
COMMENT

ALLOCATING THE COSTS OF HARM TO WHOM THEY ARE DUE: MODIFYING THE COLLATERAL SOURCE RULE AFTER HEALTH CARE REFORM

REBECCA LEVENSON[†]

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[†] J.D. Candidate, 2012, University of Pennsylvania Law School; A.B., 2009, Yale University. I would like to thank Professor Tom Baker for inspiring and advising this Comment. I would like to thank the comments and executive editors, especially Robert Craig and Elan DiMaio, and the associate editors of the *University of Pennsylvania Law Review* for their hard work on this Comment. Lastly, I would like to thank Peter Levenson, Pamela Sweeney, and Matt Bressler for all of their wisdom and guidance.

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INTRODUCTION

For decades, the collateral source rule has been a target of tort reform on both state and national levels.¹ The rule, which at common law prohibits the introduction of evidence regarding collateral payments received by the claimant in a suit for damages,² has sparked a long-standing debate. Its proponents cite its potential to align the costs of injury with tortfeasors and to deter tortious conduct, while its opponents claim that the rule results in double recovery for claimants and inflated insurance costs. The result of this debate has been varied treatment of the rule, with some states following the common law rule, some limiting its application, and some abrogating it in full.³ Calls for tort reform have been widely influential throughout the states. Most states have already limited or abrogated the rule, and it is possible that other states as well as the federal government may follow suit.⁴

The application of the collateral source rule has become more complicated since the passage of the Patient Protection and Affordable Care Act,⁵ which contains a provision establishing an individual mandate to obtain health insurance.⁶ While the insured plaintiff may have benefitted from the collateral source rule before the Affordable

¹ See, e.g., James L. Branton, *The Collateral Source Rule*, 18 ST. MARY'S L.J. 883, 887-89 (1987); Amanda Edwards, Recent Developments, *Medical Malpractice Non-Economic Damages Caps*, 43 HARV. J. ON LEG. 213, 213-14 (2006) (explaining proposed federal tort reform bills that included measures to repeal the collateral source rule).

² See RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979) (“Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.”).

³ See *infra* notes 21-23.

⁴ See, e.g., H.R. 5, 112th Cong. § 6 (2011) (“In any health care lawsuit involving injury or wrongful death, any party may introduce evidence of collateral source benefits.”).

⁵ Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

⁶ *Id.* § 1501(a)–(b), 28 U.S.C.A. § 5000A(a)–(b) (West Supp. 2011), *invalidated in part by Florida v. Dep’t of Health & Human Servs.*, 648 F.3d 125 (11th Cir. 2011), *cert. granted*, No. 11-0398, 2011 WL 5515164 (U.S. Nov. 14, 2011).

Care Act was passed, now an uninsured claimant may benefit under the rule.⁷ Under the common law collateral source rule, evidence that a plaintiff has chosen to shirk his obligation to purchase insurance must be excluded.⁸ The rule's ban of insurance evidence may have the result of protecting—as opposed to penalizing—uninsured claimants. The decision to forgo insurance that may have covered the uninsured claimants' medical expenses is hidden from the jury, whose members presumably have complied with the mandate. Under the new health care law, both insured and uninsured plaintiffs stand to gain from the use of the collateral source rule. This outcome may provide an additional incentive for states and the federal government to limit or change the common law rule.

Although commentators have put forth many arguments both supporting and opposing the use of the collateral source rule, they have proposed fewer models for its revision. This Comment will provide a model for updating and partially abrogating the collateral source rule in personal injury cases. It will examine the effect that the model will have on the outcome of these cases and the fulfillment of new policy goals in the wake of health care reform. Part I will explain the current state of the collateral source rule and will provide an overview of how it has been changed across the states. Part II will summarize the debate surrounding the elimination of the rule. Part III will address how the Affordable Care Act has changed this debate. Part IV will evaluate the consequences of modifying the collateral source rule in personal injury cases. Finally, Part V will provide a model for limiting the rule.

I. CURRENT ROLE OF THE COLLATERAL SOURCE RULE

The common law collateral source rule prohibits reducing the amount of damages that an injured claimant is entitled to receive from the tortfeasor as compensation for reasonable medical expenses.⁹ The rule therefore bars the introduction of evidence that a col-

⁷ This Comment deals solely with the Affordable Care Act as passed. The constitutionality of the individual mandate is outside the scope of this Comment, which assumes that Affordable Care Act will take effect as planned on January 1, 2014, with the individual mandate left intact.

⁸ Some versions of the collateral source rule expressly forbid the introduction of evidence demonstrating that the claimant lacks insurance under certain circumstances. *See, e.g.*, FED. R. EVID. 411.

⁹ *See, e.g.*, *Rodgers v. Boynton*, 52 N.E.2d 576, 577 (Mass. 1943) (asserting that the only relevant “measure of damages is fair compensation for the injury sustained”);

lateral source, such as an insurer, paid these expenses for a claimant.¹⁰ Though the precise definition of “collateral source” varies from state to state, it is generally accepted that a collateral benefit is any form of payment provided by a source other than the tortfeasor that repairs the claimant’s injury.¹¹ These sources can include health insurance, automobile accident insurance, disability payments, worker’s compensation, and other programs and agreements that provide or pay for medical or other related expenses.¹² Payments made to the claimant by the tortfeasor, on the other hand, are admissible at trial and are credited to the tortfeasor in the computation of damages.¹³

At trial, the collateral source rule plays both a substantive and an evidentiary role.¹⁴ The evidentiary function of the rule is to determine what evidence pertaining to collateral sources may be introduced at trial for the jury to consider when deciding the defendant tortfeasor’s liability. That is, it governs the question of whether the fact that the claimant was insured can be considered in determining if the defendant is at fault. The common law collateral source rule prevents the defendant from presenting evidence that the claimant possessed in-

Matsyuk v. State Farm Fire & Cas. Co., 229 P.3d 893, 899 n.8 (Wash. Ct. App. 2010) (“The collateral source rule is the ‘well settled rule in tort actions that a party has a cause of action notwithstanding the payment of his loss by an insurance company.’” (quoting Mahler v. Szucs, 957 P.2d 632, 640 n.4 (Wash. 1998) (en banc))), *pet. granted*, 249 P.3d 624 (Wash. 2010) (unpublished table decision).

¹⁰ As the Federal Rules of Evidence state,

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

FED. R. EVID. 411. Collateral sources are defined slightly differently across the states, but all states include medical insurance within their definitions.

¹¹ *See, e.g.*, Reed v. Nat’l Council of Boy Scouts of Am., Inc., 706 F. Supp. 2d 180, 194 (D.N.H. 2010) (“[T]he rule ‘does not differentiate between the nature of the benefits [paid to the claimant as a result of his injuries] so long as they did not come from the defendant or a person acting for him.’” (quoting RESTATEMENT (SECOND) OF TORTS § 920A cmt. b, at 514 (1979))).

¹² *See, e.g.*, FLA. STAT. ANN. § 768.76(2)(a) (West 2005).

¹³ *Cf.* Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 670-71 (1962) (explaining that the collateral source rule extends to reparations paid by sources other than the wrongdoer).

¹⁴ *See, e.g.*, Law v. Griffith, 930 N.E.2d 126, 132 (Mass. 2010) (“[T]he collateral source rule has both a substantive aspect that relates to the law of damages, and an evidentiary component that governs what types of evidence may be admitted in evidence at trial.” (citing Goldstein v. Gontarz, 309 N.E.2d 196, 202-03 (Mass. 1974))).

insurance to the jury before the verdict.¹⁵ Some state statutes allow the defendant to do so in some or all circumstances.¹⁶ The rule does not prevent the claimant from introducing evidence regarding his insurance coverage.

The substantive, or damages, function governs whether a claimant's damages may include expenses already covered by a collateral source.¹⁷ Once the jury has returned a verdict and a damages award, some states allow the amount the claimant received from the collateral source to be subtracted from the award.¹⁸

Every state and federal¹⁹ court has adopted the collateral source rule in some form.²⁰ Presently, many states have acquiesced to the demands of tort reform movements by limiting the reach of the col-

¹⁵ Federal Rule of Evidence 411 adopts the common law prohibition on admitting insurance evidence to the jury.

¹⁶ See *infra* note 21.

¹⁷ See *infra* note 21. The federal rule bars the introduction of evidence of collateral source payments for both evidentiary and substantive purposes. See RESTATEMENT (SECOND) OF TORTS § 920A. *But see* *Quintero v. United States*, No. 08-1890, 2010 WL 5071045, at *7 (E.D. Cal. Dec. 7, 2010) (concluding that the admission of collateral evidence is acceptable under the Federal Rules of Evidence when substantive probative value outweighs prejudice). State courts differ in their use of the collateral source rule. Some ban collateral source evidence outright, some use the rule for its evidentiary function during trial, and some allow collateral source information in its evidentiary and substantive forms. *Compare* *Myers v. Beem*, 712 P.2d 1092, 1093 (Colo. App. 1985) (“[E]vidence of compensation from a collateral source is inadmissible, because it is irrelevant.” (citing COLO. R. EVID. 401)), *with* ALA. CODE § 12-21-45 (LexisNexis Supp. 2007), *and* *Dyet v. McKinley*, 81 P.3d 1236, 1239 (Idaho 2003) (“Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages, which have been compensated independently from collateral sources.” (quoting IDAHO CODE ANN. § 6-1606 (1990)) (internal quotation marks omitted)).

¹⁸ For states that allow for the subtraction of collateral source payments from awards, see *infra* note 21, which lists states that allow for subtraction in some cases, and *infra* note 22, which lists states that allow for the subtraction in all cases.

¹⁹ Many federal courts adhere to Federal Rule of Evidence 411 to determine the collateral source rule's evidentiary role in a case. However, they differ as to whether the state or federal rule should be used to compute damages. *Compare* *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 884 (10th Cir. 2006) (holding that the Federal Rules of Evidence “exclusively govern in federal diversity cases”), *and* *Craig v. F.W. Woolworth Co.*, 866 F. Supp. 1369, 1372 (N.D. Ala. 1993) (holding that the Alabama statute concerning collateral sources governs only Alabama state courts, and thus applying the federal rule to bar information concerning collateral sources (citing *Killian v. Melser*, 792 F. Supp. 1217, 1218 (N.D. Ala. 1992))), *with* *Shelley v. White*, 711 F. Supp. 2d 1295, 1297 n.1 (M.D. Ala. 2010) (rejecting *Craig* and *Killian* and determining that Alabama's collateral source rule applies in full to diversity cases).

²⁰ See *infra* notes 21-23.

lateral source rule²¹ or abrogating it in full.²² In some state courts,²³ as well as in federal courts,²⁴ the rule remains intact. As a result of the

²¹ Several states have modified the collateral source rule in limited circumstances or for certain types of cases only. See ALASKA STAT. §§ 09.17.070, 09.55.560 (2008) (allowing collateral source information only post-verdict); ARIZ. REV. STAT. ANN. § 12-565 (Supp. 2008) (permitting collateral source evidence in medical malpractice cases only); CAL. CIV. CODE § 3333.1 (West Supp. 2009) (same); COLO. REV. STAT. § 13-21-111.6 (1996) (post-verdict); CONN. GEN. STAT. ANN. §§ 52-225a-c (West Supp. 2009) (post-verdict); DEL. CODE ANN. tit. 18, § 6862 (Supp. 2008) (medical malpractice only); FLA. STAT. ANN. § 768.76 (West Supp. 2009) (post-verdict); HAW. REV. STAT. § 663-10 (Supp. 2007) (post-verdict); IDAHO CODE ANN. § 6-1606 (Supp. 2008) (post-verdict); 735 ILL. COMP. STAT. ANN. 5/2-1205 (West Supp. 2009) (post-verdict); ME. REV. STAT. ANN. tit. 24, § 2906 (Supp. 2008) (post-verdict); MD. CODE ANN. CTS. & JUD. PROC. § 3-2A-09 (LexisNexis Supp. 2008) (post-verdict); MASS. ANN. LAWS ch. 231, § 60G (West Supp. 2009) (post-verdict); MICH. COMP. LAWS ANN. § 600.6303 (West Supp. 2009) (post-verdict); MINN. STAT. ANN. § 548.251 (West Supp. 2008); MONT. CODE ANN. § 27-1-308 (2007) (post-verdict); NEB. REV. STAT. § 44-2819 (2004) (post-verdict); N.J. STAT. ANN. § 2A:15-97 (West 2011) (post-verdict but preempted with regard to ERISA claims); N.Y. C.P.L.R. 4545 (McKinney Supp. 2011) (post-verdict); N.D. CENT. CODE § 32-03.2-06 (2010) (post-verdict); OR. REV. STAT. § 31.580 (2007) (post-verdict); R.I. GEN. LAWS § 19-9-34.1 (2010) (reform applies to medical malpractice cases only; held unconstitutional by an unreported Superior Court opinion); S.D. CODIFIED LAWS § 21-3-12 (2004) (medical malpractice only); TENN. CODE ANN. § 29-26-119 (2000) (medical malpractice only); UTAH CODE ANN. § 78B-3-405 (LexisNexis 2008) (post-verdict in medical malpractice cases only); WIS. STAT. § 893.55 (2009) (reform applies to medical malpractice cases only).

States that have limited the rule solely post-verdict have eliminated the collateral source rule for damages universally, allowing courts to subtract the claimant's previous collateral source payment from the total award. States that have limited the abrogation of the rule to medical malpractice cases—but that have opted not to do so post-verdict for other cases—have eliminated the collateral source rule in its damages and evidentiary roles only for medical malpractice actions.

²² Several states have altered the collateral source rule in all personal injury actions as both a rule of evidence and a rule of damages. See ALA. CODE §§ 6-5-545, 12-21-45 (LexisNexis 2005); IND. CODE ANN. § 34-44-1-2 (West 2010); IOWA CODE ANN. §§ 147.136, 668.14 (West 1998); MO. REV. STAT. § 490.715 (West 2010) (evidence of collateral payment may be presented, but not of collateral source); OHIO REV. CODE ANN. § 2315.20 (West 2010); OKLA. STAT. tit. 63, § 1-1708 (West 2004); 40 PA. CONS. STAT. ANN. § 1303.508 (West Supp. 2011); TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West Supp. 2009) (Texas courts have not yet specified whether the rule applies only post-verdict); WASH. REV. CODE § 7.70.080 (2011); W. VA. CODE ANN. § 55-7B-9a (West 2010).

²³ Many states have refused to change the rule, and some courts have overturned modifications to the collateral source rule as unconstitutional. See, e.g., VA. CODE ANN. § 8.01-35 (2007); *Johnson v. Rockwell Automation*, 308 S.W.3d 135, 137 (Ark. 2009); *Amalgamated Transit Union Local 1324 v. Roberts*, 434 S.E.2d 450, 451 n.1 (Ga. 1993); *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 208-09 (Kan. 2010); *Leighton v. CSX Transp., Inc.*, 338 S.W.3d 818, 820 (Ky. Ct. App. 2011); *Bd. of Comm'rs of Orleans Levee Dist. v. Mandry*, 40 So. 3d 500, 502 (La. Ct. App. 2009); *Cyr v. J.I. Case Co.*, 652 A.2d 685, 688 (N.H. 1994); *Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 255 P.3d 324, 359 (N.M. Ct. App. 2011); *Proctor v. Castalletti*, 911 P.2d 853, 854 (Nev.

wide disparity in the application of the rule across states and federal courts, claimants in different courts can expect widely different outcomes.²⁵ Since the law remains unsettled as to whether the collateral source rule is procedural or substantive, the discrepancies between the rule in different jurisdictions promote varying outcomes in federal diversity cases as well.²⁶

The differences among state collateral source rules reflect the divisiveness in the debate over the need for the collateral source rule, as well as states' differing reactions to numerous calls for tort reform. However, the academic debate over the rule has concentrated much more closely on the theoretical underpinnings of tort law.

II. TRADITIONAL DEBATE OVER THE COLLATERAL SOURCE RULE

Originally,²⁷ courts justified the collateral source rule as a means of promoting tort deterrence²⁸ and ensuring that a defendant tortfeasor would not benefit from the injured claimant's insurance cover-

1996); *McGee v. River Region Med. Ctr.*, 59 So. 3d 575, 581 (Miss. 2011); *Wright v. Hiester Const. Co.*, 698 S.E.2d 822, 827 (S.C. Ct. App. 2010); *Windsor Sch. Dist. v. State*, 956 A.2d 528, 542 (Vt. 2008); *Miller v. Campbell Cnty.*, 901 P.2d 1107 (Wyo. 1995). Washington, D.C. also follows the common law collateral source rule. See *Snowder v. District of Columbia*, 949 A.2d 590, 602 n.2 (D.C. 2008) ("The collateral source rule provides . . . that an injured party may recover full compensation damages regardless of the payment of any amount of those damages by an independent party . . .").

²⁴ In federal cases, courts use the common law collateral source rule. See, e.g., *Gill v. Maciejewski*, 546 F.3d 557, 565 (8th Cir. 2008) ("[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986)) (internal quotation marks omitted)); see also *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) (allowing for widely different outcomes between state and federal courts in § 1983 actions).

²⁵ See Nora J. Pasman-Green & Ronald D. Richards, Jr., *Who is Winning the Collateral Source Rule War? The Battleground in the Sixth Circuit States*, 31 U. TOL. L. REV. 425, 430-43 (2000) (detailing the differences between the collateral source rules of states in the Sixth Circuit).

²⁶ For divergent federal court interpretations of how the collateral source rule should be applied, for example, in Alabama, compare *Shelley v. White*, 711 F. Supp. 2d 1295, 1297 (M.D. Ala. 2010), with *Killian v. Melser*, 792 F. Supp. 1217, 1218 (N.D. Ala. 1992), and *Craig v. F.W. Woolworth*, 866 F. Supp. 1369, 1372 (N.D. Ala. 1993).

²⁷ Some credit *The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152 (1854), with the introduction of the collateral source rule to United States courts. See, e.g., Pasman-Green & Richards, *supra* note 25, at 427 & n.16.

²⁸ *U.S. Can Co. v. N.L.R.B.*, 254 F.3d 626, 631 (7th Cir. 2001) ("The idea behind the collateral-benefits doctrine, which originated in tort law, is damages measured by the injury are essential to deterrence.").

age.²⁹ Some scholars, including John Fleming, note that the rule was more applicable at the time it was adopted, given the relative unavailability of collateral source coverage during the nineteenth century.³⁰ However, more frequently critics debate the rule's success in promoting the theory and policy of tort law. Traditionally, there has been little disagreement or discussion about the uninsured claimant who is entitled to the costs of his medical expenses from the tortfeasor because the claimant has no collateral source to cover the costs of care. Insurance law has not changed in any way that materially would alter the scope of the debate, and so the dialogue has effectively reached a standstill—both sides have focused almost exclusively on the value of allowing the insured claimant to recover from the tortfeasor despite the claimant's insurance coverage.³¹

Before the Affordable Care Act, the debate over the collateral source rule had effectively reached equilibrium with different states persuaded by each side. Aside from changes in the public perception of the insurance industry and in the industry's practices with regard to subrogation and increased coverage, the collateral source rule debate remained largely the same as it was decades ago. Fundamentally, the disagreement about the prevalence and use of the collateral source rule centers on the purpose of tort law, as well as the determination of which party is entitled to the costs imposed by the tortfeasor and covered by the claimant's insurance. This Section lays out the debate over the collateral source rule as it stood before the Affordable Care Act's passage mandated individuals' acquisition of medical insurance coverage.

A. Arguments Supporting the Collateral Source Rule

Proponents of the rule defend it on several grounds. Advocates for the deterrent purpose of tort law are particularly protective of the collateral source rule. They assert that it is fundamental to tort law for tortfeasors to pay for the consequences of their actions,³² and that the

²⁹ *Monticello*, 58 U.S. at 155 (“[T]he wrongdoer . . . is bound to make satisfaction for the injury he has done.”).

³⁰ John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1478-82 (1966).

³¹ See *infra* note 49.

³² See, e.g., *Law v. Griffith*, 930 N.E.2d 126, 131-32 (Mass. 2010) (declaring that full payment by tortfeasors to claimants furthers deterrence); *Am. Standard Ins. Co. of Wis. v. Cleveland*, 369 N.W.2d 168, 172 (Wis. Ct. App. 1985) (“The policy of Wisconsin’s tort law is to provide full compensation to persons who are injured by negligent con-

deterrent effect of tort law is undermined when a claimant's medical expenses are covered by his own insurance.³³ Furthermore, proponents argue, a tortfeasor in a personal injury action without the collateral source rule should not receive a windfall of lesser or no damages because the claimant in the action received benefits from a collateral source.³⁴

Some defend the collateral source rule because of the practical outcome of many personal injury cases. They argue that collateral sources never pay the full costs of recovery to the plaintiff, as the costs of obtaining insurance, the deductible, and attorneys' fees are often not reimbursed by the collateral source.³⁵ Therefore, it is important that the defendant pay full damages to make up for the claimant's other out-of-pocket expenses related to the injury and the consequent litigation. Alternatively, the collateral source rule can be justified as a reward for a claimant's investment in insurance.³⁶ This "benefit of the bargain"³⁷ argument credits the collateral source rule for providing

duct and to deter such conduct by imposing the full monetary consequences on the tortfeasor." (citing *Heath v. Zellmer*, 151 N.W.2d 664, 674-75 (Wis. 1967)); Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort's Soul*, 48 U. LOUISVILLE L. REV. 1, 22 (2009) (advocating for the collateral source rule in terms of corrective justice).

³³ See Jamie L. Wershbale, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 348 (2008) (citing F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 485 (2006)).

³⁴ Fleming, *supra* note 30, at 1483 ("To anyone a little troubled by the notion that [the rule] might mean double recovery for the plaintiff, the stereotyped response has been that this is still better than letting the defendant profit" (citing *Gypsum Carriers v. Handelsman*, 307 F.2d 525, 534 (9th Cir. 1962); *Dodds v. Bucknum*, 29 Cal. Rptr. 393, 398 (Cal. Ct. App. 1963))).

³⁵ See *id.* ("[I]n any event, the damages awarded to a plaintiff at least in personal actions never fully indemnify him for his loss, especially when account is taken of the fact that a large slice of it will find its way into the pocket of his attorney.").

³⁶ See *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 66 (Cal. 1970) (noting that the collateral source rule ensures "that a person who has invested years of insurance premiums to assure his medical care . . . receives the benefits of his thrift," while allowing the plaintiff's insurance to mitigate a tortfeasor's damages would put the plaintiff "in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit").

³⁷ See Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 531-34 (1991) (explaining the benefit-of-the-bargain argument in favor of the collateral source rule); see also *Acuar v. Letourneau*, 531 S.E.2d 316, 322-23 (Va. 2000) ("The portions of medical expenses that health care providers write off constitute 'compensation or indemnity received by a tort victim from a source collateral to the tortfeasor" (quoting *Schickling v. Aspinall*, 369 S.E.2d 172, 174 (Va. 1988))). *But see* *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 220-21 (Kan. 2010) (rejecting the use of the benefit-of-the-bargain approach, as it allows privately insured claimants to receive write-offs for their medical expenses as part of damages while Medicare recipients cannot).

incentives for individuals to internalize the costs of their own medical coverage by purchasing medical insurance.³⁸ One way that states with limitations on their collateral source rules ensure that claimants recover an equitable amount of damages despite the reduction for collateral source benefits they receive is through make-whole rules, which ensure that the award is not reduced for collateral benefits until the claimant receives some of the costs of procuring the collateral benefit.³⁹

Lastly, proponents of the rule argue that the collateral source rule rarely results in double recovery because of the subrogation rights retained in primary insurance contracts and enforced by many insurance companies.⁴⁰ These rights allow insurers to deduct their costs for the claimant's care from the damages that the claimant receives from a tortfeasor if these costs are recovered in litigation.⁴¹ The insurers may either bring a suit against the defendant or the defendant's in-

³⁸ 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, 1078 (1997) ("Since the insurance company has already been paid premiums to bear an actuarial risk, the benefit payments it must make are simply a cost of doing business that has already been contracted and paid for by the plaintiff.").

³⁹ Florida, for example, limits the rule in the following way:

[T]he court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant . . . from all collateral sources Such reduction shall be offset to the extent of any amount which has been paid [by] the claimant . . . to secure her or his right to any collateral source benefit which the claimant is receiving

FLA. STAT. ANN. § 768.76 (West Supp. 2009).

⁴⁰ See Paul H. Rubin & Joanna M. Shepard, *Tort Reform and Accidental Deaths*, 50 J.L. & ECON. 221, 231 (2007) (asserting that the collateral source rule will not lead to double recovery because the damages are reduced only by the plaintiff's recovery from other sources).

⁴¹ See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* § 3.10(a)(1) (student's ed. 1988). However, subrogation rights, or a subtraction from the award for collateral benefits, may be reduced to take into account a claimant's costs, which may include some legal costs. In cases of settlements, reductions may be made in proportion to the reduced award accepted by the claimant. See Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, the Contingency Fee System, Juries, and Social Policy*, 38 LOY. L.A. L. REV. 1217, 1259-60 (2005) (discussing how plaintiffs' lawyers in Wisconsin negotiate agreements with insurers to limit subrogation rights so that it is affordable to undertake lawsuits).

In some cases, subrogation can result in reductions from noneconomic as well as economic damages because, after the legal fees and costs of the suit, the claimant's economic damages may not satisfy the subrogation agreement. See Gregory Pitts, Comment, *E.R.I.S.A. Subrogation as Interpreted Within the Seventh Circuit—A Roadmap for Managing First Dollar Recovery*, 35 J. MARSHALL L. REV. 765, 769-70 (2002).

surer on its own behalf⁴² or claim a right to a portion of the claimant's winnings.⁴³ An insurer's exercise of its subrogation rights reduces the claimant's capacity for double recovery for covered costs.⁴⁴

Proponents of the collateral source rule are concerned that its modification or repeal would also have an effect on the independence of jury determinations. This group worries that juries would look unfavorably upon insured claimants suing tortfeasors for recovery of costs already paid by a collateral source, regardless of whether the recovery would be subrogated to the insurer or retained by the claimant.⁴⁵ The argument follows that the collateral source rule promotes jury determinations independent of a potentially prejudicial inquiry as to whether or not the plaintiff had insurance.⁴⁶

B. *Arguments Opposing the Collateral Source Rule*

Opponents of the collateral source rule, however, reject these arguments as out of touch with reality. Stemming from a fundamental belief that the purpose of tort law is not deterrence⁴⁷ but rather compensation for harm, the central objection for opponents of the collateral source rule is the possibility that claimants may recover twice for their injuries: once from a primary insurer⁴⁸ and again from the tort-

⁴² The insurer must return to the victim any award it receives in excess of the victim's covered medical expenses. STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 235 (1987).

⁴³ See KEETON & WIDISS, *supra* note 41, § 3.10(b)(1).

⁴⁴ See *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 368 (2006) (holding that a health insurer covered by ERISA may enforce its subrogation right).

⁴⁵ See Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 *RUTGERS L.J.* 835, 861 (2002) (citing studies that suggest that juries have reacted to antitort public relations campaigns by limiting verdicts).

⁴⁶ *Id.* However, studies have shown that despite the existence of the collateral source rule, juries speculate on insurance in deliberations on liability and awards. See, e.g., Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 *VA. L. REV.* 1857, 1875-95 (2001) (finding that conversations about insurance occurred in the jury room in eighty-five percent of all cases in the study).

⁴⁷ See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 *UCLA L. REV.* 377, 381-87 (1994) (collecting arguments from authors who doubt the deterrent effect of tort liability).

⁴⁸ I refer to both first-party and liability (third-party) insurance throughout this Comment. Put simply, a first-party medical insurance policy will pay some of the policy holder's medical costs. A third-party liability insurer generally pays at least some of the costs due to a claimant when the policyholder is found liable in the claimant's suit against him.

feasor.⁴⁹ For those opponents who view the purpose of tort law as solely compensatory, the collateral source rule seems to facilitate the payment of additional punitive damages.⁵⁰ These opponents argue that subrogation does not justify the use of the rule, as insurers do not always pursue subrogation rights because of the expense of recovering awards.⁵¹

Further, medical write-offs can also allow for inflated awards. Collateral sources often do not pay for medical services at full price, allowing an insured claimant to receive medical care at a reduced rate.⁵² Under the collateral source rule, claimants are able to collect the write-off—the difference between the actual cost and the reasonable

⁴⁹ Steven B. Hantler et al., *Moving Toward the Fully Informed Jury*, 3 GEO. J.L. & PUB. POL'Y 21, 26 (2005); see also Hubbard, *supra* note 33, at 485.

⁵⁰ See John G. Fleming, *The Collateral Source Rule and Contract Damages*, 71 CALIF. L. REV. 56, 58-59 (1983) (arguing that justifying the collateral source rule because of its ability to punish the tortfeasor is incompatible with the exclusive purpose of tort law—victim compensation—and noting that punitive damages in these cases may be restricted through statutes and common law). At least two federal circuit courts have rejected this rationale in the context of Federal Tort Claims Act litigation. See *Siverson v. United States*, 710 F.2d 557, 560 (9th Cir. 1983) (finding that this justification “would essentially always find recovery from a collateral source to be ‘punitive’ and ignores the collateral source doctrine’s purpose of preventing a windfall to the defendant”); *Smith v. United States*, 587 F.2d 1013, 1017 (3rd Cir. 1978) (“Were we to adopt the government’s position we would deprive a victim of benefits—which he has paid for out of his own wages—merely because he had the misfortune to have been injured by the United States rather than by a private tortfeasor.”).

⁵¹ Cf. Hubbard, *supra* note 33, at 486 (“[S]ubrogation involves additional administrative costs because shifting the tort payment from the plaintiff to the provider entails time and expense as the plaintiff and provider determine the rights of the provider.” (citing *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 65 n.8, 67-68 (1970))).

⁵² Medical bills admissible at trial do not necessarily reflect the amount paid by the insurer. See *Law v. Griffith*, 930 N.E.2d 126, 133 (Mass. 2010) (“The only patients actually paying the stated charges are the uninsured, a small fraction of medical bill payors.”); Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 661-63 (2008) (characterizing the difference between rates paid by the insured and uninsured patients as “eye-popping”); James McGrath, *Overcharging the Uninsured in Hospitals: Shifting a Greater Share of Uncompensated Medical Care Costs to the Federal Government*, 26 QUINNIPIAC L. REV. 173, 184-85 (2007) (asserting that only the uninsured pay the hospital’s list price because insurance providers have usually negotiated discounts); see also *Stanley v. Walker*, 906 N.E.2d 852, 857 (Ind. 2009) (“The complexities of health care pricing structures make it difficult to determine whether the amount paid, the amount billed, or an amount in between represents the reasonable value of medical services.”). The justification for this discrepancy is that the defendant should not benefit from the deals the claimant’s insurer makes with its providers. See *Bozeman v. State*, 879 So. 2d 692, 704 (La. 2004) (embracing the benefit-of-the-bargain approach to allow claimants to recover the full value of their medical expenses, including the amount that was written off).

cost of the care paid by the collateral source.⁵³ States allow claimants to collect write-offs under the collateral source rule because disclosure of the reduced payment often suggests that a collateral source paid for these expenses, undermining the purpose of keeping this information from the jury.⁵⁴

As a result of double payments and inflated awards, opponents blame the collateral source rule for increasing insurance payments and encouraging claimants to go to trial.⁵⁵ This argument has led to the modification or abrogation of the rule in many states in response to calls for tort reform.⁵⁶

Until now, this debate has driven state and federal decisions to either maintain or limit the collateral source rule. Legislatures that were persuaded by the tort reform argument passed legislation limiting the rule,⁵⁷ whereas those for which the deterrent value of the rule prevails⁵⁸ have retained it.⁵⁹

⁵³ See, e.g., 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, 476-77 (1998) (explaining that many courts treat write-offs as a collateral source benefit).

⁵⁴ See, e.g., *Wills v. Foster*, 892 N.E.2d 1018, 1030 (Ill. 2008) (holding that a claimant is entitled to the reasonable value of his medical expenses, not only those paid by an insurer); see also *Swanson v. Brewster*, 784 N.W.2d 264, 281-82 (Minn. 2010) (citing MINN. STAT. ANN. § 548.251, subdiv. 5 (West Supp. 2008)) (noting inadmissible evidence showing that an insurer paid less than the billed amount).

⁵⁵ See, e.g., Krauss & Kidd, *supra* note 32, at 11-12 (noting that critics of the collateral source rule argue that the rule increases both insurance premiums and litigation costs because it encourages needless litigation (citing Pasman-Green & Richards, *supra* note 25, at 429-30)).

⁵⁶ See *supra* notes 21-22; see also Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1341 (1994) ("As part of tort reform, the collateral source rule has by now been abolished in several states.").

⁵⁷ See, e.g., Jonathan J. Lewis, *Putting MICRA Under the Microscope: The Case for Repealing California Civil Code Section 3333.1(a)*, 29 W. ST. U. L. REV. 173, 174-78 (2001) (detailing California's partial repeal of the collateral source rule in hopes of addressing escalating medical malpractice insurance rates in the mid-1970s).

⁵⁸ While courts have struck down many tort reform efforts as unconstitutional, some legislatures have managed to satisfy their courts by narrowly tailoring the rule. See Kara Lee Monahan, Comment, *State Constitutional Law—Tort Reform—Supreme Court of Ohio Reverses Course and Upholds Limits on Noneconomic and Punitive Damages as Constitutional*, 40 RUTGERS L.J. 953, 956-60 (2009) (reviewing the history of the Ohio Supreme Court overturning legislative efforts on tort reform and the court's later acceptance of noneconomic and punitive damages limitations). The court in *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007), did not reach the issue of the constitutionality of abrogating the collateral source rule, a measure that has been struck down by the Ohio Supreme Court multiple times. See, e.g., *State ex rel. Ohio Acad. of Trial Lawyers v. Sherward*, 715 N.E.2d 1062, 1102-03 (Ohio 1999) (striking down the

Both sides present persuasive arguments. Rewarding individuals for choosing to purchase health insurance makes sense in a world in which insurance is not required, yet the increasing number of defendants with liability insurance seems to undermine the deterrence justification for the rule. Accordingly, neither side of the traditional debate is fully persuasive in justifying either a universal return to the collateral source rule or its abrogation. However, the recent health care reform legislation has introduced a new issue that changes the scope and persuasiveness of each side of the debate: the uninsured claimant.

III. INTRODUCING THE ISSUE OF THE UNINSURED CLAIMANT: HOW THE INDIVIDUAL MANDATE CHANGES THE SCOPE OF THE COLLATERAL SOURCE RULE DEBATE

The Affordable Care Act mandates the acquisition of insurance coverage by most Americans, and, in so doing, undermines the justifications for maintaining the collateral source rule, especially because the rule would now benefit uninsured individuals who shirk their obligations to obtain insurance under the Affordable Care Act. The Affordable Care Act's purpose is to improve and extend insurance coverage to nearly all Americans.⁶⁰ Central to this effort is the individual mandate—the requirement that all nonexempt individuals obtain “minimum essential coverage” by 2014.⁶¹ All included individuals⁶²

repeal of the collateral source rule for violating separation of powers); Sorrell v. Thevenir, 633 N.E.2d 504, 510 (Ohio 1994) (striking down the repeal of the collateral source rule for violating the right to trial by jury), *superseded by statute*, 2002 Ohio Laws File 250.

⁵⁹ See, e.g., VA. CODE ANN. § 8.01-35 (2007) (codifying the common law collateral source rule).

⁶⁰ The Act seeks to provide coverage for an additional thirty-two million Americans. See John D. Goodson, *Patient Protection and Affordable Care Act: Promise and Peril for Primary Care*, 152 ANNALS INTERNAL MED. 742, 742 (2010); see also Scott E. Harrington, *U.S. Health-Care Reform: The Patient Protection and Affordable Care Act*, 77 J. RISK & INS. 703, 704 (2010) (listing the ways in which the Affordable Care Act will expand insurance coverage “by (1) requiring individuals to obtain health insurance, (2) subsidizing the cost of insurance for low- and moderate-income persons, (3) requiring employers above a certain size to offer health coverage to employees, and (4) significantly expanding eligibility for Medicaid”).

⁶¹ Affordable Care Act sec. 1501(b), § 5000A, 26 U.S.C.A. § 5000A(b) (West Supp. 2011) (“An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.”).

⁶² The Affordable Care Act contains exemptions for religious reasons, individuals not lawfully present in the United States, incarcerated individuals, and individuals who cannot afford insurance. *Id.* sec. 1501(b), § 5000A, 26 U.S.C.A. § 5000A(d)–(e).

who are noncompliant with the mandate must pay a monthly penalty⁶³ for their failure to contribute to the system.⁶⁴ This section explains the effect of the statute on the justifications for the collateral source rule.

Mandated health insurance changes the collateral source rule equation. Because the rule is meant in part to hide whether or not the claimant is insured to uphold the defendant's liability and protect insured plaintiffs, the rule has less effect in an age when juries may well assume that the claimants have insurance.⁶⁵ The insurance mandate of the Affordable Care Act will further undermine the rule's ability to hide a claimant's insured status.⁶⁶ If juries currently make assumptions about a claimants' coverage,⁶⁷ expanded coverage under the Affordable Care Act will further support a jury's assumption that a claimant is insured.

A weightier concern is that now not only is it controversial for insured claimants to recover full damages for their losses despite their coverage, but also, under the Affordable Care Act, willfully uninsured claimants⁶⁸ would receive full damages despite their failure to opt in to a mandatory insurance system that could have mitigated the damages that the tortfeasor would have to pay. As passed, the Affordable Care Act imposes a penalty on willfully uninsured individuals, illustrating that it intends the individual procurement of medical insurance coverage to be required. The mandate is a conscious effort to spread

⁶³ *Id.* sec. 10106(b)(1), § 5000A, 26 U.S.C.A. § 5000A(b) ("If a taxpayer who is an applicable individual . . . fails to meet the requirement of [maintaining minimum essential coverage] . . . , there is hereby imposed on the taxpayer a penalty with respect to such failures . . .").

⁶⁴ In addition to aligning the collateral source rule with the Affordable Care Act's philosophy, changing the collateral source rule may act as an enhanced deterrent for individuals to shirk their responsibility under the individual mandate.

⁶⁵ See *supra* text accompanying note 30.

⁶⁶ It is estimated that between twenty-one and twenty-three million people, including illegal immigrants, will remain uninsured under the Affordable Care Act. See Harrington, *supra* note 60, at 704 n.2; Mitchell H. Katz, *Future of the Safety Net Under Health Reform*, 304 JAMA 679, 679 (citing Office of the Actuary, Cntrs. for Medicare & Medicaid Services estimate). It is projected that about four million nonelderly people will remain willfully uninsured in 2016. Harrington, *supra* note 60, at 704 n.2.

⁶⁷ See Diamond & Vidmar, *supra* note 46, at 1889 (contrasting concerns with over-compensating plaintiffs with "traditional assumptions about the role of insurance in juror thinking").

⁶⁸ I use "willfully uninsured" to distinguish those who ignore the Affordable Care Act mandate from individuals who are exempt from obtaining coverage under the statute. See *supra* note 62. For the purpose of this Comment, "willfully uninsured" refers to individuals who have the obligation to obtain coverage but refuse to do so.

costs among individuals to reduce premiums and health care costs.⁶⁹ Willfully uninsured individuals subvert this purpose.

With the passage of the Affordable Care Act, the collateral source rule allows willfully uninsured claimants to hide their lack of health coverage during trial and during the calculation of damages. Though proponents of the rule argue that a defendant should not benefit from a claimant's decision to purchase insurance,⁷⁰ the states and the federal government may decide that because purchasing insurance is now mandatory, rewarding the decision is less important. In addition, rewarding willfully uninsured claimants with full damages for their decisions to forgo coverage is less justifiable.

Thus, the collateral source rule is less defensible as applied to either insured or willfully uninsured plaintiffs. The Affordable Care Act provides an additional and substantial reason to favor changing the rule. Updating the collateral source rule to align with the goals of the Affordable Care Act—specifically to dissuade individuals from refusing to obtain insurance coverage and to ensure that willfully uninsured individuals do not receive damages that an insurance plan otherwise would have covered—reinforces the Affordable Care Act's message and provides an opportunity for tort reform consistent with the Act. This measure may have the effect of providing an additional deterrent to nonexempt individuals deciding to forgo health insurance coverage. At the very least, the new issue of the uninsured claimant changes the weight of the arguments fundamental to the traditional collateral source rule debate.

IV. THE EFFECT OF MODIFYING THE COLLATERAL SOURCE RULE IN THE WAKE OF HEALTH INSURANCE REFORM

In light of the Affordable Care Act, arguments for upholding the common law collateral source rule are no longer as persuasive as they were before. Whether or not changes to the collateral source rule will be made in the wake of the Affordable Care Act will vary from jurisdiction to jurisdiction. However, to evaluate this choice and determine how the rule should be changed, a number of factors must be considered to evaluate the effect that such a limitation may have on the existing tort regime. This Part highlights a number of these factors and

⁶⁹ See *infra* note 84.

⁷⁰ See, e.g., *Eastin v. Broomfield*, 570 P.2d 744, 751 (Ariz. 1977) (offering a rationale for the collateral source rule).

evaluates the consequences that changes to the collateral source rule may have for each.

A. *Political Benefits*

Long a target of calls for tort reform, critics often blame the collateral source rule for driving up insurance costs as well as the costs of both litigation and settlement.⁷¹ Limiting the collateral source rule's application in certain circumstances may be a low-cost means of pleasing big businesses, people in the medical profession, individuals who purchase their own liability insurance coverage, and others who are looking for government intervention to reduce premiums.⁷² On the federal level, a limited abrogation of the collateral source rule meant to decrease damages in connection with the Affordable Care Act may produce some goodwill from groups who are more likely to oppose the mandate, while also promoting the policy objective of incentivizing individuals to purchase coverage. However, it does not make good political sense to eliminate the rule outright. Collateral source rule statutes must have protections for those exempt from the individual mandate, those subject to mandatory subrogation agreements, and those who otherwise would be denied a sufficient recovery. The following Sections will lay out what these protections should be.

B. *Purpose of Tort Law*

At the core of the debate over the collateral source rule is a theoretical argument about the purpose of tort law. Those who favor de-

⁷¹ See, e.g., Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 709 (1997) ("To the extent that victims are compensated twice, these additional payments are passed on to the public in the form of higher insurance costs." (citing John L. Antracoli, Note, *California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits*, 37 HASTINGS L.J. 667, 671 (1986))); Victor E. Schwartz, Essay, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569, 573-74 (1986) ("When the tort system distributes a previously compensated-for risk, it, in effect, *redistributes* the risk to a different insurance system. This redistribution makes poor economic sense [I]t is far easier to return premium dollars to injured parties through accident and health insurance.").

⁷² Whether or not these reforms have a meaningful effect on cutting the costs of litigation, the number of suits brought, or premium prices is subject to wide debate. See, e.g., Alexee Deep Conroy, *Lessons Learned from the "Laboratories of Democracy": A Critique of Federal Medical Liability Reform*, 91 CORNELL L. REV. 1159, 1185-86 (2006) (citing studies that present varied conclusions on the effect of repealing the collateral source rule).

terrence⁷³ are more likely to sympathize with the application of the collateral source rule,⁷⁴ while those who favor a compensatory approach⁷⁵ seek the rule's limitation.⁷⁶

When a state limits the collateral source rule, it supports the view that the primary purpose of the tort system is to compensate a victim for his loss.⁷⁷ At first glance, the total abrogation of the collateral source rule would seem to advance this purpose, so that juries may award economic damages⁷⁸ based solely upon the claimant's demonstration of uncompensated loss.⁷⁹ However, some proponents of the compensation theory of torts agree that the collateral source rule does play a role in allocating to the claimant the costs of obtaining insurance, attorneys' fees, and the deductible—costs that the tortfeasor has theoretically imposed that otherwise may not be awarded to the claimant.⁸⁰ For this reason, some states that have abrogated the collateral source rule include make-whole provisions allowing the claimant to recover some of these costs before the collateral benefits are subtracted from the award.⁸¹

Proponents of the compensatory theory of tort law may also take issue with a modification of damages awards that would deny willfully uninsured claimants the full cost of their injuries, failing to make the claimant whole. However, perhaps this outcome is justifiable. Under the Affordable Care Act, those who refuse to purchase insurance pay a

⁷³ RESTATEMENT (SECOND) OF TORTS § 901 (1979) (“[One of] the purposes for which actions of tort are maintainable [is] . . . to punish wrongdoers and deter wrongful conduct . . .”).

⁷⁴ See *supra* note 32 and accompanying text.

⁷⁵ RESTATEMENT (SECOND) OF TORTS § 901(a) (explaining that tort damages are meant “to give compensation, indemnity or restitution for harms”).

⁷⁶ See *supra* note 50 and accompanying text.

⁷⁷ See generally Fleming, *supra* note 50 (advancing the view that the tort system should function solely to compensate claimants for their losses).

⁷⁸ The claimant's award should only be reduced for economic damages covered by insurance, as this is the portion of the award for which double recovery is possible. KEETON & WIDISS, *supra* note 41, § 3.11(d).

⁷⁹ Cf. IDAHO CODE ANN § 6-1606 (Supp. 2008) (“In any action for personal injury or property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources . . .”).

⁸⁰ See Fleming, *supra* note 50, at 59 (“The *Helpend* court considered that the collateral source rule . . . also performed a ‘legitimate and even indispensable function’ by compensating for the plaintiff's attorney's share in the recovery . . . [A] plaintiff does not really receive a double recovery, because he must pay his own attorney a substantial percentage of the damages awarded.” (quoting *Helpend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 69 (Cal. Ct. App. 1970))).

⁸¹ See *supra* note 39.

penalty equal to the lesser of a cash amount⁸² and the insurance premium for the lowest level of “minimum acceptable coverage,” the bronze plan.⁸³ Anyone who pays less than the premium for minimum essential coverage may be enriched by the failure to purchase health insurance. Such nonparticipants also cause a loss to the public by failing to contribute to the national insurance fund used to reduce the costs of insurance for all.⁸⁴ If the purpose of the Affordable Care Act is to build such a fund, for which all of society pays to ensure lower-priced coverage for those who are harmed, then limiting the collateral source rule may be justified as a means to encourage cost spreading and to efficiently compensate those who are harmed for their loss, which would promote the goal of compensation.⁸⁵

From a deterrence perspective, changing the collateral source rule would undermine its important purpose—ensuring that tortfeasors pay for the harm they cause.⁸⁶ The deterrence argument against limiting the common law collateral source rule contends that defendant tortfeasors will not be made to pay for the harm they have caused if the claimant’s primary insurer covers his medical expenses. Proponents of deterrence would likely disagree with changes to the collateral source rule that reduce the liability of defendant tortfeasors to uninsured claimants, unless it could be proven that this measure has an offsetting deterrence benefit. A measure that accounts for willfully uninsured plaintiffs in awarding damages should strike a balance be-

⁸² In 2014, this cash amount will be \$95, multiplied by a cost-of-living adjustment; in 2015, \$325; and in 2016, \$695. Affordable Care Act, sec. 1501(b), 10106(b)(3), § 5000A, 26 U.S.C.A. § 5000A(c)(3) (West Supp. 2011); Health Care and Education Reconciliation Act of 2010 (HCERA), § 1002(a)(2), 26 U.S.C.A. § 5000A.

⁸³ Insurance plans meeting the “minimum essential coverage” requirement are placed into four categories specifying levels of coverage: bronze, silver, gold, and platinum. Affordable Care Act § 1302(d)(1), 42 U.S.C.A. § 18022(d)(1). The calculation of the penalty amount is based on a comparison between the cash amount and premiums for a bronze level plan. *Id.* sec. 1501(b), 10106(b)(2), § 5000A(c), 26 U.S.C.A. § 5000A(c)(1)(B); HCERA § 1002, 26 U.S.C.A. § 5000A(c)(1)(B).

⁸⁴ As the theory behind the Affordable Care Act is to decrease insurance premiums for individuals and small groups by grouping people together, a willful nonparticipant theoretically causes a societal loss as well. *See, e.g.,* Sara Rosenbaum, *A “Broader Regulatory Scheme”—The Constitutionality of Health Care Reform*, 363 NEW ENG. J. MED. 1881, 1881-82 (2010) (explaining the centrality of the individual mandate to the Affordable Care Act’s objective of fighting the adverse selection problem by inserting healthy individuals into the insurance pool to stabilize costs).

⁸⁵ For an overview of the theory and justifications behind cost spreading, see Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517-19 (1961).

⁸⁶ *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.14 (3d ed. 1986); SHAVELL, *supra* note 42, at 21-32 (1987); Calabresi, *supra* note 85, at 502.

tween deterring individuals from shirking their responsibilities under the individual mandate⁸⁷ and upholding fair and reasonable awards for claimants through both the make-whole rule and subrogation for insurers. The result would be that tortfeasors still pay for their behavior.

Under a system without the collateral source rule, the tortfeasor's liability may be reduced to reflect the economic damages paid by the claimant's insurer, but the tortfeasor will still be responsible for non-economic damages and expenses not paid by insurance.⁸⁸ In practice, however, although the tortfeasor is theoretically liable for damages awarded to the claimant, more frequently the defendant's liability insurance covers them.⁸⁹ This insurance payment strips the defendant of most of the responsibility for paying the claimant's damages, with the exception of damages awarded beyond the defendant's coverage, the defendant's deductible, and consequently higher premiums.⁹⁰

Eliminating the collateral source rule for insured claimants also creates a problem from a deterrence perspective, as a system that deducts collateral source payments from damages awards fails to hold the defendant responsible for the full extent of the harm he caused. To mitigate this problem, I analyze a damages award regime that promotes subrogation. Allowing for subrogation ensures that the defendant tortfeasor is liable for the amount otherwise subtracted from the claimant's award. Promoting subrogation for insured claimants, discussed below,⁹¹ may help to ease the tension between the compensatory and deterrence justifications for retaining and changing the collateral source rule.

C. The Collateral Source Rule as a Rule of Damages Versus a Rule of Evidence

A proposal to modify the collateral source rule to align with the Affordable Care Act's goals must address the collateral source rule's

⁸⁷ See *supra* text accompanying notes 61 and 63.

⁸⁸ See *supra* note 78.

⁸⁹ See, e.g., Fleming, *supra* note 50, at 59; cf. Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Insurance Economics Perspective*, 72 TEX. L. REV. 1681, 1688 (1994) (“[I]nsurance reduces the incentives of the insured and potential victims to avoid accidents.”).

⁹⁰ See Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 316-17 (1990) (detailing the ways in which covered defendants may still be responsible for out-of-pocket payments for a claimant's damages if the damages exceed a predetermined cap).

⁹¹ See *infra* Section IV.D.

role as both a rule of evidence and a rule of damages. Some states have abrogated the collateral source rule as a rule of evidence, allowing defendant tortfeasors to present evidence of the claimant's insurance coverage or lack thereof to the jury.⁹² However, even in states that have made this change, it is unclear how a jury charged with deciding a defendant's liability should consider insurance information.⁹³ Jurors who have complied with their obligation to purchase insurance likely will be prejudiced against a claimant who failed to obtain insurance.⁹⁴ This prejudice may cause willfully uninsured claimants to recover much less in damages than is reasonable—less than the claimant would have received without the collateral source rule had he been insured. The purpose of changing the collateral source rule after the Affordable Care Act should not be to deny all damages to willfully uninsured claimants, but to align the rule's outcome with the underlying goal of the individual mandate: to facilitate spreading the costs of injury and illness, and not to compensate an individual for medical coverage he refused to obtain in violation of the Affordable Care Act.

In addition, because all willfully uninsured claimants are equally at fault for their failure to purchase minimum essential coverage, it would be unjust to hinge the claimant's award on the jury's prejudice against a claimant's failure to obtain insurance. For these reasons, the modifications to the collateral source rule proposed here leave the rule's evidentiary function intact.

Introducing insurance evidence after the verdict does not create the same subjectivity and prejudice as during trial. In many states, judges are charged with reducing the award post-verdict based on evidence of collateral source benefits paid to the claimant that is presented after trial.⁹⁵ There are at least three benefits to reducing awards during the damages phase of the trial. First, evidence of collateral payments or the lack thereof does not have the same relevance problem post-trial as it does during the trial. Second, the modifica-

⁹² See *supra* note 22.

⁹³ Cf. *Killian v. Melser*, 792 F. Supp. 1217, 1219 (N.D. Ala. 1992) (noting that putting insurance evidence to the jury was "irrelevant and prejudicial . . . having nothing whatsoever to do with the true calculation of the possible recoverable damages").

⁹⁴ See, e.g., Danielle A. Daigle, Commentary, *The Collateral Source Rule in Alabama: A Practical Approach to Future Application of the Statutes Abrogating the Doctrine*, 53 ALA. L. REV. 1249, 1257-58 (2002) (observing that federal district courts in Alabama have reached differing decisions as to how to use collateral evidence because of jurors' likely prejudice).

⁹⁵ See, e.g., MONT. CODE ANN. § 27-1-308(3) (2007) (describing the process for reducing the claimant's award by the amount of the collateral source payments received).

tion of the collateral source rule's damages function may be much less unpredictable than total abrogation because judges can make objective deductions instead of juries making subjective calculations. Third, the rule prevents possible prejudice against claimants based on their lack of insurance coverage. However, such a rule would have to protect not only the willfully uninsured claimant from jury prejudice. Two other groups—insured claimants subject to subrogation agreements and uninsured claimants exempt from obtaining insurance—must be considered in order to construct a damages rule that fairly allocates awards.

D. Subrogation

Commentators often acknowledge that the collateral source rule would be easily reconcilable with a compensatory theory of torts if it consistently supported subrogation,⁹⁶ a contractual arrangement through which a claimant's primary insurer is reimbursed for its coverage of the claimant's medical costs if the claimant recovers these costs from the tortfeasor.⁹⁷ Subrogation benefits both the insurers and the insureds: insurers receive reimbursement for medical costs they cover when their insureds are victims of a tort, and insureds who opt into subrogation arrangements can benefit from lower premiums.⁹⁸

Decreasing premiums by way of subrogation agreements furthers the policy of the Affordable Care Act by driving down insurance costs. In fact, health plans using federal money to provide individual health insurance must pursue subrogation from liable third parties by "all reasonable measures."⁹⁹

States considering changes to their collateral source rules as well as states that have changed the rule already should consider the benefits of subrogation. However, subrogation poses two problems that

⁹⁶ Subrogation often follows twin ideals: (1) a tortfeasor does not benefit from a collateral source while the plaintiff is not overcompensated, and (2) the plaintiff does not receive a windfall because of the obligation to reimburse the collateral source. See Fleming, *supra* note 50, at 57-58.

⁹⁷ See KEETON & WIDISS, *supra* note 41, § 3.10(a)(1). The claimant's insurer can also recover these costs in an action against the tortfeasor or the tortfeasor's insurer.

⁹⁸ Individuals will prefer insurance contracts with subrogation agreements because they will prefer lower-cost full coverage plans to plans that cost more for the exclusion of a subrogation right, and because individuals seeking to profit from arrangements without subrogation obligations can drive up premiums for plans with subrogation rights. See SHAVELL, *supra* note 42, at 236-37.

⁹⁹ 42 U.S.C. § 1396a(a)(25)(A) (2006).

limit the efficacy of the arrangement.¹⁰⁰ The first problem is the cost for insurance providers to exercise their subrogation rights.¹⁰¹ Yet insurance companies often succeed in their subrogation claims,¹⁰² illustrating that while costs of subrogation may be high, they are not prohibitive. While policymakers may consider increasing the efficiency of the suit for subrogation, the problem by itself does not merit a change in the collateral source rule.¹⁰³

More seriously, subrogation affects an insured claimant's award, a problem that should prompt a revision of the collateral source rule. In some personal injury actions, successful claimants may find that their awards are small after insurance setoffs to cover the costs of obtaining insurance, attorneys' fees, and noneconomic damages.¹⁰⁴ Some claimants, after cooperating with a subrogation agreement, may

¹⁰⁰ First, while subrogation has been credited with making lower premiums possible, the fact that insurance companies receive refunds pursuant to subrogation contracts does not always result in the reduction of costs and premiums. Though many individuals are given the choice of lower premiums in exchange for a subrogation agreement, these lower premiums may not reflect the true extent of insurance company savings. Second, subrogation may present a problem for third-party liability insurance premiums, which may increase as a result of larger awards to claimants that are in part subrogated to the first-party insurer. For this reason, some state collateral source statutes limit subrogation in certain circumstances. See, e.g., ARIZ. REV. STAT. ANN. § 12-565(C) (Supp. 2008). Decreasing awards for willfully uninsured claimants and insured claimants without subrogation agreements may not fully offset the increased costs from newly insured claimants with subrogation agreements. However, this outcome is still preferable to the current system because it allocates the payment for harm to the tortfeasor, as opposed to the claimant's insurer. Rather than resulting in the tortfeasor paying full damages directly, this situation may cause him to pay indirectly in the form of increased liability insurance premiums.

¹⁰¹ See CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 6 n.15 (2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5549/Report.pdf> (explaining that many insurers do not exercise their rights to subrogation because "it can be difficult to establish that a certain award covers the same damages as the injury covered by an insurance benefit," because of the substantial administrative costs involved in obtaining awards, and because of possible "ill will among customers").

¹⁰² See, e.g., *DeHerrera v. Am. Family Mut. Ins. Co.*, 219 P.3d 346, 350 (Colo. App. 2009) (holding that the insurer had a right of subrogation for payments it made to the insured's medical providers); *Estate of Risk v. Risk*, 771 N.W.2d 653 (Iowa Ct. App. 2009) (unpublished table decision) (holding that a workers' compensation insurance company had a subrogation right to benefits paid to a widow for her husband's injuries).

¹⁰³ Evaluating the extent of this problem is difficult; most authors writing about the subject do not show the rate at which insurers exercise their subrogation rights following successful personal injury suits.

¹⁰⁴ See, e.g., Michelle Andrews, *Adding Insult to Injury*, SMARTMONEY, July 1, 2000, at 130 (highlighting stories of severely injured claimants whose pain and suffering damages were significantly reduced for subrogation costs).

not have the funds to cover the costs of obtaining the subrogated damages. This lack of funds has contributed to the development of setoff rules, which limit how awards are reduced post-verdict. One of these setoff options, the make-whole rule, ensures that a claimant's award is not reduced for collateral benefits before the claimant recovers some of the costs of procuring the collateral benefit.¹⁰⁵ The make-whole rule can limit the burden of a subrogation obligation because it can restrict an insurer's exercise of subrogation rights until the claimant has been fully compensated for losses the insurer did not cover.¹⁰⁶ Although the make-whole rule does not guarantee full compensation for the plaintiff's costs,¹⁰⁷ it aims to ensure that the claimant does not lose more than he gains from the suit.¹⁰⁸ The rule takes into account the real costs of personal injury litigation: attorneys' fees, costs of obtaining insurance, and so on.¹⁰⁹

While some courts have adopted the make-whole rule,¹¹⁰ a number of states have statutory provisions that prioritize compensation of the plaintiff's costs of obtaining the judgment over both deductions for the defendant and for the plaintiff's insurer.¹¹¹ For example, the Connecticut collateral source statute requires that the court reduce

¹⁰⁵ See, e.g., FLA. STAT. ANN. § 768.76 (West Supp. 2009) (“[T]he court shall reduce the . . . award by the . . . amounts which have been paid for the benefit of the claimant . . . from all collateral sources. . . . Such reduction shall be offset to the extent of any amount which has been paid . . . [by] the claimant . . . to secure [the] right to any collateral source benefit which the claimant is receiving as a result of her or his injury.”).

¹⁰⁶ See *Barnes v. Indep. Auto. Dealers of Cal.*, 64 F.3d 1389, 1394 (9th Cir. 1995) (“It is a general equitable principle of insurance law that, absent an agreement to the contrary, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries, that is, has been made whole.”).

¹⁰⁷ Most make-whole provisions account for the cost of obtaining the collateral source benefit but do not necessarily account for attorneys' fees, although these fees are sometimes considered unofficially.

¹⁰⁸ See Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. REV. 237, 249-52 (1996) (explaining the make-whole doctrine as a means of easing the effect of subrogation on claimants); see also David M. Kono, Note & Comment, *Unraveling the Lining of ERISA Health Insurer Pockets—A Vote for National Federal Common Law Adoption of the Make Whole Doctrine*, 2000 BYU L. REV. 427, 449-50 (analyzing the doctrine in light of ERISA concerns).

¹⁰⁹ In a post-Affordable Care Act regime, the cost of obtaining insurance should not be taken into account because the individual mandate requires that everyone obtain insurance coverage. The costs of a deductible, however, should be considered.

¹¹⁰ See, e.g., *Rimes v. State Farm Mut. Auto. Ins. Co.*, 316 N.W. 2d 348, 355-56 (Wisc. 1982); cf. *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1297-98 (7th Cir. 1993) (evaluating, without deciding, whether the make-whole rule should be applied in federal court).

¹¹¹ See, e.g., FLA. STAT. ANN. § 768.76 (West Supp. 2009) (declaring no reduction of award for collateral sources for which a subrogation right exists).

the award by the amount of benefits the claimant received from collateral sources.¹¹² However, the statute specifies that the amount the claimant has paid to secure insurance will be removed from the reduction, therefore ensuring that the claimant is adequately reimbursed for the costs of insurance.¹¹³

A second and less common means of easing the effects of subrogation is the common fund. The common fund requires that where a party to litigation receives an award, others sharing the award must bear a portion of the cost of obtaining it, including a reasonable amount of attorneys' fees.¹¹⁴ In the context of insurance contracts, some courts require this kind of fee-sharing for insurers that do not exercise their rights to intervene or join with the claimant in personal injury cases¹¹⁵ but stand to gain from a claimant's recovery in the case.¹¹⁶ This equitable form of recovery allows claimants to be compensated for harms not covered by collateral benefits without losing the entire award to attorneys' fees and subrogation.¹¹⁷ The common fund is also credited with increasing efficiency in the long run. The fund encourages cost sharing between the claimant and the insurer, whether by means of mounting a joint case, or by sharing the cost of attorneys' fees in a successful case.¹¹⁸

¹¹² CONN. GEN. STAT. ANN. § 52-225a(a) (West Supp. 2009).

¹¹³ *Id.*

¹¹⁴ See Johnny Parker, *The Common Fund Doctrine: Coming of Age in the Law of Insurance Subrogation*, 31 IND. L. REV. 313, 321 (1998) (quoting *Means v. Montana Power Co.*, 625 P.2d 32, 37 (Mont. 1981), which described the purpose of the common fund doctrine as avoiding unjust enrichment).

¹¹⁵ See *id.* at 328 (explaining the options available to an insurer with claims against a tortfeasor).

¹¹⁶ See, e.g., *Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir. 2000) (explaining that without the common fund the claimant would be in a worse position after her settlement than if she had not brought suit). In *Mathews v. Bankers Life & Cas. Co.*, the court held:

[W]here [the insured's attorney] effects a recovery it is only fair that the insurance company pay a reasonable attorney fee on its part of the recovery. How in the name of fairness can it be said that the injured should pay a fee not only on his recovery but also on the recovery of the insurance company?

690 F. Supp. 984, 987 (M.D. Ala. 1988). See also *Eiland v. Meherin*, 854 So.2d 1134, 1137 (Ala. Civ. App. 2002) (following *Mathews* to avoid a "manifestly unjust result").

¹¹⁷ See, e.g., *Wal-Mart Stores*, 213 F.3d at 402 (explaining an insurance plan in which the common fund rule allowed the claimant to recover damages not explicitly covered by the plan).

¹¹⁸ *Cf. id.* (concluding that attorneys' fees would likely make existing plans worse in the long run).

A system with a limited collateral source rule needs strict set-off rules such as the make-whole rule or the common-fund rule if the goal is to ensure that victims have incentives to seek damages for their losses. An updated statute would need to ensure that claimants bringing successful claims would not be worse off than they would have been had they not brought suit at all.¹¹⁹ In cases with a jury unsympathetic to reimbursing an insurance company, juries may award the claimant less than full economic damages.¹²⁰ This outcome is especially likely where a claimant sues a sympathetic defendant or where his award is reduced for comparative negligence.¹²¹ A collateral source statute, particularly one that limits the rule, should incorporate some safeguards for claimants obligated to subrogate a portion of their damages. Such safeguards are also beneficial to insurance companies that would have to spend their own resources to recover the insured's collateral payments if the insured had no incentive to sue for damages. No state collateral source statutes currently adopt the common fund doctrine, which courts enforce as a rule of equity. As stated above, though, some states do adopt rules that incorporate the make-whole rule.¹²² The make-whole rule may be more effective as a direct and efficient way for the court to protect the claimant's award, as opposed to the common fund rule, which requires the court to collaborate with the insurer to ensure the payment of the insurer's portion of the costs of the suit.

In addition, many states with modified collateral source rules make special provisions for individuals whose insurance coverage includes a subrogation agreement.¹²³ While some states allow for the introduction of evidence regarding a claimant's subrogation agreements to counter the defense's introduction of evidence of the claimant's collateral benefits,¹²⁴ others have limited the rule to preserve collat-

¹¹⁹ See, e.g., *id.* at 402 (ruling that a system that leaves the claimant worse off than had she not sued would "gratuitously deter the exercise of the tort rights").

¹²⁰ See KEETON & WIDISS, *supra* note 41, § 3.10(c) (explaining jury members' possible prejudice against insurance companies trying to recover the cost of providing collateral benefits to an injured party from a tortfeasor).

¹²¹ See, e.g., *Wal-Mart Stores*, 213 F.3d at 404 (reducing claimant's award by twenty-five percent for comparative negligence).

¹²² See, e.g., *supra* notes 111-12.

¹²³ See, e.g., ALA. CODE § 6-5-545(c) (LexisNexis 2005) ("Upon proof by the plaintiff to the court that the plaintiff is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed, evidence relating to such reimbursement or payment shall be admissible.").

¹²⁴ See, e.g., CONN. GEN. STAT. ANN. § 52-225(a) (West Supp. 2009) (allowing for post-verdict reduction of damages by the amount the claimant received from collateral

eral-source-rule protection for sources with a subrogation right.¹²⁵ Ostensibly, states have adopted this standard out of concern that claimants who have received collateral benefits may be less likely to receive full awards from juries, even if they present evidence of their subrogation obligations.¹²⁶ For this reason, some claimants may prefer to hide all evidence of their insurance coverage from the jury. Conversely, in states where claimants may present evidence of subrogation obligations to counter evidence of collateral benefits, the jury may determine more accurately the amount of money the claimant will receive from the suit and the award needed to make the claimant whole.¹²⁷ In a world after the Affordable Care Act, where juries will likely presume that claimants are insured, claimants should be able to decide for themselves whether information regarding subrogation agreements is beneficial or harmful. Specifically, claimants should be able to determine whether the jury is more likely to award full damages if it knows that the claimant is insured but obligated to repay the insurer, or if it does not know whether the claimant is insured. Once the court has decided that a valid subrogation right exists, the choice of whether or not to inform the jury of the collateral benefit should be the claimant's. Retaining the collateral source rule for claimants with subrogation obligations aligns with the interest of insurers. Claimants are likely to choose the course that yields awards from which they can benefit, a choice from which the insurer will benefit as well, allowing for compensation, deterrence, and perhaps lower premiums.

E. Exemptions

Aside from claimants legally bound to subrogation agreements with their insurers, other groups may be unfairly affected by modifications to the collateral source rule. A collateral source statute should

sources except where "a right of subrogation exists"); 735 ILL. COMP. STAT. ANN. 5/2-1205(2) (West Supp. 2009) ("Such reduction shall not apply to the extent that there is a right of recoupment through subrogation . . ."); WASH. REV. CODE § 7.70.080 (same).

¹²⁵ See, e.g., ALASKA STAT. § 09.17.070 (2008) ("[A] defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract."); N.Y. C.P.L.R. 4545 (McKinney Supp. 2011) ("[E]vidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified . . . from any collateral source . . .").

¹²⁶ See KEETON & WIDISS, *supra* note 41, § 3.10(c) (discussing the possibility of juror prejudice against insurance companies).

¹²⁷ See Pitts, *supra* note 41, at 769-70.

take into account individuals exempt from the requirement to obtain health insurance under the Affordable Care Act.¹²⁸ The statute specifies a number of exempt groups, including individuals who cannot afford health coverage.¹²⁹ These exempt groups should not be exposed to jury criticism or given reduced awards for not obtaining coverage. For some in these groups, lawsuits may be the only means by which they can pay for their medical costs, as opposed to willfully uninsured individuals, who are able to obtain health insurance but refuse to do so.¹³⁰ For these reasons, like individuals whose insurance contracts reserve subrogation rights, exempt individuals should have the discretion to determine whether evidence of their uninsured status should be revealed to the factfinder.

V. PROPOSING MODIFICATIONS TO THE COLLATERAL SOURCE RULE

Accounting for the numerous issues raised by changing the rule, I propose below a model statute for changing the common law collateral source rule—based both on preexisting state statutes¹³¹ amending the rule and on new policy objectives that the Affordable Care Act raises. This Part first lays out the objectives that this new regime is meant to achieve. It then provides language for a model damages statute modifying the collateral source rule and adding an additional damages rule to account for the uninsured plaintiff. Finally, it addresses some of the criticisms that may be raised against the proposal.

A. *Objectives of Modifying the Collateral Source Rule*

Any changes modifying the collateral source rule after the Affordable Care Act must account for the different groups affected. This Section identifies these groups and explains the proposed statute's treatment of them, as well as the motivation for this treatment.

¹²⁸ See *supra* note 62.

¹²⁹ Cf. Affordable Care Act sec. 1501(b), § 5000A(e), 26 U.S.C.A. § 5000A(e) (West Supp. 2011) (listing individuals who cannot afford health coverage as the first exempt group).

¹³⁰ In some cases, willfully uninsured claimants pay the equivalent of a bronze plan premium and simply refuse the coverage that comes with it. See *supra* text accompanying notes 82-83.

¹³¹ Though many state statutes pertaining to collateral sources address both tort and contract actions, this statute is meant to address only personal injury actions.

1. The Willfully Uninsured Claimant

If the purpose of the collateral source rule, and of tort law more generally, is to proportionately allocate the costs of harm to the individuals who cause it, then it is reasonable to hold a claimant partially responsible for shirking his responsibility to mitigate the costs of this harm by purchasing insurance. The Affordable Care Act fundamentally changed the incentives surrounding the purchase of medical insurance by imposing the individual mandate, and the collateral source rule should be updated to align with an individual's new responsibility to obtain coverage.

For this reason, the model statute proposed here would introduce a new damages rule to supplement the changes proposed to the collateral source rule below. The new statute would require the subtraction of the amount of medical costs that would have been covered under a bronze plan, the minimum coverage plan acceptable under the Affordable Care Act, from damages awarded to willfully uninsured plaintiffs. The bronze plan is the only justifiable plan to use as a measure because using a more expensive plan would punish uninsured plaintiffs for not obtaining coverage they were not obligated to buy. To protect willfully uninsured claimants from the reduction of damages that would not have been covered under a bronze plan, the model statute incorporates a version of the make-whole rule. This proposed statute would ensure that the awards for willfully uninsured claimants are not unjustly reduced and that these claimants do not unjustly benefit from damages that should be covered by an insurance plan.

2. The Insured Claimant

The Affordable Care Act's passage has also weakened some of the justifications for upholding the collateral source rule for insured claimants. Although there is still a deterrence justification for holding the tortfeasor responsible for the full cost of his harm, it now makes little sense to preserve a rule meant in part to protect or reward insured claimants when obtaining insurance is mandatory. In light of the proposal for reducing the awards of willfully uninsured claimants, it is only equitable that the damages rule for uninsured claimants be the same for insured claimants. Therefore, under the model collateral source rule proposed below, the court must reduce the insured claimant's award post-verdict to reflect the amount paid by the collateral source—except in the case of claimants with subrogation obligations. For these claimants, no portion of the award subject to a subro-

gation agreement may be reduced from the claimant's award. Furthermore, because of the unique difficulties posed by subrogation,¹³² the proposed rule contains both a make-whole provision and the opportunity for claimants subject to subrogation agreements to present evidence of this obligation to the jury. The make-whole provision, in particular, is meant to ensure that the claimant is adequately compensated. In addition, the actual cost of collateral benefits—and not the reasonable cost of medical care—is deducted from the award, leaving room for the additional coverage of the insured claimant's costs, since the jury will still be asked to award the reasonable cost of care. The provisions for insured claimants reflect limitations on the damages portion of the collateral source rule that are currently in place in a majority of states.¹³³

3. The Claimant Exempt from Purchasing Insurance

Because the claimant exempt from purchasing insurance may have no other means of covering his medical costs, he is exempt from the provision in the proposed statute that reduces the award of a willfully uninsured plaintiff. Like the claimant subject to a subrogation agreement, the exempt claimant should also have the option to share this fact with the jury, if he so chooses. Since the uninsured claimant receives no collateral benefits, no reductions are made from his award.

B. *Model Statute for the Introduction of Evidence Pertaining to Collateral Sources*

(a) In all tort actions for which economic damages for personal injury are claimed and are legally recoverable, information pertaining to whether the claimant has been or will be paid or reimbursed by a third party is not admissible, except that information relating to the payment of collateral benefits or the lack thereof may be introduced by the claimant if:

- (1) the court determines that the claimant has an obligation to repay the expenses which have been or will be paid or reimbursed; or
- (2) the court determines that the claimant is exempt from obtaining insurance under 26 U.S.C. § 5000A(d) or (e).

¹³² See *supra* Section IV.D.

¹³³ See statutes cited *supra* notes 21-22.

(b) The trial judge shall deduct from the verdict the amount of nonsubrogated collateral benefit paid to the claimant by a third party, less the total amount determined to be paid, contributed, or forfeited by the claimant to obtain reimbursement or payment of medical or hospital expenses.

(c) After the finder of fact has returned its verdict, the defendant may produce evidence that the claimant failed to obtain minimum essential insurance coverage under 26 U.S.C. § 5000A(b), but was not exempt from purchasing insurance under 26 U.S.C. § 5000A(d) or (e). If the court so finds, it shall reduce the damages to be awarded by the amount that would have been reimbursed to him by the lowest level of minimum essential coverage accepted under 42 U.S.C. § 18022(d)(1), “the bronze plan,” except that:

- (1) this amount may be deducted only to the extent that the verdict exceeds the amount of the claimant’s damages that would not be covered by the bronze plan; and
- (2) the claimant is not entitled to the costs of any penalty paid under 26 U.S.C. § 5000A(b) for failure to obtain insurance coverage.

C. Effect of the Model Statute

This model statute may be criticized by those who argue that holding willfully uninsured claimants responsible for their failure to purchase mandatory health insurance accomplishes neither the compensatory nor the deterrent function of tort law. The rule offered above does not fully compensate the willfully uninsured claimant for his injury, nor does it impose the full cost of harm on the tortfeasor.

However, this model statute aims to achieve compensation and deterrence more broadly. In failing to obtain the mandatory insurance, the willfully uninsured claimant causes a loss to society by failing to take part in a system that promotes loss compensation at a low price to individuals. In this sense, the willfully uninsured plaintiff is held responsible for the portion of the loss he could have covered, just as a claimant’s award can be deducted for comparative negligence.¹³⁴ In this way, and by exempting uninsured plaintiffs who are not required to purchase health insurance under the Affordable Care Act, the pro-

¹³⁴ See, e.g., *Cockerline v. Menendez*, 988 A.2d 575, 588 (N.J. Super. Ct. App. Div. 2010) (“[The] comparative fault system is intended to ensure ‘the distribution of loss in proportion to the respective faults of the parties causing that loss.’” (quoting *Brodsky v. Grinnell Haulers, Inc.*, 853 A.2d 940, 947 (N.J. 2004))).

posed statute attempts to achieve the equitable result. This proposal would also affect settlement negotiations by lowering the willfully uninsured claimant's expectation of the damages he could receive from a trial.

Similarly, a deterrence perspective can justify this revised rule. Now that obtaining insurance coverage is mandatory, this rule imposes costs on both parties at fault in a suit—the tortfeasor and the willfully uninsured claimant. To ensure that the tortfeasor still pays a portion of the damages, the only costs imposed on the claimant are those that otherwise would have been covered by the lowest level insurance plan, and the successful claimant is guaranteed recovery of his other costs before his damages are reduced.

Supporters of the common law collateral source rule may raise arguments from the traditional debate: that the common law rule protects insured claimants and that this particular statute undermines the deterrence function of the collateral source rule. However, with the significant majority of Americans insured,¹³⁵ the rule will not protect claimants from jury assumptions. Collateral source rule supporters also may argue that a statute that reduces damages undermines the deterrence achieved from the tortfeasor's payment of full damages. However, many states have already adopted this kind of reduction to combat rising insurance costs and the increased use of liability insurance.¹³⁶ The model statute attempts to maintain a level of deterrence by allowing insured claimants to continue to receive write-offs and encouraging subrogation. In addition, the model statute's primary aim—to allocate the costs of harm fairly in light of the Affordable Care Act—functions as a deterrent for those claimants who may otherwise choose to ignore their obligation to purchase insurance.

CONCLUSION

Although the passage of the Affordable Care Act will not resolve the collateral source rule debate, it has the potential to galvanize states and the federal government to reevaluate their collateral source rule statutes by introducing a new factor to be considered in the debate: the willfully uninsured claimant. By evaluating how the debate over the collateral source rule has changed, perhaps a new consensus can be achieved in terms of resolving some of the differences among states that have limited the rule. The model statute presented here is

¹³⁵ See *supra* note 66.

¹³⁶ See *supra* note 21.

not the only solution to the issue; however, it strives to achieve an equitable result in a society in which insurance coverage is mandated. A full repeal of the rule will not achieve this result, but an evaluation of which claimants the rule should be protecting may allow for its proper limitation and a more standardized approach to the way in which the rule is used across the states.