reduce their liability by introducing evidence of payments made by an independent source on behalf of a tort victim.⁷¹

To better understand the rule's application, recall the hypothetical from Part I in which the healthcare provider billed Mary \$100,000.⁷² Due to the use of a fee schedule, Mary's health insurer only paid \$60,000 in full satisfaction of the bill. This resulted in a \$40,000 write-off, which neither Mary nor her insurer paid or was liable to pay.

In pursuit of a maximum special damages award, Mary would introduce the bill from the healthcare provider listing the \$100,000 charge for the surgery. An example of what Mary would introduce as evidence is provided below:

Plaintiff's Exhibit:

Bill to: Plaintiff

DESCRIPTION	AMOUNT
Surgery to Repair Broken Leg	\$100,000.00
Total Expense	\$100,000.00

The defendant-tortfeasor would likely attempt to introduce the final invoice—showing both the write-off and the amount paid—into evidence, an example of which is provided below:

Defendant's Exhibit:

Bill to: Plaintiff

DESCRIPTION	AMOUNT
Surgery to Repair Broken Leg	\$100,000.00
Write-Off	\$(40,000.00)
Total Expense	\$60,000.00

70. *Ambulance Fee Schedule Page*, *supra* note 68.

71. *Francis v. Brown*, 95-1241, p. 9 (La. App. 3 Cir. 3/20/96); 671 So. 2d 1041, 1047.

72. *See supra* p. 294.

Yet, article 409 clearly categorizes such evidence as inadmissible.⁷³ Thus, under Louisiana's current application of article 409, a court would allow Mary's exhibit into evidence but would exclude the defendant's exhibit.

1. LOUISIANA'S APPLICATION OF THE RULE TO PAYMENTS MADE BY THE TORT VICTIM'S HEALTH INSURER

Perhaps the most frequent application of the collateral source rule occurs when tortfeasors seek a credit in damages after tort victims have already obtained payment from their personal health insurer. Louisiana Code of Evidence article 409 clearly categorizes evidence of these payments as inadmissible.⁷⁴ For example, in *Dumas v. Harry*, a Louisiana Fifth Circuit Court of Appeal decision, the tort victim successfully appealed the trial judge's decision to admit collateral sources of recovery into evidence for the jury to consider when awarding special damages.⁷⁵ The trial judge admitted evidence of payments made by the tort victim's personal health insurer, Blue Cross, for medical care provided to the tort victim for injuries sustained in the automobile accident giving rise to the lawsuit.⁷⁶ The jury failed to award the tort victim damages for the medical expenses incurred and, in doing so, provided the tortfeasor with a credit for the payments made by Blue Cross.⁷⁷

On appeal, the court overruled the trial judge's admission of the Blue Cross payments as evidence, noting that "[t]he collateral source rule holds that a tortfeasor is not entitled to a credit for payments made to a plaintiff through collateral sources independent of the wrongdoer's procurement or contribution."⁷⁸ In admitting such evidence, the trial judge violated one purpose of the collateral source rule: to prevent the tortfeasor from "benefit[ing] from the financial payments of others."⁷⁹

In sum, Louisiana's application of the collateral source rule does not permit tortfeasors to enjoy a reduction in damages owed

73. See LA. CODE EVID. ANN. art. 409 (2015) (stating "evidence of furnishing or offering or promising to pay expenses or losses occasioned by an injury to person . . . is not admissible to . . . mitigate, reduce, or avoid liability [for the damage]").

74. See *id.*

75. See *Dumas v. Harry*, 94-19, 94-20 (La. App. 5 Cir. 5/11/94); 638 So. 2d 283.

76. See *id.* at p. 4; 638 So. 2d at 286.

77. See *id.* at p. 5; 638 So. 2d at 287.

78. *Id.* at p. 4; 638 So. 2d at 286.

79. *Id.*

in the amount of the payments made by the tort victim's personal health insurer. The courts considered this scenario when the rule was implemented at common law in *The Propeller Monticello* and embraced by Louisiana in *Gunter*.⁸⁰

2. LOUISIANA'S APPLICATION OF THE RULE IN WRITE-OFF SITUATIONS

Louisiana's application of the collateral source rule varies when there is a write-off in medical expenses. This section will discuss the collateral source rule's applicability to three forms of medical expense write-offs: (1) private health insurer write-offs, (2) Medicaid write-offs, and (3) attorney-negotiated write-offs. Generally, the write-off rule hinges on whether the tort victim's patrimony⁸¹ was diminished to secure the write-off.⁸² This analysis, which will be explained later, has been coined the "Benefit of the Bargain" approach.⁸³

a. PRIVATE HEALTH INSURER WRITE-OFFS

The Louisiana First Circuit Court of Appeal, in *Griffin v. Louisiana Sheriff's Auto Risk Ass'n*, was the first Louisiana court to analyze the applicability of the collateral source rule in situations where health insurers obtained write-offs from medical providers in exchange for a continuous inflow of patients.⁸⁴ The tort victim, who was injured in an automobile accident, was a state employee with health insurance coverage through the State Employees Group Benefits Plan (SEGB).⁸⁵ SEGB established a fee schedule listing the maximum amounts of reimbursement it would pay for medical care provided to its insureds.⁸⁶ Any healthcare provider who "accept[ed] an assignment of benefits from SEGB . . . [was] prohibited from collecting [the written-off amount] from the insured."⁸⁷

80. See *supra* Section II.B.1-2.

81. *Patrimony*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("All of a person's assets and liabilities that are capable of monetary valuation and subject to execution for a creditor's benefit.").

82. See, e.g., *Bozeman v. State*, 2003-1016, pp. 18-20 (La. 7/2/04); 879 So. 2d 692, 703-05.

83. See *id.*

84. See *Griffin v. La. Sheriff's Auto Risk Ass'n*, 1999-2944 (La. App. 1 Cir. 6/22/01); 802 So. 2d 691.

85. *Id.* at p. 2, 33; 802 So. 2d at 696, 713.

86. *Id.* at p. 33; 802 So. 2d at 713.

87. *Id.*

The tort victim appealed the trial court's determination that the collateral source rule was inapplicable in situations where the victim's own insurer obtained a contractual write-off from a healthcare provider.⁸⁸ The fee originally charged for the medical care provided to the tort victim was \$89,909.05;⁸⁹ however, pursuant to the fee schedule, SEGB obtained a write-off in the amount of \$47,739.28.⁹⁰ This resulted in an SEGB payment of only \$42,169.72 on behalf of the tort victim.⁹¹ The tort victim argued that she was also entitled to the \$47,739.28 write-off in her special damages award, but the trial court denied her request.⁹²

On appeal, the first circuit determined that the collateral source rule's applicability to write-offs should be analyzed *vis-à-vis* the tortfeasor, rather than *vis-à-vis* the tort victim.⁹³ The court determined that it would be unfair to reduce a tortfeasor's liability to an insured victim by the written-off amount, while requiring payment of the fully billed amount to an uninsured victim.⁹⁴ The court ruled that the tortfeasor should be required to pay the fully billed amount in each instance, given that the tortfeasor's liability to both an insured victim and an uninsured victim is the same.⁹⁵ Furthermore, the court reasoned that allowing the victim to recover the write-off would not amount to a windfall in her favor.⁹⁶ Instead, it found that no windfall occurred because the plaintiff's SEGB benefits were obtained via payment of her insurance premiums, which the court considered a diminishment of her patrimony.⁹⁷

To avoid granting a windfall to the tortfeasor, the court ultimately determined that the write-off was a collateral source benefit that the tort victim secured through her bargain with her private insurer.⁹⁸ This reasoning is known as the "Benefit of the Bargain" approach.

88. *Griffin v. La. Sheriff's Auto Risk Ass'n*, 1999-2944, p. 34 (La. App. 1 Cir. 6/22/01); 802 So. 2d 691, 713.

89. Note that the fees in the case appear to be off by five cents.

90. *Griffin*, 1999-2944, p. 33; 802 So. 2d at 713.

91. *Id.*

92. *Id.*

93. *Id.* at pp. 36-37; 802 So. 2d at 714-15.

94. *Id.*

95. *Griffin*, 1999-2944, p. 36; 802 So. 2d at 715.

96. *Id.* at pp. 35-36; 802 So. 2d at 714.

97. *Id.*

98. *Id.* at p. 37; 802 So. 2d at 715.

b. MEDICAID WRITE-OFFS

Though Medicaid differs from private health insurance—in that Medicaid is “a health care program for people with low income and limited assets” and does not require payment of premiums—the program still mandates reimbursement rates through fee schedules.⁹⁹ Therefore, write-offs also exist in cases where an injured party is covered by Medicaid.

In *Bozeman v. State*, the Louisiana Supreme Court confronted the issue of whether “a Medicaid recipient . . . is entitled to recover medical damages that were ‘written-off’ by his healthcare providers . . . under the collateral source rule.”¹⁰⁰ The tort victim was severely injured in an automobile collision and required extensive medical treatment.¹⁰¹ Claims were submitted to Medicaid in the amount of \$622,086.89.¹⁰² Medicaid paid claims totaling \$319,838.46 and denied claims totaling \$35,368.51.¹⁰³ The tort victim’s various healthcare providers wrote-off the remaining expenses, which totaled \$266,879.92.¹⁰⁴

In determining whether to award the tort victim the written-off amount of medical expenses, the Louisiana Supreme Court accepted the Benefit of the Bargain approach utilized by the Louisiana First Circuit Court of Appeal in *Griffin*¹⁰⁵ and other jurisdictions.¹⁰⁶ Under this approach, courts allow the tort victim to take advantage of the collateral source rule and recover the full value of the medical expenses—including the write-off—only when “the [tort victim] has paid some consideration for the

99. See *Bozeman v. State*, 2003-1016, pp. 20–21 (La. 7/2/04); 879 So. 2d 692, 704–05 (internal citations omitted)

100. See *id.* at pp. 12–13; 879 So. 2d at 700–01.

101. See *id.* at pp. 2–3; 879 So. 2d at 694.

102. *Id.* at p. 12; 879 So. 2d at 700.

103. See *id.*

104. See *Bozeman*, 2003-1016, p. 12; 879 So. 2d at 700.

105. See *supra* Section IV.A.2.a.

106. See *Bozeman*, 2003-1016, pp. 18–20; 879 So. 2d at 703–05. The court noted two other approaches utilized for awarding or not awarding the “written-off” amount under the collateral source rule. The first being the “Reasonable Value of Services” approach, which awards tort victims the “entire amount of the medical expenses that were billed to the [tort victim], including those amounts that were written off by healthcare providers.” *Id.* at pp. 14–16; 879 So. 2d at 701–02. The other approach is referred to as the “Actual Amounts Paid” approach, which “den[ies] the [tort victim] the ability to recover the write-off amounts because the plaintiff did not incur the ‘write-off’ amount, thus resulting in a windfall for the plaintiff, if the plaintiff was allowed to recover.” *Id.*

benefit of the ‘write-off’ amount.”¹⁰⁷ In *Bozeman*, the tort victim paid no consideration for the write-off because Medicaid is a free medical service for which a person “pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for.”¹⁰⁸ Therefore, the court concluded the victim was not entitled to recover the written-off amount under the collateral source rule.¹⁰⁹

An argument can be made that the public’s payment of taxes to provide Medicaid to impoverished members of the community is analogous to premium payments to secure private insurance; however, the Louisiana Supreme Court focused on the patrimony of the individual victim, not the patrimony of the tax-paying public.¹¹⁰ The court determined that the collateral source rule does not apply to write-offs for care provided to a Medicaid recipient when that recipient suffers no diminishment of his patrimony, even though the public’s patrimony is diminished through the payment of taxes.

c. ATTORNEY-NEGOTIATED WRITE-OFFS

The Louisiana Supreme Court recently decided “whether the collateral source rule applies to the ‘written-off’ portion of a medical bill when the [tort victim’s] attorney negotiated the discount.”¹¹¹ In *Hoffman v. 21st Century North America Insurance Co.*, the tort victim introduced a billing statement from an imaging center totaling \$3,000 for two magnetic resonance imaging (MRI) scans (or \$1,500 each).¹¹² In response, the defendant introduced a final bill from the same imaging center totaling \$950 for the two MRIs (or \$475 each).¹¹³ The evidence indicated that the tort victim’s attorney made an agreement with the imaging center to receive discounts for his client’s MRI

107. *Bozeman v. State*, 2003-1016, p. 18 (La. 7/2/04); 879 So. 2d 692, 703.

108. *Id.* at pp. 21–22; 879 So. 2d at 705.

109. *Id.* at p. 22; 879 So. 2d at 705–06.

110. *Id.* at p. 21; 879 So. 2d at 705 (citing *Gordon v. Forsyth Cty. Hosp. Auth., Inc.*, 409 F. Supp. 708 (M.D. N.C. 1975), *aff’d in part and vacated in part*, 544 F.2d 748 (4th Cir. 1976)) (“It would be unconscionable to permit the taxpayers to bear the expense of providing free medical care to a person and then allow that person to recover damages for medical expenses from a tort-feasor and pocket the windfall.”).

111. *Hoffman v. 21st Century N. Am. Ins. Co.*, 2014-2279, p. 1 (La. 10/2/15); 209 So. 3d 702, 704.

112. *See id.*

113. *See id.*

expenses.¹¹⁴ As a result, each MRI was discounted by \$1,025, so the actual amount the tort victim paid was \$950 total.¹¹⁵

The tort victim claimed entitlement to the \$3,000 total expense of the MRIs without subtracting the amount of the write-off; however, the defendant argued that the trial court was correct to award only the amount actually paid by the tort victim.¹¹⁶ The victim contended that the collateral source rule should apply to the write-off because, pursuant to his contingency fee arrangement, his payment to his attorney would be a diminishment of his patrimony under the Benefit of the Bargain approach.¹¹⁷ The court expressly rejected this argument, finding that the payment of attorney's fees was not "*additional* damage suffered by the tort victim."¹¹⁸ "Because the tortfeasor is not liable for, and the tort victim has no right to recover, attorney's fees, the payment of an attorney fee is not *additional* damage to the plaintiff's patrimony so as to justify the 'windfall' or 'double recovery' represented by the attorney-negotiated discount."¹¹⁹ Therefore, the court adopted a bright-line rule that the collateral source rule is inapplicable to attorney-negotiated discounts.¹²⁰

3. SUMMARY OF LOUISIANA'S APPLICATION OF THE COLLATERAL SOURCE RULE IN WRITE-OFF SITUATIONS

Louisiana courts allow recovery of write-offs under the collateral source rule as long as the write-off is secured through some diminishment of the tort victim's patrimony. As demonstrated in *Griffin*, the payment of premiums to a private insurer satisfies the diminishment of the patrimony requirement.¹²¹ Medicaid write-offs, in contrast, are not collateral source benefits because a person suffers no diminishment of

114. *Hoffman v. 21st Century N. Am. Ins. Co.*, 2014-2279, p. 1 (La. 10/2/15); 209 So. 3d 702, 704.

115. *See id.* at p. 1; 209 So. 3d at 704.

116. *Id.*

117. *Id.* at p. 4; 209 So. 3d at 704.

118. *See id.* at p. 8; 209 So. 3d at 707 ("This argument is based on the assumption that the payment of an attorney's fee is *additional* damage suffered by the tort victim. However, '[i]t is . . . well recognized in the jurisprudence of this state that as a general rule attorney fees are not allowed except when authorized by statute or contract.'") (quoting *Killebrew v. Abbott Laboratories*, 61338, p. 3 (La. 6/19/78); 359 So. 2d 1275, 1278).

119. *Hoffman*, 2014-2279, p. 8; 209 So. 3d at 704 (emphasis added).

120. *See id.*

121. *See supra* Section IV.A.2.a.

patrimony when covered by Medicaid.¹²² Similarly, discounts obtained through negotiations between an attorney and a healthcare provider are not collateral source benefits because the discount does not diminish the victim's patrimony.¹²³

B. OTHER JURISDICTIONS' APPLICATIONS OF THE COLLATERAL SOURCE RULE IN WRITE-OFF SITUATIONS

Because Louisiana finds other jurisdictions' applications of the collateral source rule persuasive, the forthcoming analysis should provide Louisiana courts guidance in potential modifications of the state's rule.¹²⁴ As shown below, many states disagree as to whether write-offs should be considered collateral source benefits.

1. SOME STATES CLASSIFY WRITE-OFFS AS COLLATERAL SOURCE BENEFITS

A few jurisdictions in the country classify write-offs as collateral source benefits¹²⁵ and consider write-offs as benefits bestowed upon the tort victim through a contract with a private health insurer.¹²⁶ These jurisdictions generally agree that write-offs are obtained solely because the tort victim has paid to secure some collateral benefit—medical insurance.¹²⁷ This is essentially the reasoning Louisiana applies in its Benefit of the Bargain approach, which, as discussed earlier,¹²⁸ classifies write-offs as collateral source benefits as long as the tort victim has suffered some diminishment of patrimony to secure the benefit. These

122. *See supra* Section IV.A.2.b.

123. *See supra* Section IV.A.2.c.

124. *See* La. Dep't of Transp. and Dev. v. Kansas City S. Ry. Co., 2002-2349, p. 11 (La. 5/20/03); 846 So. 2d 734, 742.

125. That is not to say that all of these jurisdictions allow tort victims to recover write-offs; rather, they classify write-offs as collateral source benefits and either award or deny those benefits based on the jurisdiction's collateral source rule. *See* Swanson v. Brewster, 784 N.W.2d 264, 276, 282 (Minn. 2010) (classifying write-offs as collateral source benefits but failing to allow the victim to recover such written-off amount pursuant to MINN. STAT. ANN. § 548.251, subd. 3 (West 2015)).

126. *See* *Hardi v. Mezzanotte*, 818 A.2d 974, 985 (D.C. Cir. 2003) (“[B]ecause any write-offs enjoyed by [the tort victim] were negotiated by her private insurance company, a source independent of [the tortfeasor], they should be included in her damages. Under the collateral source rule, she is entitled to all benefits resulting from her contract.”).

127. *Id.*; *see also* *Dewits by Nuestel v. Emery*, 508 N.W.2d 334, 340 (N.D. 1993) (classifying the write-off as a collateral source benefit because it was traceable to the tort victim's health insurance policy).

128. *See supra* Section IV.A.2.

jurisdictions find that write-offs are benefits to the tort victim obtained via a contractual bargain; therefore, they should be classified as collateral source benefits.¹²⁹

2. OTHER STATES HOLD THAT WRITE-OFFS ARE NOT COLLATERAL-SOURCE BENEFITS

Conversely, a number of states have concluded that write-offs should not be classified as collateral source benefits.¹³⁰ The Second Restatement of Torts classifies collateral source benefits as either “payments made to” or “benefits conferred on the injured party” from a source independent of the tortfeasor.¹³¹ Under this principle, these jurisdictions hold that write-offs are neither payments made to nor benefits conferred on tort victims.¹³²

First, these jurisdictions generally hold that write-offs are not payments under the collateral source rule solely because no one pays the written-off amount.¹³³ Write-offs result in a lower amount accepted as full satisfaction¹³⁴ for the medical expenses incurred; therefore, the written-off amount is neither paid on the tort victim's behalf nor paid to the tort victim to indemnify him for expenses.¹³⁵ Second, though the healthcare provider confers a benefit by accepting an amount less than the original amount billed, the write-off benefits either the private insurer in instances of private health insurance, or the taxpayers in

129. See, e.g., *Bozeman v. State*, 2003-1016, p. 19 (La. 7/2/04); 879 So. 2d 692, 704.

130. See generally *Hamilton v. Howell Meats and Provisions, Inc.*, 257 P.3d 1130, 1140 (Cal. 2011); *Coop. Leasing v. Johnson*, 872 So. 2d 956, 960 (Fla. Dist. Ct. App. 2004); *Dyet v. McKinley*, 81 P.3d 1236, 1239 (Idaho 2003); *Stanley v. Walker*, 906 N.E.2d 852, 855 (Ind. 2009); *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 208 (Kan. 2010); *Jaques v. Manton*, 928 N.E.2d 434, 438 (Ohio 2010); *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 791 (Pa. 2001); *Haygood v. De Escabedo*, 356 S.W.3d 390, 395 (Tex. 2011).

131. Restatement (Second) of Torts § 920A (AM. LAW INST. 1979).

132. See *Stayton v. Delaware Health Corp.*, 117 A.3d 521, 528–29 (Del. 2015).

133. See, e.g., *Hamilton*, 257 P.3d at 1139.

134. *Accord and Satisfaction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“An agreement to substitute for an existing debt some alternative form of discharging that debt, coupled with the actual discharge of the debt by the substituted performance. The new agreement is called the *accord*, and the discharge is called the *satisfaction*.”). The payment of the reduced amount of medical bills settles all potential claims for reimbursement for the medical care provider by the healthcare provider. Neither the tort victim nor the private insurer can be held liable for the written-off amount.

135. See, e.g., *Hamilton*, 257 P.3d at 1139.

instances of Medicaid.¹³⁶ Health insurers and Medicaid agree to cover a person's medical expenses;¹³⁷ therefore, these entities benefit from the reduction in the expense rather than the individual victim.

Because these jurisdictions have not identified a way to classify write-offs as either payments made on the tort victim's behalf or benefits bestowed upon the tort victim, they have refused to classify such amounts as collateral source benefits.

3. STATUTORY MODIFICATIONS OF THE COLLATERAL SOURCE RULE IN OTHER JURISDICTIONS

Minnesota and Missouri have statutorily modified their collateral source rules in an attempt to provide the most equitable solution for all parties. The forthcoming proposal incorporates aspects of these jurisdictions' collateral source rules by proposing a mechanism for post-trial reduction that applies a rebuttable presumption that the actual amount paid is the reasonable value of the medical care.

a. MINNESOTA'S POST-TRIAL REDUCTION AVOIDS CONCERNS OF PLACING COLLATERAL-SOURCE EVIDENCE IN FRONT OF THE JURY

Minnesota modified its rule in 2008 through a revision of its collateral source rule statute.¹³⁸ The statute is noteworthy because it provides a unique mechanism for reducing the damage award based on collateral source payments. Though the statute explicitly bars tort victims from recovering any payments from a collateral source,¹³⁹ the jury is not "informed of the existence of collateral sources or any future benefits which may or may not be payable to the [tort victim]."¹⁴⁰ Instead, the court requires a tortfeasor seeking a reduction in damages to submit a post-judgment motion asking the court to reduce the damage award based on evidence of collateral source payments.¹⁴¹

136. See *Haygood v. De Escabedo*, 356 S.W.3d 390, 395 (Tex. 2011) ("An adjustment in the amount of those charges to arrive at the amount owed is a benefit to the insurer, one it obtains from the provider for itself, not for the insured.").

137. See *Understanding Health Insurance*, INDEPENDENCE BLUE CROSS, <http://basics.ibx.com/what-is-health-insurance/> (last visited Apr. 30, 2016).

138. See MINN. STAT. ANN. § 548.251 (West 2015).

139. This Comment does not propose a ban on recovering all collateral source payments.

140. See MINN. STAT. ANN. § 548.251(5) (West 2015).

141. See *id.*

Minnesota, like other states, has recognized that submitting evidence of both the amount billed and the amount actually paid creates the potential for confusion and misuse of the evidence by the jury.¹⁴² Minnesota's post-trial reduction allows the jury to make a determination of the reasonable value of the medical expenses based solely on the amount billed; therefore, it adequately avoids all potential misuse of collateral source evidence by the jury.

b. MISSOURI HAS ESTABLISHED A REBUTTABLE PRESUMPTION THAT THE AMOUNT PAID BY THE HEALTH INSURER IS THE REASONABLE VALUE OF THE TORT VICTIM'S MEDICAL EXPENSES

Missouri amended its collateral source rule in 2005.¹⁴³ The relevant portion of the statute, for purposes of this Comment, is its method for determining the reasonable value of the tort victim's medical expenses. The statute establishes a rebuttable presumption that the *amount actually paid* by the collateral source to "satisfy the financial obligation to the health care provider" represents the reasonable value of the medical expenses.¹⁴⁴ A party seeking to rebut this presumption can introduce evidence, outside of the presence of the jury, such as the amount billed, the amount actually paid, and the amount the tort victim will have to pay to the healthcare provider in the event of a judgment in his or her favor.¹⁴⁵

V. PROPOSAL

While Louisiana has yet to legislatively modify its collateral source rule,¹⁴⁶ the general trend throughout the country is to limit the rule from its original all-encompassing application.¹⁴⁷ This Comment makes two proposals: (1) Write-offs should no longer be considered collateral source benefits in Louisiana in any situation; and (2) Louisiana should modify its collateral source

142. See *Swanson v. Brewster*, 784 N.W.2d 264, 269 (Minn. 2010) (citing *Scott v. Garfield*, 454 Mass. 790; 912 N.E.2d 1000 (2009)).

143. See MO. ANN. STAT. § 490.715 (West 2015).

144. MO. ANN. STAT. § 490.715(5)(2) (West 2015).

145. MO. ANN. STAT. § 490.715(5)(2)(a)–(c) (West 2015).

146. See *Bozeman v. State*, 2003-1016, p. 9 (La. 7/2/04); 879 So. 2d 692, 698 (“[T]he Louisiana Legislature has declined to make any statutory changes to the [collateral source] rule.”).

147. Wershale, *supra* note 10, at 351 (noting that “a majority of states have enacted some provisions affecting collateral benefits in tort actions”).

rule of evidence to accommodate the proposed declassification of write-offs as collateral source benefits.

**A. WRITE-OFFS SHOULD NO LONGER BE CONSIDERED
COLLATERAL SOURCE BENEFITS UNDER LOUISIANA LAW**

The first step in determining the applicability of the collateral source rule in write-off situations requires an inquiry into whether such write-offs should be classified as collateral source benefits in the first place. Louisiana should declassify write-offs as collateral source benefits for two reasons: (1) Write-offs cannot be classified as collateral source benefits under the wording of article 409 of Louisiana's Code of Evidence; and (2) Write-offs cannot be classified as collateral source benefits under the jurisprudentially recognized categories of collateral source benefits.

First, applying Louisiana's rules of statutory interpretation,¹⁴⁸ write-offs cannot be classified as collateral source benefits under the clear and unambiguous wording of Louisiana Code of Evidence article 409.¹⁴⁹ Article 409 clearly limits collateral source benefits to (1) actual payments by a collateral source, (2) offers to make payments by a collateral source, and (3) promises to make payments by a collateral source.¹⁵⁰ Write-offs are not classified as actual payments by a collateral source because they are contracted-for discounts that are never actually paid. Furthermore, health insurers do not offer or promise to pay the write-off; rather, they contract with the healthcare provider for the discount and are not held liable for payment of the write-off. Write-offs cannot be classified as collateral source benefits under the clear and unambiguous wording of article 409 because health insurers do not pay, offer to pay, or promise to pay write-offs.

Next, write-offs cannot be classified as collateral source benefits under the jurisprudentially recognized categories. The Louisiana Supreme Court, citing the Second Restatement of

148. "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." *See* LA. CIV. CODE ANN. art. 9 (2017).

149. "When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit." LA. STAT. ANN. § 1:4 (2003).

150. *See* LA. CODE EVID. ANN. art. 409 (2006).

Torts, acknowledges that collateral source benefits are limited to (1) payments made to or on behalf of the tort victim or (2) benefits bestowed upon the tort victim.¹⁵¹ Under current law, Louisiana classifies write-offs as benefits bestowed upon the tort victim that are only procured through the victim's contract with his private insurer.¹⁵²

This determination is flawed because write-offs are not benefits bestowed upon the tort victim; they are benefits bestowed upon the tort victim's insurer. Louisiana currently views write-offs as byproducts of the tort victim's personal insurance policy. Essentially, the logic is that because the tort victim's personal insurer secures write-offs, the tort victim obtained the write-off benefit by purchasing private insurance. To the contrary, as other jurisdictions have explained, citizens secure health insurance for the benefit of having their medical expenses covered.¹⁵³ Thus, a reduction in the amount necessary to satisfy the tort victim's medical expenses is a benefit to the private insurer, not the tort victim.¹⁵⁴ Some may argue that write-offs benefit tort victims and the general public by reducing insurers' costs and lowering insurance premiums. However, such a benefit is indirect and would not be equal to or measured by the written-off amount.¹⁵⁵ In sum, because write-offs are amounts of money never actually paid and are benefits to the health insurer—not the tort victim—such amounts should not be classified as collateral source benefits under Louisiana law.

B. LOUISIANA'S FLAWED REASONING IN CLASSIFYING WRITE-OFFS AS COLLATERAL SOURCE BENEFITS

While allowing tort victims to recover write-offs under the collateral source rule is sympathetic to victims, such a rule of law is contrary to the primary purpose of compensatory damages—to make the plaintiff whole. Neither the insurer nor the tort victim is held liable for the written-off amount.¹⁵⁶ If neither the tort victim nor the tort victim's insurer can be held liable for the

151. See *Hoffman v. 21st Century N. Am. Ins. Co.*, 2014-2279, p. 2 (La. 10/2/15); 209 So. 3d 702, 705 (citing Restatement (Second) of Torts § 920A (AM. LAW INST. 2015)).

152. See *Bozeman v. State*, 2003-1016, p. 18 (La. 7/2/04); 879 So. 2d 692, 703.

153. See *Haygood v. De Escabedo*, 356 S.W.3d 390, 395 (Tex. 2011).

154. See *id.*

155. See *id.*

156. See, e.g., *Hamilton v. Howell Meats and Provisions, Inc.*, 257 P.3d 1130, 1133 (Cal. 2011).

write-off, awarding write-offs as special damages makes the plaintiff “more than whole.”

The Louisiana Supreme Court has accepted the view that write-offs should be viewed vis-à-vis the tortfeasor.¹⁵⁷ This flawed reasoning orders tortfeasors to pay damages to insured victims who do not suffer a loss merely because the tortfeasors would have to compensate uninsured victims who would have suffered the loss.¹⁵⁸ Analyzing the collateral source problem vis-à-vis the tortfeasor ignores the fundamental principle of compensatory damages. This practice, which allows double recovery in some instances, essentially allows Louisiana courts to impose punitive damages in cases where punitive damages are not otherwise available.¹⁵⁹ This result directly conflicts with the Louisiana legislature’s unwillingness to award punitive damages, which are only available in extremely specific and egregious situations.¹⁶⁰ Application of the collateral source rule, which applies only to special damages, should be concerned solely with making the victim whole.¹⁶¹ Punitive damages, on the other hand, should be viewed vis-à-vis the tortfeasor.¹⁶²

It may seem unconventional, but Louisiana courts should not be discouraged from analyzing the applicability of the collateral source rule to write-offs vis-à-vis the tort victim. One of the fundamental principles of tort law is the “Thin Skull” or “Eggshell Skull” rule, which states that tortfeasors must take victims as

157. *Bozeman v. State*, 2003-2016, p. 18; 879 So. 2d at 703–04 (citing *Griffin v. La. Sheriff’s Auto Risk Ass’n*, 1999-2944, pp. 35–36 (La. App. 1 Cir. 6/22/01); 802 So. 2d 691, 715).

158. *See Hamilton v. Howell Meats and Provisions, Inc.*, 257 P.3d 1130, 1145 (Cal. 2011).

159. *Hoffman v. 21st Century N. Am. Ins. Co.*, 2014-2279, p. 3 (La. 10/2/15); 209 So. 3d 702, 705 (citing *Gagnard v. Baldrige*, 92-1415, p. 2 (La. 2/18/93); 612 So. 2d 732, 736) (“Double recovery would be in the nature of exemplary or punitive damages, which are not allowable under Louisiana law unless expressly provided by statute.”).

160. Jerry Hermann, *Punitive Damages and Louisiana Law*, Kopfler & Hermann Blog (Mar. 9, 2015), <http://www.kopflerhermann.com/blog/2015/03/punitive-damages-and-louisiana-law.shtml>. Punitive damages are available when (1) “a person is injured by a drunk or legally impaired driver” and (2) “injuries are caused through an act of pornography involving juveniles or where a child [seventeen] years or younger is criminally victimized by a sex offender.” *Id.*

161. *See supra* Section II.A.

162. *See Mosing v. Domas*, 2002-0012, p. 8 (La. 10/15/02); 830 So. 2d 967, 974 (citing *Rivera v. United Gas Pipeline Co.*, 96-502 (La. App. 5 Cir. 6/30/97); 697 So. 2d 327).

they are found.¹⁶³ This principle has been accepted by the Louisiana Supreme Court, which noted that a tortfeasor's liability is not mitigated by the fact that the victim's unfortunate condition was responsible in part for the consequences of the injury caused by the tortfeasor.¹⁶⁴ The Thin Skull rule should apply to write-offs and require tortfeasors to take victims as they are found.

In other words, if tortfeasors "find" victims without insurance coverage, they may be forced to pay the fully-billed amount. However, if tortfeasors "find" victims with insurance coverage, they may "benefit" from a reduction in damages measured by the write-off for the reasons outlined in the previous section. Louisiana's current practice of analyzing the applicability of the collateral source rule to write-offs vis-à-vis the tortfeasor is punitive in nature. Shifting the analysis to be viewed vis-à-vis the tort victim, by applying the Thin Skull rule, would better suit the principles of compensatory damages.

Special damages are awarded based on the reasonable amount of medical expenses resulting from the tort.¹⁶⁵ Jurisdictions disagree, however, about how to measure a reasonable amount. Louisiana courts even acknowledge that write-offs are essentially quantity discounts¹⁶⁶ obtained through a contractual agreement between healthcare providers and insurers in exchange for some business benefit.¹⁶⁷ In the case of health insurance, healthcare providers agree to the write-offs in exchange for a constant inflow of patients from a health insurer.¹⁶⁸ If the amount accepted as payment, the amount billed less the write-off, is unreasonable to a for-profit healthcare provider, why would that healthcare provider agree to accept

163. See Stein, *supra* note 2 at § 11:1.

164. See *Lasha v. Olin Corp.*, 93-0044, p. 2 (La.11/18/93); 625 So. 2d 1002, 1006 (ruling that the defendant was liable even though an ordinary person would not have suffered the injury under the same circumstances).

165. See Restatement (Second) of Torts § 924 (AM. LAW INST. 1979).

166. See *Quantity Discount*, INVESTOPEDIA, <http://www.investopedia.com/terms/q/quantity-discount.asp> (last visited Mar. 31, 2017) ("A quantity discount is an incentive offered to a buyer that results in a decreased cost per unit of goods or materials when purchased in greater numbers.").

167. See *Griffin v. La. Sheriff's Auto Risk Ass'n*, 1999-2944, p. 37 (La. App. 1 Cir. 6/22/01); 802 So. 2d 691, 715 (noting that write-offs are procured by insurers in exchange for providing a volume of business).

168. *Id.*

it?¹⁶⁹ If the amount in a health insurer's fee schedule is unreasonable, the healthcare provider would simply deny insureds covered by that specific insurer. In sum, the mere fact that a for-profit healthcare provider contractually agrees to a reduced price in exchange for an influx of business makes the price actually paid by the insurer "reasonable."

**C. LOUISIANA SHOULD MODIFY ITS COLLATERAL SOURCE
RULE OF EVIDENCE TO ADDRESS THE PROPOSED
DECLASSIFICATION OF WRITE-OFFS AS COLLATERAL
SOURCE BENEFITS**

Declassifying write-offs as collateral source benefits requires modification of Louisiana's current rule, and the proposal below would result in an equitable solution for both tort victims and tortfeasors in litigation. This proposal can be equitably applied in any write-off situation, including private health insurer write-offs, Medicaid write-offs, Medicare write-offs, and attorney-negotiated write-offs.

Louisiana's current collateral source rule, Louisiana Code of Evidence article 409, bars the introduction of expenses paid on behalf of the tort victim by a collateral source.¹⁷⁰ To be clear, this proposal does not advocate repealing this general principle. It simply suggests a post-judgment reduction of the written-off amount, which is similar to the procedure Minnesota utilizes in applying its collateral source rule.

At trial, evidence relating to collateral source payments or write-offs should remain inadmissible. Louisiana juries, as they currently do, should award a reasonable amount of medical expenses based solely on the amount billed by the healthcare provider. The new rule, similar to Minnesota's collateral source rule,¹⁷¹ should grant the tortfeasor the ability to move for a post-judgment reduction of damages based on the written-off amount. Again, this process would avoid the concerns other jurisdictions have voiced about admitting write-off evidence to the finder of fact.

169. See Balasko, *supra* note 58, at 28 n.71 (noting that, in some instances, the healthcare provider can still earn a profit even when the discount from the list price is over 900% because the negotiated rate is still above the provider's costs).

170. See LA. CODE EVID. ANN. art. 409 (2006).

171. See MINN. STAT. ANN. § 548.251(2) (West 2015). Minnesota's rule allows a reduction of all collateral source payments, whereas the proposed Louisiana rule would only allow a reduction of the written-off amount of the expenses.

Similar to Missouri's rule,¹⁷² the post-judgment motion would allow for a rebuttable presumption that the amount actually paid by the collateral source was the reasonable value of the tort victim's medical expenses. If the tort victim can prove that the reasonable amount of medical expenses is actually higher than the amount paid, the trial judge shall award that amount.¹⁷³

These proposed revisions to Louisiana's collateral source rule, which seek to accommodate the declassification of write-offs as collateral source benefits, can be encapsulated in a mathematical formula. Courts should use the following formula to calculate the reasonable amount of medical expenses a tort victim can recover in a special damage award:

*Presumed Reasonable Amount of Medical Expenses =
(Actual Amount Billed by Medical Provider) – (Write-Off Amount)*

VI. CONCLUSION

A series of attacks have weakened the collateral source rule in recent years. While important policy goals justify maintaining the rule's existence,¹⁷⁴ the onslaught of attacks shows no sign of slowing. This Comment's proposal is a practical compromise between avid supporters and fierce opponents of the rule.¹⁷⁵ Plaintiffs may argue that their acceptance of this proposal would be a concession, not a compromise, given that this proposal advocates for stripping away currently available damages. However, such a view fails to recognize the potential to maintain the rule's existence in non-write-off situations. Striking a compromise could slow the intensifying pressure to abolish the rule. Adopting this Comment's legislative proposal would shelter tortfeasors from the current windfall benefitting tort victims, while also ensuring that victims are made whole and that

172. See MO. ANN. STAT. § 490.715(5)(2) (West 2015) (applying a rebuttable presumption that the reasonable amount of the medical expenses is the amount actually paid). The difference between the proposed Louisiana modification and the Missouri statute is that Missouri allows for the introduction of the amount billed as evidence at trial, whereas the proposed Louisiana modification would apply the presumption at the post-judgment motion hearing.

173. In Missouri, the tort victim can introduce, among other things, the amount billed, the amount actually paid, and the amount they will be liable to the healthcare provider for if they obtain a judgment in their favor.

174. See *supra* Section II.C.

175. See Balasko, *supra* note 58, at 20–24.

tortfeasors are held liable for the damages they have caused.

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