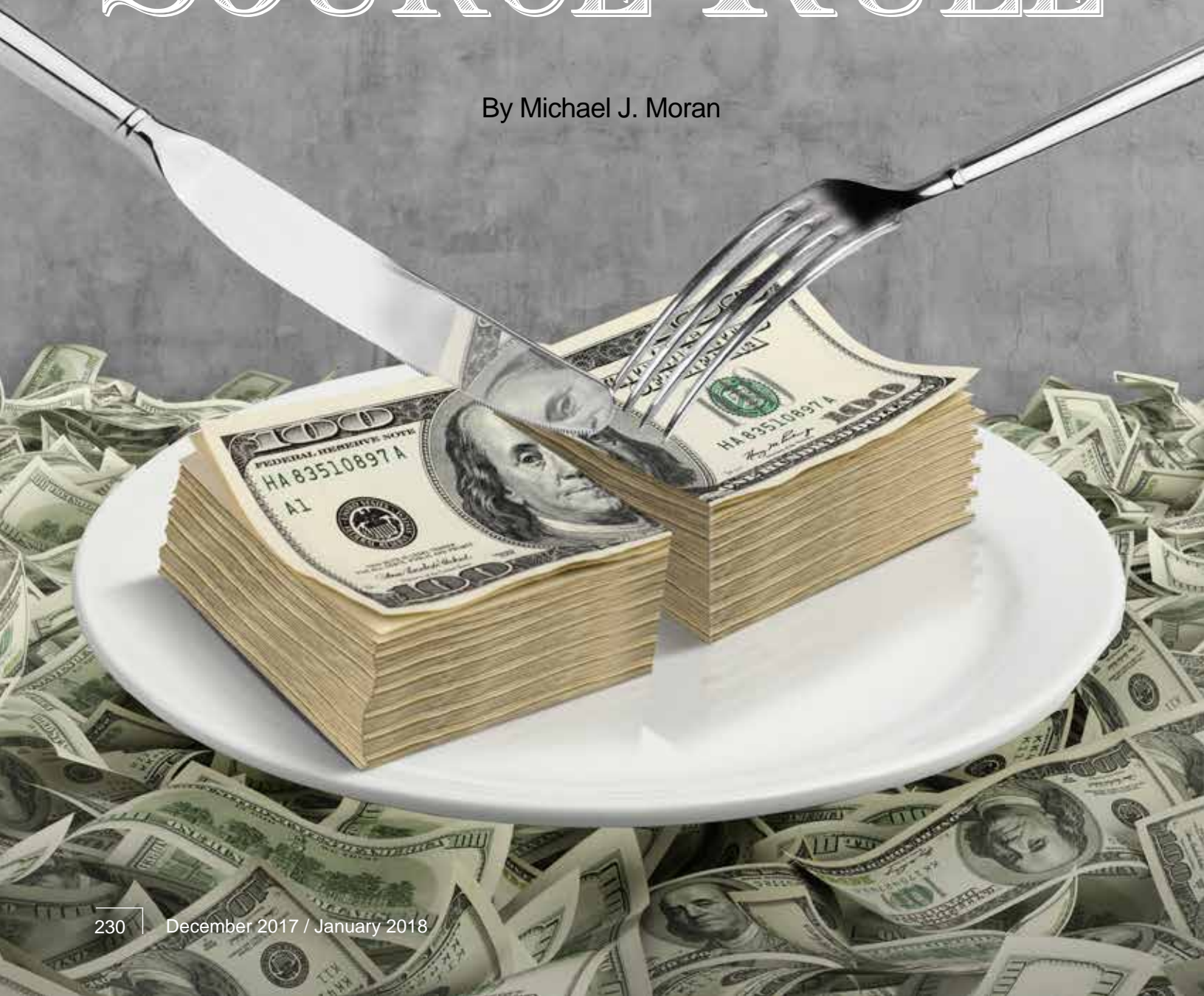


LOUISIANA COLLATERAL SOURCE RULE

By Michael J. Moran



Guy walks into a bar and asks, “Why would a mediator be concerned with a substantive subject like collateral source?” Bartender says, “Because the participants think mediators should be treated like mushrooms — kept in the dark and fed manure.” Ba da boom! From that witticism flows this effort.

Origin

The origin of the Collateral Source Rule dates back more than 150 years to the United States Supreme Court’s decision in *The Propeller Monticello v. Mollison*, 58 U.S. 152, 15 L.Ed. 68 (1854). There, a steamship, *The Propeller Monticello*, was in a shipwreck with a schooner, *The Northwestern*. Both ships were carrying cargo; the schooner, which was insured, sank. The insurance carrier for the schooner paid for the losses sustained, including its cargo. Later, the schooner filed suit against the steamship, seeking to recover the value of the schooner’s cargo. As a defense, the steamship argued that the payment by the private insurer effectively released the steamship from liability as it would be unfair to have the schooner collect twice for its cargo-related damages.

The Supreme Court disagreed and for the first time created the Collateral Source Rule, stating: “The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others.” 58 U.S. at 155. Ultimately, the Supreme Court concluded that the tortfeasor “is bound to make satisfaction for the injury he has done.” *Id.*

In Louisiana, the seminal case is *Gunter v. Lord*, 242 La. 943, 140 So.2d 11 (1962), which established the plaintiff’s right to fully receive benefits he has paid for (or those benefits paid for on his behalf) and

to fully recover those same amounts from the tortfeasor.

Codification of the Rule

Today, the Collateral Source Rule is codified in both the Louisiana Code of Evidence and the Federal Rules of Evidence.

► **La. C.E. art. 409** provides, in pertinent part, “In a civil case, evidence of furnishing or offering or promising to pay expenses or losses occasioned by an injury to person or damage to property is not admissible to prove liability for the injury or damage nor is it admissible to mitigate, reduce, or avoid liability therefor.”

► **Fed. R. Evid. Rules 407, 408 and 409** are similar and provide for the same Collateral Source Rule.

Jurisprudential Statement of the Rule

Today, the prevailing expression of the Collateral Source Rule, and its meaning, is found in *Bozeman v. State*, 2003-1016 (La. 7/2/04), 879 So.2d 692. There, the Louisiana Supreme Court stated: “Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff’s tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor’s procurement or contribution.” *Id.* at 693.

Theory and Purpose of the Rule

The Collateral Source Rule is most often placed at issue where insurance payments have been made in relation to a tort victim’s damages. However, as discussed below, application of the Rule is not confined to tort cases only.

Still, the theory and purpose behind the Collateral Source Rule is best explained in terms of insurance proceeds or benefits in tort cases. That is, courts applying the Rule have emphasized that a tortfeasor should not be allowed to benefit or gain an advantage from a plaintiff’s foresight and prudence in securing insurance and other outside benefits. A tortfeasor should pay an “insured” and an “uninsured” victim

the same amounts for the damages resulting from the tortfeasor’s actions.

Factors Guiding the Application of the Rule

Two primary considerations guide a court’s determination with respect to the Collateral Source Rule:

(1) whether application of the Rule will further the major policy goal of tort deterrence; and

(2) whether the victim, by having a collateral source available as a source of recovery, either paid for such benefit or suffered some diminution in his patrimony because of the availability of the benefit, such that no actual windfall or double recovery would result from application of the Rule.

Contractual Adjustments or Write-Offs

In cases involving contractual adjustments or write-offs, the Supreme Court in *Bozeman* instructed that the proper focus of the inquiry should be on the nature of the write-offs vis-à-vis the tortfeasor, rather than vis-à-vis the tort victim. Additionally, courts typically ask whether the tort victim “incurred” the total charged amount for services provided. Stated otherwise, is the tort victim liable or legally obligated to pay for expenses exceeding the contractually adjusted, or written-off, amount?

Windfalls or Double Recovery

The purpose of tort damages is to make the victim whole. This purpose is thwarted, however, when the victim is allowed to recover the same element of damages twice. Nevertheless, the potential for double recovery does not necessarily bar application of the Collateral Source Rule. Thus, where application of the Rule is appropriate, a plaintiff will occasionally have insurance reimbursements for certain elements of damages and recover some of the same elements from the tortfeasor. In such cases, double recovery is justified because the tortfeasor should not receive the benefit of the victim’s thrift, employment benefits, or special services rendered by a third party. Rather, in cases where double recovery might occur, courts must ensure that the

tortfeasor bears only the single burden for his wrong.

The Collateral Source Rule as an Evidentiary Rule

The Collateral Source Rule is not technically an exclusionary rule of evidence. However, where application of the Rule is placed at issue (e.g., whether a jury may be presented evidence of contractual adjustments pursuant to health care insurance), parties typically file a motion in limine regarding introduction of evidence of payments made by the collateral source. See, e.g., *Asbahi v. Beverly Indus. L.L.C.*, 2011-2012 (La. App. 1 Cir. 5/23/12), 2012 WL 1922300, writ denied, 2012-1309 (La. 9/28/12), 98 So.3d 842 (upholding trial court's exclusion of evidence of amounts written off by health care providers as a result of their contract with tort victim's private medical insurance provider).

The Rule also is incorporated into the La. Code of Evidence, as Art. 409 makes evidence of "furnishing or offering or promising to pay expenses or losses occasioned by an injury to person or damage to property is not admissible . . . to mitigate, reduce, or avoid liability therefor." Further, a court may disallow introduction of evidence of collateral benefits because of the resulting prejudice. See, e.g., *Francis v. Brown*, 95-1241 (La. App. 3 Cir. 3/20/96), 671 So.2d 1041 (holding that trial court erred in allowing plaintiff to be cross-examined as to payment by her counsel of plaintiff's medical costs).

The Collateral Source Rule, as Applied

Private Health Insurance

The Collateral Source Rule applies, and a tortfeasor may not seek a reduction in the damages award for any written-off amounts procured by the tort victim's insurer. See, e.g., *O'Connor v. Litchfield*, 2003-0397 (La. App. 1 Cir. 12/31/03), 864 So.2d 234, writ not cons., 2004-0655 (La. 5/7/04), 872 So.2d 1069 (upholding application of Collateral Source Rule where defendant employer paid plaintiff's entire health care premium as part of plaintiff's employment contract with

defendant); *Griffin v. Louisiana Sheriff's Auto Risk Ass'n*, 1999-2944 (La. App. 1 Cir. 6/22/01), 802 So.2d 691, writ denied, 2001-2117 (La. 11/9/01), 801 So.2d 376 (explaining that plaintiff's patrimony was continually diminished to the extent she had to pay premiums in order to secure the benefit of the insurance). Stated otherwise, a tort victim generally is entitled to recover the full amount of his medical expenses. Thus, in *Royer v. State, Dept. of Transp. & Dev.*, 2016-0534 (La. App. 3 Cir. 1/11/17), 210 So.3d 910, writ denied, 2017-0288 (La. 4/24/17), 221 So.3d 69, the 3rd Circuit upheld the trial court's denial of DOTD's motion in limine which sought credit for medical bills paid by injured plaintiff's workers' compensation insurer and explained that the Rule applies to a tortfeasor even if consideration — in the form of policy payments — is nonexistent.

But note: Where medical expenses are paid through workers' compensation coverage provided by the employer pursuant to Longshore and Harbor Workers' Compensation Act (LHWCA), an injured plaintiff may not recover from third-party tortfeasor for full amount of medical expenses billed but not paid. *Deperrodil v. Bozovic Marine Inc.*, 842 F.3d 352 (5 Cir. 2016).

Medicare Insurance Coverage

The Louisiana Supreme Court has not squarely addressed the issue of whether the Collateral Source Rule applies where a tort victim is insured through Medicare. Following *Bozeman*, the answer is likely: Yes, the Rule applies because Medicare is a form of insurance for which the insured pays premiums, thereby diminishing the insured's patrimony. Nevertheless, the Louisiana Courts of Appeal are split on the issue.

► 1st, 2nd, 3rd and 5th Circuits — The Rule applies. *Ketchum v. Roberts*, 2012-1885 (La. App. 1 Cir. 5/29/14), 2014 WL 3510694; *Johnson v. CLD, Inc.*, 50,094 (La. App. 2 Cir. 9/30/15), 179 So.3d 695; *Niles v. American Bankers Ins. Co.*, 229 So.2d 435 (La. App. 3 Cir. 1969), writ ref'd, 255 La. 479, 231 So.2d 394 (1970); *Kozina v. Zeagler*, 94-413 (La. App. 5 Cir. 11/29/94), 646 So.2d 1217.

Note: *Kozina* was based on a compromise settlement in which the tortfeasor de-

endant agreed to pay the plaintiff victim the full amount of medical bills, specifically including the difference between the total medical expenses billed and the amount paid by Medicare. Thus, the 5th Circuit emphasized that the compromise agreement was the law between the parties; the 4th Circuit has distinguished *Kozina* on this basis.

► 4th Circuit — The Rule does not apply, but the cases predate *Bozeman*. *Suhor v. Lagasse*, 2000-1628 (La. App. 4 Cir. 9/13/00), 770 So.2d 422 (holding that the Rule did not give a tort victim the right to recover medical expenses extinguished by operation of federal law governing Medicare); *Boutte v. Kelly*, 2002-2451 (La. App. 4 Cir. 9/17/03), 863 So.2d 530, writ denied, 2004-0071 (La. 5/21/04), 874 So.2d 172 (following the reasoning in *Suhor*).

Note: Tort victims must reimburse the Medicare Trust Fund to the extent they are awarded damages for the medical expenses paid by Medicare. 42 U.S.C. § 1395y(b).

Medicaid Program (Free Medical Care)

The Collateral Source Rule *does not apply*, and a tort victim who is a Medicaid recipient may not recover medical expenses that were written off by a health care provider pursuant to the Medicaid program. *Bozeman*, *supra* at 692; see also, *Benoit v. Turner Indus. Group, L.L.C.*, 2011-1130 (La. 1/24/12), 85 So.3d 629 (workers' compensation).

In *Bozeman*, the Louisiana Supreme Court discussed the nature of the Medicaid write-off process: "When an injured plaintiff is a Medicaid recipient, federal and state law require that the health care providers accept as *full payment*, an amount set by the Medicaid fee schedule, which, invariably, is lower than the amount charged by the health care provider." The Court reasoned that a tort plaintiff could not recover as damages those medical expenses written off under the Medicaid program, explaining: "Care of the nation's poor is an admirable social policy. However, where the plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source benefits he receives, we hold that the plaintiff is unable to re-

cover the ‘write-off’ amount. This position is consistent with the often-cited statement . . . that ‘(i)t would be unconscionable to permit the taxpayers to bear the expense of providing free medical care to a person and then allow that person to recover damages for medical expenses from a tortfeasor and pocket the windfall.’ After careful review, we conclude that Medicaid is a free medical service, and that no consideration is given by a patient to obtain Medicaid benefits. His patrimony is not diminished, and, therefore, a plaintiff who is a Medicaid recipient is unable to recover the ‘write off’ amounts. The operative words here are ‘free medical care,’ which, again, we hold is applicable to plaintiffs who receive Medicaid, not plaintiffs who receive Medicare or private insurance benefits.” *Bozeman, supra* at 705.

Prior to *Bozeman*, the 2nd Circuit had similarly concluded that the Collateral Source Rule does not allow recovery of medical expenses in excess of Medicaid payments. *Terrell v. Nanda*, 33,242 (La. App. 2 Cir. 5/10/00), 759 So.2d 1026.

Note: A tortfeasor is liable to the State for the reduced amount of medical expenses paid by Medicaid. See, *Benoit v. Turner Indus. Group, supra*; *Terry v. Simmons*, 51,200 (La. App. 2 Cir. 2/15/17), 215 So.3d 410.

Other Kinds of Damage Claims

Application of the Collateral Source Rule is not limited to personal injury claims in tort cases. Nevertheless, courts applying the Rule with respect to other types of damage claims have drawn parallels between the policy concerns at issue in conventional tort cases and elsewhere. Additionally, a factor that courts have looked to when deciding whether to apply the Rule is whether the collateral source has a right to seek reimbursement (via conventional subrogation or otherwise) from the aggrieved party.

Environmental Property Damages; Federal Agency as Collateral Source

In *Louisiana Dept. of Transp. & Dev. v. Kansas City Southern Ry. Co.*, 2002-

2349 (La. 5/20/03), 846 So.2d 734, the Supreme Court held that the Collateral Source Rule applied in cases arising under the Louisiana Environmental Quality Act (LEQA), “at least where a damaged party is seeking reimbursement only for remediation expenses.” Thus, a former property owner could not seek a reduction in liability for the amount of environmental cleanup paid to plaintiff DOTD by the Federal Highway Administration (FHWA). The Court’s holding was “commanded by the paramount public interest in ensuring that those persons or entities responsible for harming our environment and the welfare of our citizens be held fully responsible for the consequences of their actions, and deterred from committing future violations of the LEQA.” There, the defendant railway’s actions had caused the pollution, which was discovered during an Interstate construction project; FHWA had reimbursed DOTD 90 percent of the cleanup costs incurred by DOTD.

Property Damages (Hurricane); Recovery-Authority Grant Funds

In *Metoyer v. Auto Club Family Ins. Co.*, 536 F.Supp.2d 664 (E.D. La. 2008), the federal district court granted a motion in limine filed by plaintiff property owner in action seeking enforcement of insurance contract for losses sustained as a result of Hurricane Katrina; the motion sought to exclude evidence of Louisiana Recovery Authority (LRA) funds the plaintiff had received to rebuild his home. In finding that the Collateral Source Rule applied to the LRA funds, the district court explained that there was no danger of a double recovery or windfall as the LRA required that when it awards a grant (which was funded through a federal agency), it will be subrogated to the rights of the homeowner with regard to insurance payments.

Property Damages (Construction Defect)

In an indemnity action concerning a construction project, the federal district court concluded that the Collateral Source Rule precluded the defendant architect’s attempt to rely on payments made by the plaintiff subcontractor’s insurer to decrease the damages that the architect may owe to the subcontractor. *AFC Inc. v. Mathes*

Brierre Architects, 2017 WL 2731028 (E.D. La. 2017). There, a prior arbitration proceeding ended after the subcontractor paid the project’s contractor to settle the arbitration; some of the settlement payments came from the sub’s insurer. For this reason, the architect sought a summary judgment that the amounts paid by the sub’s insurer were not recoverable because they did not constitute actual losses to the sub. The district court disagreed, explaining that in Louisiana a wrongdoer may not “benefit from the victim’s foresight in purchasing insurance and other benefits.”

Legal Loan Broker

Magee v. ENSCO Offshore Co., 2013 WL 2389910 (E.D. La. 2013), involved maintenance and cure and unseaworthiness claims under the Jones Act and general maritime law against two defendants — the plaintiff’s employer and the owner-operator of the vessel on which plaintiff was injured. After the parties negotiated a settlement, a dispute arose between the plaintiff and his employer about the payment of certain medical bills incurred by plaintiff and paid for by Diagnostic Management Affiliates (DMA). DMA, through various agreements it had with certain medical providers, was able to obtain medical services for plaintiff’s back injuries at a discounted rate.

In opposing the plaintiff’s motion to enforce the settlement agreement, his employer argued that, under the terms of the settlement, it should have to reimburse only the actual sums that DMA paid to the medical providers, not the full amount due (approximately \$76,000). The employer claimed that it should not have to pay the additional amount that was billed because such amount merely represented a profit for DMA, not a “reasonable” medical expense.

The federal district court disagreed. Noting that the settlement agreement’s plain language provided that the employer would “assume responsibility for all low back related cure,” the court found the disputed medical bills constituted “necessary medical expenses” and thus “cure.” The court deemed it significant that the plaintiff was only able to obtain the disputed medical services by contracting with DMA for their payment: the employer had refused to

pay for his medical care, and, as a result, plaintiff entered into an agreement with DMA by which DMA would provide his necessary medical care, and plaintiff in turn would repay the costs associated with testing and surgery to DMA. Accordingly, the court concluded that the full amount charged by DMA was the reasonable and necessary amount of cure and was covered by the settlement agreement. *See also, Howard v. Offshore Liftboats, L.L.C.*, 2016 WL 232252 (E.D. La. 2016), which applied the same rationale to another DMA claim.

Attorney-Related Payments

Hoffman v. 21st Century N. Am. Ins. Co., 2014-2279 (La. 10/2/15), 299 So.3d 702, held that the Collateral Source Rule does not apply to attorney-negotiated medical write-offs or discounts obtained through the litigation process. In adopting this “bright line rule,” the Supreme Court explained: First, allowing the plaintiff to recover expenses he has not actually incurred himself, and for which he has no obligation to pay, is at cross purposes with the basic principles of tort recovery under Louisiana law. Second, plaintiff’s argument that consideration is given for attorney-negotiated medical discounts by virtue of the contractual obligation of the plaintiff to pay attorney fees is based on the incorrect assumption that payment of an attorney fee is an additional damage suffered by the tort victim. Lastly, to hold that attorney-negotiated discounts fall under the Rule would invite a variety of evidentiary and ethical dilemmas for counsel.

Kie v. Williams, 2016 WL 6208692 (W.D. La. 2016), granted plaintiff’s motion in limine, holding that evidence of the total amounts billed before attorney-negotiated discounts is irrelevant and inadmissible.

Francis v. Brown, *supra*, applied the Rule to a \$500 medical bill paid by attorney on behalf of his client, an uninsured tort victim.

Woodard v. Andrus, 2007 WL 855360 (W.D. La. 2007), was a civil rights action alleging that state court clerks were overcharging filing fees; the court applied the Rule to a filing fee assessed against plaintiff and paid by plaintiff’s counsel, noting that issue of reimburse-

ment was a matter to be worked out between plaintiff and his attorneys.

Reduced Payments Negotiated by the Victim

Lockett v. UV Ins. Risk Retention Group, Inc., 15-166 (La. App. 5 Cir. 11/19/15), 180 So.3d 557, involved a nurse at East Jefferson General Hospital who incurred about \$55,000 in medical expenses for treatment at Ochsner. Although she had health insurance available, she opted not to file an insurance claim; instead, she personally negotiated with Ochsner for a significant reduction of her bills in exchange for immediate payment of the reduced amount, a lump sum of \$13,786. The trial court awarded her the full amount of the Ochsner bill, and the 5th Circuit affirmed. The plaintiff’s payment of her own funds to Ochsner “clearly diminished her patrimony,” and “thus, she was entitled to recover the full cost of her medical expenses, including the reduced or ‘written-off’ amount.” Further, “it would be contrary to the purpose of the collateral source rule to allow Defendants to benefit from Plaintiff’s bargain with Ochsner, which consisted of an early payment with no contribution by Defendants, that Plaintiff personally negotiated and paid for.”

Jones v. Progressive Sec. Ins. Co., *supra*, noted that, under the Rule, defendants do not enjoy the benefits of reductions in plaintiff’s medical costs which were the result of plaintiff’s discount due to self-pay at a surgical hospital.

Gratuitous Services

Tanner v. Fireman’s Fund Ins. Cos., 589 So.2d 507 (La. App. 1 Cir. 1991), *writs denied*, 590 So. 2d 1207 (1992), upheld award of hourly rate of sitting services rendered gratuitously by nonprofessional family and friends of tort victim who required 24-hour attention.

Johnson v. Neill Corp., 2015-0430 (La. App. 1 Cir. 12/23/15), 2015 WL 9464625, *writs denied*, 2016-0137, 0147 (La. 3/14/16), 189 So.3d 1068, 1070, upheld award which included expenses for medical services rendered to tort victim — an internist at the medical clinic where she received the treatment — as a professional courtesy. *Spizer v. Dixie Brewing Co.*, 210

So.2d 528 (La. App. 4 Cir. 1968), reached the same conclusion; *Asbahi v. Beverly Indus.*, *supra*, also addressed, in dicta, the Collateral Source Rule as applied to professional courtesy services rendered gratuitously by a fellow physician.

Summary

The Collateral Source Rule has proven fertile ground for some contentious discussions in mediation, bench conferences and settlement discussions.

The smoke has somewhat cleared recently regarding issues of plaintiffs’ use of “funding agents” post-accident to secure medical treatment so that the bulk of authority is that the gross billing of such entities will be approved as a collateral source even though the funding agents paid discounted amounts to discharge the billing.

Also, just about any type of insurance or benefit for which a litigant pays will also be seen as a collateral source, e.g., medical insurance, Medicare, workers’ compensation.

Finally, if a litigant is so well positioned as to receive gratuitous services or grants of assistance, the tortfeasor cannot assert the value of these services as a credit against his damage exposure.

What clearly seems to be “out of bounds” as a collateral source are Medicaid-covered gross billing expenses, LHWCA gross billing expenses and medical bills discounted by a provider based upon a discount arrangement with the claimant’s attorney.

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