

Oklahoma Law Review

Volume 62 | Number 3

Centennial Issue

2010

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Recommended Citation

Michael W. Cromwell, *Cutting the Fat Out of Health-Care Costs: Why Medicare and Medicaid Write-Offs Should Not Be Recoverable Under Oklahoma's Collateral Source Rule*, 62 OKLA. L. REV. 585 (2010), <https://digitalcommons.law.ou.edu/olr/vol62/iss3/9>

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Cutting the Fat Out of Health-Care Costs: Why Medicare and Medicaid Write-Offs Should Not Be Recoverable Under Oklahoma's Collateral Source Rule

I. Introduction

An all-too-common conversation taking place around the American kitchen table concerns increasing health-care costs and the hardships associated with this trend. In fact, long before the current debate over health-care reform took shape, one poll reported that 80% of the public expressed dissatisfaction with the cost of health care.¹ There is good reason for such dissatisfaction. As of September 2008, approximately fifty-seven million Americans were members of families that were having a difficult time paying their medical bills.² Moreover, the average cost for family health-care coverage was approximately \$12,680 a year, a 5% increase over the 2007 average.³ Though high, this cost pales in comparison with the estimated \$4.1 trillion of total national health-care expenditures that are expected by 2016.⁴ If these projections are accurate, total expenditures on health care in 2016 will represent nearly 20% of the United States' gross domestic product (GDP).⁵

Oklahomans are not strangers to the woes of rising health-care costs. As of 2008, 16% of Oklahomans did not have health insurance.⁶ Additionally, health-care costs in Oklahoma grew 6.7% annually between 1991 and 2004.⁷

While Oklahoma and the rest of America have felt the impact of increased health-care costs, the question of how to address this problem remains. To answer this question, we must determine where these increases come from and how to decrease them in the future. According to the National Coalition on Health Care, experts agree that the American "health care system is riddled

1. ABC NEWS/KAISER FAMILY FOUND./USA TODAY SURVEY PROJECT, HEALTH CARE IN AMERICA 2006 SURVEY 3 (2006), <http://www.kff.org/kaiserpolls/upload/7572.pdf>.

2. Reed Abelson, *Health Care Costs Create Rising Strain, Studies Find*, N.Y. TIMES, Sept. 25, 2008, at C4.

3. *Id.*

4. John A. Poisal et al., *Health Spending Projections Through 2016: Modest Changes Obscure Part D's Impact*, 26 HEALTH AFF. w242, w242 (Supp. 2007).

5. *Id.*

6. StateHealthFacts.org, Oklahoma: Health Insurance Status, <http://www.statehealthfacts.org> (follow "Health Coverage & Uninsured" hyperlink; then follow "Total Population" hyperlink; then follow "Oklahoma" hyperlink) (last visited Apr. 20, 2010).

7. Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., Health Expenditures by State of Residence: Summary Tables, 1991-2004, at 1 (Sept. 2007), <http://www.cms.hhs.gov/NationalHealthExpendData/downloads/res-us.pdf>.

with inefficiencies, excessive administrative expenses, *inflated prices*, poor management, and inappropriate care, waste and fraud,” all of which correlate with significant increases in health-care costs.⁸ Health-care prices are comprised, in part, of the cost of physician services, and “[t]he rising cost of malpractice coverage is becoming one of the most important factors driving inflation for physicians’ services.”⁹ As of 2004, a majority of awards in medical malpractice suits exceeded \$1 million, and the average award was \$3.5 million.¹⁰ Consequently, many commentators attribute the rising cost of health care to large lawsuit verdicts and settlements.¹¹

“In an era of rapidly rising health care costs, America’s legislators are continually searching for ways to decrease costs to the consumer,”¹² and public discussion and debate have long focused on determining methods for providing cost-effective and adequate health care.¹³ Some scholars have suggested that legislatures should reform medical malpractice laws as a way to reduce medical costs,¹⁴ and all states, including Oklahoma, have followed their suggestion in some form or fashion.¹⁵ In 2003, Oklahoma governor Brad Henry and the Oklahoma Legislature passed a version of tort reform, the

8. NAT’L COAL. ON HEALTH CARE, FACTS ON HEALTH CARE COSTS 1 (2009), <http://nchc.org/sites/default/files/resources/Fact%20Sheet%20-%20Cost.pdf> (emphasis added).

9. Joseph B. Treaster, *Malpractice Rates Are Rising Sharply; Health Costs Follow*, N.Y. TIMES, Sept. 10, 2001, at A1 (quoting Kenneth S. Abramowitz, Managing Dir., Carlyle Group).

10. See Stephen L. Olson & Pat Wasson, *Is the Collateral Source Rule Applicable to Medicare and Medicaid Write-Offs?*, 71 DEF. COUNS. J. 172, 172 (2004).

11. See Michelle M. Mello et al., *The New Medical Malpractice Crisis*, 348 NEW ENG. J. MED. 2281, 2283 (2003); see also Jeff Watters, Note, *Better to Kill Than to Maim: The Current State of Medical Malpractice Wrongful Death Cases in Texas*, 60 BAYLOR L. REV. 749, 755 (2008) (describing the finding of the Texas Legislature’s Senate Special Committee on Prompt Payment of Health Care Providers that “increasing and excessive litigation and jury verdicts were central factors in the steep rise of medical malpractice premiums”). *But see* Joseph Treaster & Joel Brinkley, *Behind Those Medical Malpractice Rates*, N.Y. TIMES, Feb. 22, 2005, at C1 (attributing the rise in medical malpractice rates to a broader range of factors, including changes in competition in the health industry and the lower returns on insurance companies’ earnings).

12. Amy C. Waltz, Note, *Closing the Deal: Making the Right Congressional Decision About Patent Settlement Agreements*, 5 IND. HEALTH L. REV. 155, 156 (2008).

13. JOSEPH L. VERHEIJDE, 22 ISSUES IN BUSINESS ETHICS, MANAGING CARE: A SHARED RESPONSIBILITY 1 (Henk van Lujik & Patricia Werhane eds., 2006).

14. Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. ECON. 353, 383 (1996) (arguing that reforming medical malpractice laws in order to reduce liability for health-care providers would reduce medical expenditures by 5%–9% without substantially affecting major health outcomes).

15. See Westlaw.com, 50 State Statutory Surveys, *Health Care Medical Malpractice: Tort Reform*, Oct. 2009, available at 0100 SURVEYS 45.

Affordable Access to Health Care Act (AAHCA).¹⁶ The AAHCA specifically targets medical malpractice litigation and reflects the policy goal of “ensur[ing] that Oklahomans have access to high-quality, affordable health care.”¹⁷

Of all the states adopting some variety of tort reform in an effort to lower medical malpractice awards, more than thirty have legislatively modified or abrogated what is known as the collateral source rule.¹⁸ The traditional collateral source rule provides that “[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.”¹⁹ In other words, just because an injured plaintiff’s medical bills are covered by a third party does not mean that the negligent party can offset its own liability on the basis that the injured party has already been compensated. Some studies show that modification or abrogation of this rule lowers malpractice costs²⁰ and, therefore, overall health-care costs. Some studies even show that allowing collateral source offsets decreases malpractice awards between 11% and 18%.²¹

16. Affordable Access to Health Care Act, ch. 390, 2003 Okla. Sess. Laws. 1678 (codified as amended at 63 OKLA. STAT. §§ 1-1708.1A-.1I (Supp. 2009)).

17. Ray Carter, *Henry Signs Tort Reform Legislation*, J. REC. (Okla. City), June 5, 2003, at 1. Subsequent attempts to pass additional tort reform have been difficult. See Janice Francis-Smith, *Lawmakers Ditch Idea to Limit Contingency Fees*, J. REC. (Okla. City), Apr. 25, 2008, at 3A. It should be noted, however, that the state legislature recently passed a much broader version of tort reform, see Comprehensive Lawsuit Reform Act of 2009, ch. 228, 2009 Okla. Sess. Laws 935, which included some amendments to the 2003 medical malpractice reform package. Compare 63 OKLA. STAT. §§ 1-1708.1A-.1G (Supp. 2003), with 63 OKLA. STAT. §§ 1-1708.1A-.1I (Supp. 2009). Nevertheless, none of these further reform measures have altered the collateral source rule. John Brock, Editorial, *Lawsuit Reform Good News for Oklahoma*, TULSA WORLD, June 3, 2009, at A21 (“The new law covers every issue on our list except Collateral Source Rule Reform.”).

18. Olson & Wasson, *supra* note 10, at 173.

19. RESTATEMENT (SECOND) OF TORTS § 920A (1979).

20. Teresa M. Waters et al., *Impact of State Tort Reforms on Physician Malpractice Payments*, 26 HEALTH AFF. 500, 502 (2007); cf. Kenneth E. Thorpe, *The Medical Malpractice ‘Crisis’: Recent Trends and the Impact of State Tort Reforms*, 23 HEALTH AFF. w4-20, w4-26 (Supp. Web Exclusives 2004) (finding that discretionary collateral setoffs are associated with lower premiums and improved profits, but mandatory setoffs are not). But see Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. 183, 208 (2007) (finding that “collateral source reform decrease[d] average awards by 17–32 percent,” but concluding that this decrease was not particularly significant in either of the statistical models used in the study to analyze awards).

21. See, e.g., Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, LAW & CONTEMP. PROBS., Spring 1986, at 57, 77.

Medicare and Medicaid write-offs are specific types of collateral source offsets that have generated tremendous confusion. When doctors or other health-care providers agree to treat Medicare or Medicaid patients, they bill these two programs instead of a private insurance company. Unlike many private insurance companies, these two social programs typically only pay back a portion of the amount billed,²² and the difference between the amount billed and the amount paid is written off as a loss to the health-care provider by operation of federal law.²³ Currently, courts do not agree on a uniform application of the collateral source rule to these write-offs. Some jurisdictions hold that the collateral source rule prohibits defendants from entering these write-offs into evidence, while other jurisdictions hold that the rule is inapplicable to these write-offs. Still others find the rule inapplicable to Medicaid write-offs but applicable to Medicare write-offs on the basis of varying policy rationales.

This comment focuses on the heterogeneous application of the collateral source rule to Medicare and Medicaid write-offs, the prevailing jurisdictional methods for interpreting the rule, and the policy rationales supporting each interpretation. Additionally, this comment evaluates the collateral source rule in Oklahoma and concludes that, in light of Oklahoma's legislative policy of lowering health-care costs, a reasonable and preferable interpretation of the collateral source rule dictates that the rule be inapplicable to both Medicare and Medicaid write-offs.

Part II of this comment presents the history of the collateral source rule, both generally and in Oklahoma. Part III provides a detailed analysis of the different approaches courts take when deciding whether to apply the rule to Medicare and Medicaid write-offs and contends that recoverable damages should be limited to the amounts paid by Medicare and Medicaid. Part IV discusses Oklahoma's new formulation of the collateral source rule and the newly articulated policy goals that counsel against applying the rule to Medicare and Medicaid write-offs. This comment concludes in Part V by arguing that it is important for Oklahoma courts to decide this specific issue in order to create binding precedent and prevent unwarranted recoveries from occurring.

22. See Milt Freudenheim, *Low Payments by U.S. Raise Medical Bills Billions a Year*, N.Y. TIMES, June 1, 2006, at C3 (discussing how private payers are charged more for medical services to make up for the underpayments by Medicare and Medicaid).

23. See 42 U.S.C. § 1395cc(a)(1)-(2) (2006) (Medicare); 42 U.S.C. § 1396a(n) (2006) (Medicaid). The regulations corresponding to these statutes may be found at 42 C.F.R. § 489.21(a) (2009) (Medicare) and 42 C.F.R. § 447.15 (2009) (Medicaid).

II. History of the Collateral Source Rule

A. General Overview and Trends

The collateral source rule originated in English common law around 1823²⁴ and first appeared in American courts in 1854 when the United States Supreme Court decided *The Propeller Monticello v. Mollison*.²⁵ This case arose when a propeller (a type of steamboat), *Monticello*, collided on Lake Huron with a schooner, the *Northwestern*, and the schooner lost its entire cargo.²⁶ The schooner was insured, and the owner recovered the insured value of the ship and cargo before trial began.²⁷ Despite the propeller owner's argument that he was no longer liable because the schooner's damages had already been paid, the Court held that the owner of the propeller was still liable for the damages.²⁸ The Court reasoned that "[t]he contract with the insurer [was] in the nature of a wager between third parties, with which the trespasser ha[d] no concern."²⁹ In short, the tortfeasor was required to pay for the damage he had caused even though the owner had already recovered the value of his losses from a collateral source.³⁰

The drafters of the Restatement (First) of Torts briefly mentioned the collateral source rule;³¹ however, it was not until the drafting of the Restatement (Second) that the rule was formally embraced by the drafters.³² The second Restatement defines "collateral source benefits" as "[p]ayments made or benefits conferred by other sources,"³³ and the general rule provides that "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."³⁴ Therefore, benefits received by a plaintiff "from a source wholly independent of" the

24. Dag E. Ytreberg, Annotation, *Collateral Source Rule: Injured Person's Hospitalization or Medical Insurance as Affecting Damages Recoverable*, 77 A.L.R. 3d 415, 419 (1977).

25. 58 U.S. (17 How.) 152 (1854), cited in *Bozeman v. State*, 2003-1016, p. 13 (La. 7/2/04); 879 So. 2d 692, 700 (La. 2004) ("The origins of the collateral source rule can be traced to a decision by the United States Supreme Court in 1854, *The Propeller Monticello v. Mollison*.").

26. *Id.* at 152.

27. *Id.* at 154.

28. *See id.* at 155.

29. *Id.* The Court further explained that "[t]he insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others." *Id.*

30. *Id.*

31. *See* RESTATEMENT (FIRST) OF TORTS § 920 cmt. e (1939).

32. *See* RESTATEMENT (SECOND) OF TORTS § 920A (1979).

33. *Id.* § 920A cmt. b.

34. *Id.* § 920A(2).

wrongdoer do not decrease the damages that an injured plaintiff can recover from the wrongdoer.³⁵

For example, suppose that John Doe falls and breaks his arm in the parking lot of Harry's Burger Joint as a result of the restaurant's negligence. Suppose further that John Doe is covered by private insurance that he purchased either individually or through his employment, and assume that John's damages are approximately \$10,000. After John is taken to the hospital and treated, the health-care provider bills John's insurance for \$10,000, and the insurance company in turn pays the health-care provider the billed amount. In this case, John has a negligence claim against Harry's Burger Joint for \$10,000, the amount of damages he suffered. The traditional collateral source rule would prevent Harry's Burger Joint from entering into evidence the fact that John's private insurance had already paid for the damages John incurred.

This simple illustration of the collateral source rule highlights one of the main criticisms of the rule—the possibility of double recoveries.³⁶ In the above illustration, John would not only receive the medical treatment to repair his arm, which was billed at \$10,000 and paid for by his insurance; he would also receive \$10,000 for the negligence claim against Harry's Burger Joint. In essence, the collateral source rule would allow John to recover \$20,000 worth of damages,³⁷ even though he only suffered \$10,000 worth of damages. The policy rationale for allowing these double recoveries is straightforward:

[R]educing recovery by the amount of the benefits received by the plaintiff would grant a windfall to the defendant by allowing a

35. 22 AM. JUR. 2D *Damages* § 392 (2003).

36. The drafters of the Restatement (Second) explicitly recognized that the collateral source rule could allow a plaintiff to receive a double recovery. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b.

37. Though an injured plaintiff may recover both medical insurance benefits from his insurance company and damages from the tortfeasor, “nearly all courts agree that the doctrine of subrogation requires [the injured plaintiff] to repay the . . . medical payments to his insurer.” Jeffrey A. Greenblatt, Comment, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 U. CHI. L. REV. 1337, 1337 (1997) (citing 16 MARK S. RHODES, 16 COUCH CYCLOPEDIA OF INSURANCE LAW § 61:29, at 109 (Law Co-op ed., rev. vol. 1983)). Subrogation gives an insurance company the right to recover the amount the company has paid out to the insured. See *id.* (citing *Garrity v. Rural Mut. Ins. Co.*, 253 N.W.2d 512, 513-14 (Wis. 1977)). Thus, subrogation may keep an injured plaintiff from truly recovering double damages, depending on the specific terms of the insurance contract at issue. See *id.* But the Congressional Budget Office provides evidence that “insurers often do not exercise th[e] right [of subrogation] for at least three reasons. First, it can be difficult to establish that a certain award covers the same damages as an insurance benefit; second, administrative costs are large; and third, those actions may contribute to ill will among customers.” CARY ELLIOT ET AL., U.S. CONG. 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>.

credit for the reasonable value of those benefits. Such credit would result in the benefits being effectively directed to the tortfeasor and from the intended party—the injured plaintiff. If there is a windfall, it is considered more just that the injured person profit rather than grant the wrongdoer relief from full responsibility for the wrongdoing.³⁸

The rule and policy rationale supporting it would place John Doe in a better financial position than he was in before he slipped and fell. But the possibility of double recovery runs counter to the established principle of fair compensation, which provides that an injured plaintiff should be restored to a position as similar as possible to his position before the injury.³⁹ So, which policy should win?

Modern critiques of the collateral source rule, combined with the rising cost of health care, best support the policy of fair compensation and thus suggest that application of the collateral source rule to Medicare and Medicaid write-offs should be headed down “the path to extinction.”⁴⁰ Despite once being one of the most universally accepted doctrines in state and federal courts,⁴¹ the common law form of the collateral source rule is currently retained by only a few jurisdictions.⁴² This trend is particularly noticeable when examined in the context of medical liability claims. State legislatures have looked at abrogating and even eliminating the collateral source rule in order to limit medical malpractice plaintiffs’ recoverable damages.⁴³ As of 2005, twenty-one states had statutes providing that evidence of collateral source payments may be introduced in medical malpractice suits.⁴⁴ Against the backdrop of this modern, national trend, the question in Oklahoma, a state that has yet to

38. 22 AM. JUR. 2D *Damages*, *supra* note 35, § 392.

39. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a.

40. See Guillermo G. Zorogastua, Comment, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs*, 55 U. KAN. L. REV. 463, 463-64 (2007).

41. Charles W. Peckinpaugh, Jr., *An Analysis of the Collateral Source Rule*, 32 INS. COUNS. J. 32, 32 (1965).

42. See David Schap & Andrew Feeley, *The Collateral Source Rule: Statutory Reform and Special Interests*, 28 CATO J. 83, 89 tbl.1 (2008) (figure current through Aug. 12, 2005) (finding that twelve jurisdictions retain the common law collateral source rule); see also Jamie L. Wershba, Comment, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 351 n.49 (2008) (noting that seventeen jurisdictions retain the common law collateral source rule “without statutory modification, or the statutory modification [has been] repealed or struck down”).

43. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 527 & n.4 (2005).

44. Schap & Feeley, *supra* note 42, at 89 tbl.1.

address this issue, is whether its collateral source rule permits a plaintiff to recover the portion of a medical bill written off by Medicare or Medicaid. To answer this question, one must understand Oklahoma's adoption of the collateral source rule, and its evolution up to the present day.

B. Overview of Oklahoma's Collateral Source Rule

The development of the collateral source rule in Oklahoma has followed a path similar to the national trend of limiting the application of the common law form of the rule. The collateral source rule first appeared in Oklahoma case law in *Capitol Hill Burial Ass'n v. Oliver*.⁴⁵ Olan Oliver purchased a burial certificate from Capitol Hill Burial Association to cover future burial costs for himself and his family members.⁴⁶ The association's agent, however, did not deliver Oliver's application to the association before Oliver's twelve-year-old child died, and because the "application was approved and the certificate issued without including the deceased son after the boy's death," another funeral home took care of the boy's services.⁴⁷ Oliver sued the association for the costs of the funeral and burial expenses that the association, had it processed Oliver's application in a more timely manner, would otherwise have covered.⁴⁸ In its defense, the association claimed that the other funeral home's costs had partly been paid by third parties—the county and a private individual.⁴⁹ The Oklahoma Supreme Court rejected this defense and ultimately held that "[a]s a general rule partial compensation received from a collateral source wholly independent of the wrongdoer cannot operate to lessen the damages recoverable from the latter."⁵⁰

Although *Capitol Hill* marked the first reference to the collateral source rule by an Oklahoma court, it was not until 1951 in *Denco Bus Lines v. Hargis* that the Oklahoma Supreme Court interpreted Oklahoma law as incorporating the rule in the context of common law tort actions.⁵¹ In *Denco Bus Lines*, the court interpreted title 23, section 61 of the Oklahoma Statutes as though the collateral source rule were included in its language.⁵² This statute provides that "[f]or the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all detriment

45. 1939 OK 227, ¶ 15, 91 P.2d 673, 676.

46. *Id.* ¶ 3, 91 P.2d at 674.

47. *Id.* ¶¶ 5-6, 91 P.2d at 674.

48. *See id.* ¶¶ 7-8, 91 P.2d at 674-75.

49. *Id.* ¶ 15, 91 P.2d at 676.

50. *Id.*

51. *See Denco Bus Lines v. Hargis*, 1951 OK 11, ¶ 26, 229 P.2d 560, 564.

52. *See id.*

proximately caused thereby, whether it could have been anticipated or not.”⁵³ Analyzing this statutory language, the court reason that

it is the duty of the wrongdoer to answer for the damages wrought by his wrongful act, and that is measured by the whole loss so caused. Under the statute the receipt of compensation by the injured party from a collateral source wholly independent of the wrongdoer would not operate to lessen the damages recoverable from the person causing the injury.⁵⁴

This passage in *Denco* signaled Oklahoma’s formal adoption of the collateral source rule.

Since the supreme court’s 1951 decision, most Oklahoma courts have held steadfast to the rule’s general application and interpretation. Oklahoma courts have even interpreted the workers’ compensation statute, title 85, section 45(A) of the Oklahoma Statutes, to include the collateral source rule.⁵⁵ Even though the language of this statute has remained unaltered since its original enactment in 1915,⁵⁶ it was not until 2003 that the Oklahoma Supreme Court held that the statute effectively codified the collateral source rule for purposes of workers’ compensation,⁵⁷ barring employers from obtaining a set-off when injured workers receive compensation from private insurance in addition to workers’ compensation.⁵⁸

The common law collateral source rule remained the same until 2003,⁵⁹ when the Oklahoma Legislature passed the AAHCA,⁶⁰ Oklahoma’s version of medical tort reform. The purpose of the Act was

53. 23 OKLA. STAT. § 61 (1941).

54. *Denco Bus Lines*, ¶ 26, 229 P.2d at 564.

55. *Blythe v. Univ. of Okla.*, 2003 OK 115, ¶¶ 7-8, 82 P.3d 1021, 1026-27 (discussing 85 OKLA. STAT. § 45(A) (2001)).

56. *See id.* ¶ 8, 82 P.3d at 1026.

57. *Id.* ¶ 8, 82 P.3d at 1026-27 (“While this section of The Workers’ Compensation Act has never been expressly labeled ‘the collateral source rule,’ the meaning and application of the statutory provision clearly mirrors that common law damages rule in the context of workers’ compensation awards and/or benefits.”).

58. *Id.* ¶ 8, 82 P.3d at 1027.

59. Up to this point, there were few exceptions to the common law collateral source rule. *See e.g.*, 51 OKLA. STAT. § 155(14) (2001) (providing that “[t]he state or a political subdivision shall not be liable if a loss or claim results from . . . [a]ny loss to any person covered by any workers’ compensation act or any employer’s liability act”).

60. 63 OKLA. STAT. §§ 1-1708.1A-.1G (Supp. 2003) (current version at 63 OKLA. STAT. §§ 1-1708.1A-.1I (Supp. 2009)); *see also* RESTATEMENT (SECOND) OF TORTS § 920A cmt. d (1979) (“The collateral-source rule is of common law origin and can be changed by statute.”).

to implement reasonable, comprehensive, and effective medical liability reforms designed to:

1. Improve the availability of health care services;
2. *Lower the cost of medical liability insurance*;
3. Ensure that persons with meritorious health care injury claims receive fair and adequate compensation; and
4. Improve the fairness and cost-effectiveness of [Oklahoma's] current medical liability system to resolve disputes over, and provide compensation for, medical liability.⁶¹

Reform of Oklahoma's collateral source rule was an important component of the Act.⁶² The Act modified the rule and allowed for the admission of evidence of medical bill payments in medical liability actions, with an exception for payments subject to subrogation by the injured party's insurer.⁶³ Following the national trend, Oklahoma intended the Act to reform the common law rule, because the traditional rule created an incentive to file lawsuits "by inflating the size of possible judgments."⁶⁴

Although Oklahoma state courts have never specifically addressed whether the collateral source rule applies to Medicare and Medicaid write-offs, a federal court in Oklahoma arguably misconstrued the rule by deciding that it applies to Medicare write-offs despite the AAHCA and the policy considerations supporting the Act.⁶⁵ The following section analyzes the heterogeneous jurisdictional interpretations of the collateral source rule and contends that a reasonable interpretation of Oklahoma's collateral source rule reveals that it should not apply to Medicare and Medicaid write-offs.

III. State Split: Application of the Collateral Source Rule to Medicare and Medicaid Write-Offs

This section begins in Part A with a brief introduction to the characteristics of Medicare and Medicaid and the write-offs that accompany each of these government programs. Part B provides a look at the general inapplicability of the collateral source rule to Medicaid write-offs. Part C provides an in-depth analytical overview of the collateral source rule's applicability or

61. 63 OKLA. STAT. § 1-1708.1B(B) (emphasis added).

62. See James A. Higgins, *Oklahoma's Tort Reform Act: Texas-Style Tort Reform or Texas-Size Compromise?*, 57 OKLA. L. REV. 921, 926 (2004).

63. *Id.* (citing 63 OKLA. STAT. § 1.1708.1D); see also *supra* note 37.

64. Higgins, *supra* note 62, at 926.

65. See *Simpson v. Saks Fifth Ave., Inc.*, No. 07-CV-0157-CVE-PJC, 2008 WL 3388739, at *2, *5, *9 (N.D. Okla. Aug. 8, 2008) (denying defendant's motion in limine to exclude evidence of amounts billed prior to Medicare write-off).

inapplicability to Medicare write-offs, discussing both the “benefit-of-the-bargain theory” and the “reasonable value theory” and providing modern critiques of each. This section describes the different rationales in support of each theory and contends that the collateral source rule should be inapplicable to Medicare and Medicaid write-offs in Oklahoma, because this interpretation better serves the state’s policy objective of making health care more affordable.

A. An Introduction to Medicare and Medicaid Write-Offs

Government programs such as Medicare and Medicaid have significantly increased the complexity and difficulty of applying the collateral source rule.⁶⁶ As a result, courts in different states are split over whether Medicare and Medicaid write-offs are subject to the collateral source rule and, if so, how the rule applies.⁶⁷

Although often thought of as the same, Medicare and Medicaid are two separate and distinct programs.⁶⁸ Medicare is the “country’s health insurance program” for those sixty-five years of age and older and is broken up into four different Parts: A, B, C, and D.⁶⁹ Part A, the Part most relevant to this comment,⁷⁰ is the federal program, financed through payroll taxes, that pays hospital bills and other medical benefits for those meeting the eligibility requirements.⁷¹ The program covers “the costs of hospital, related post-

66. See Zorogastua, *supra* note 40, at 465.

67. Compare, e.g., *Rose v. Via Christi Health Sys., Inc.* (*Rose I*), 78 P.3d 798, 806 (Kan. 2003) (applying the collateral source rule to Medicare write-offs), and *Brandon HMA, Inc. v. Bradshaw*, 2000-CA-00735-SCT (¶ 23) (Miss. 2001), 809 So. 2d 611, 618 (finding that Medicaid benefits are subject to the collateral source rule), with *Liberty v. Westwood United Super, Inc.*, No. 89,143, 2005 WL 1006363, at *5 (Kan. Ct. App. Apr. 29, 2005) (per curiam) (finding that the collateral source rule does not apply to Medicare write-offs), and *Bozeman v. State*, 2003-1016, pp. 20-22 (La. 7/2/04); 879 So. 2d 692, 704-05 (holding that the collateral source rule is not applicable to Medicaid write-offs).

68. SOC. SEC. ADMIN., MEDICARE 5 (2009), <http://www.ssa.gov/pubs/10043.pdf>.

69. *Id.* at 4-5.

70. While this comment focuses mainly on whether the collateral source rule should apply to services rendered under Medicaid and Medicare Part A, a brief sketch of Medicare’s other components is useful. As the Social Security Administration explains, “Part B . . . helps pay for doctors’ services and many other medical services and supplies that are not covered by hospital insurance,” while Part C provides for Medicare Advantage plans, which allow individuals who already have Part A or B plans “to receive all of their health care services through one of these provider organizations.” *Id.* at 5. Part D helps patients pay for prescription drugs. *Id.*

71. *Id.* at 4; see also *Bozeman*, at p. 21; 879 So. 2d at 705 (quoting *Hodge v. Middletown Hosp. Ass’n*, 581 N.E.2d 529, 531 (Ohio 1991)).

hospital, home health services, and hospice care.”⁷² Conversely, Medicaid is a state-run program, funded in part by the federal government, “that provides hospital and medical coverage for people with low income and little or no resources.”⁷³ In Oklahoma, the program is known as SoonerCare.⁷⁴

While Medicare and Medicaid are distinguishable, they have one thing in common for purposes of this comment: write-offs. When a Medicare or Medicaid patient receives medical services from a health-care provider, “the provider must submit its bill to the corresponding agency for reimbursement.”⁷⁵ The provider, however, must accept as full payment the actual amount the agency pays.⁷⁶ This amount is typically less than a third of what the provider originally billed.⁷⁷ In other words, any portion of the original bill remaining after payment by Medicare or Medicaid is eliminated—that is, “written off”—by law, and the provider on average suffers a greater than 67% reduction in the amount it receives compared with the amount it billed.⁷⁸ Yet despite this federally mandated write-off of any unpaid portion of Medicare or Medicaid recipients’ medical bills, courts have reached different conclusions regarding the collateral source rule’s applicability to such write-offs and their recoverability as damages, as the next subsections describe.

B. The Collateral Source Rule’s Inapplicability to Medicaid Write-Offs

As a general rule, courts do not apply the collateral source rule to Medicaid write-offs,⁷⁹ unlike the jurisdictional split found with respect to Medicare

72. 42 U.S.C. § 1395c (2006).

73. SOC. SEC. ADMIN., *supra* note 68, at 5; *see also* 42 U.S.C. § 1396b (2006) (providing the terms and conditions under which states may receive Medicaid funds from the federal government).

74. Okla. Health Care Auth., What is SoonerCare?, <http://www.ohca.state.ok.us/individuals.aspx?id=52> (last visited Apr. 20, 2010).

75. Olson & Wasson, *supra* note 10, at 172.

76. *See* 42 U.S.C. § 1395cc(a)(1)-(2) (2006) (Medicare); 42 U.S.C. § 1396a(n) (2006) (Medicaid). The regulations corresponding to these statutes may be found at 42 C.F.R. § 489.21(a) (2009) (Medicare) and 42 C.F.R. § 447.15 (2009) (Medicaid).

77. Olson & Wasson, *supra* note 10, at 172.

78. *See id.*

79. *See, e.g.,* Bozeman v. State, 2003-1016, pp. 20-22 (La. 7/2/04); 879 So. 2d 692, 704-05 (observing that “[s]everal courts have distinguished Medicaid benefits from Medicare and private insurance” on the grounds that, unlike Medicare and private insurance beneficiaries, Medicaid beneficiaries give no consideration for the services they receive); *see also* Russell G. Thornton, *Recovery of Medical Expenses in Texas*, 20 BAYLOR UNIV. MED. CTR. PROC. 315, 316 (2007) (asserting that “most jurisdictions hold that Medicaid/Medicare write-offs are not a collateral source” and that “[i]n the context of Medicaid, most jurisdictions have found that Medicaid write-offs are not an incurred expense”), *available at* <http://www.pubmedcentral>.

write-offs.⁸⁰ Despite silence by Oklahoma courts on the issue, a reasonable interpretation of the state's collateral source rule would not allow injured plaintiffs to recover Medicaid write-offs. This interpretation would be consistent with most other jurisdictions, as described below. Medicaid is unlike most collateral sources because its "recipients do not pay for the benefit" they are receiving,⁸¹ unlike private insurance owners and, arguably, Medicare recipients. As the following cases illustrate, courts emphasize this differentiating factor when declining to apply the collateral source rule to Medicaid write-offs.

In *Terrell v. Nanda*, Vernon Taylor required surgery after an automobile accident.⁸² Eventually he required a second surgery, which was unsuccessful.⁸³ Taylor subsequently suffered a series of debilitating complications and died less than a year after his accident.⁸⁴ Taylor's medical bills totaled \$1,110,922.82, and Medicaid paid the health-care provider \$164,084.82, forcing the provider to write off the difference between the amounts pursuant to Medicaid requirements.⁸⁵ Mr. Taylor's family, the plaintiffs in the case, argued that they were entitled to recover the difference between the two amounts and that the collateral source rule should apply to the portion written off by the health-care provider.⁸⁶ The Louisiana Court of Appeals affirmed the trial court's denial of the plaintiffs' motion in limine to exclude evidence of the write-offs.⁸⁷ The plaintiffs could not recover the written-off portion of the hospital's bill because the payment to the hospital was "payment in full" under federal law and because the Mr. Taylor did not incur the written-off portion as damages.⁸⁸

A similar situation arose in *Bozeman v. State*.⁸⁹ Mr. Bozeman, a Medicaid recipient, died as a result of a car accident, and his surviving spouse sued the State of Louisiana for personal injuries suffered because of an allegedly unsafe

nih.gov/picrender.fcgi?artid=1906584&blobtype=pdf. *But see* Brandon HMA, Inc. v. Bradshaw, 2000-CA-00735-SCT (¶ 23) (Miss. 2001), 809 So. 2d 611, 618 (finding "no reason why Medicaid benefits should be treated any differently than insurance payments, and [that] they should be subject to the collateral source rule").

80. *See* discussion *infra* Part III.C.

81. Rebecca F. Anderson, Note, *The Collateral Source Rule and Medicaid Plaintiffs: Eliminating Windfalls and Double Recovery*, 30 T. JEFFERSON L. REV. 223, 231 (2007).

82. *See* 33,242, p. 1 (La. App. 2 Cir. 5/10/00); 759 So. 2d 1026, 1027.

83. *Id.*

84. *See id.*

85. *Id.* at p. 2; 759 So. 2d at 1028.

86. *Id.*

87. *See id.* at pp. 2-3, 9; 759 So. 2d at 1028, 1031-32.

88. *See id.* at pp. 7-9; 759 So. 2d at 1028, 1030-31.

89. 2003-1016 (La. 7/2/04); 879 So. 2d 692.

road.⁹⁰ Mrs. Bozeman sought to recover from the State the amount billed by the health-care provider who treated her husband.⁹¹ The trial court initially applied the collateral source rule, awarding Mrs. Bozeman damages that included amounts written off by Medicaid.⁹² The court of appeals reversed on that issue, citing *Terrel*, which it had decided in the interim between the *Bozeman* trial and initial appeal.⁹³ On remand, the trial court thus excluded the written-off portion, and the court of appeals affirmed with minor adjustments.⁹⁴ The plaintiff subsequently applied for and was granted a writ of certiorari by the Louisiana Supreme Court.⁹⁵ In upholding the intermediate appellate court, the Louisiana Supreme Court held that Medicaid recipients like Mr. Bozeman are not eligible to collect the written-off portion of a hospital's medical bill because they give no consideration for the free medical services they receive.⁹⁶

A federal district court in Virginia addressed an identical situation in *McAmis v. Wallace*.⁹⁷ There, the plaintiff received Medicaid, and the defendant filed a motion in limine to limit the amount of recoverable damages to only the fees paid by Medicaid as opposed to the entire amount billed.⁹⁸ Applying Virginia law, the district court ruled that the collateral source rule did not apply because the plaintiff was never responsible for making any payment on the portion of the bill subject to write-off, nor did anyone—i.e., a third-party collateral source—actually pay such portion.⁹⁹ The court relied on the policy rationale that it was unfair to grant the plaintiff a windfall at the expense of taxpayers who funded the plaintiff's medical care.¹⁰⁰ The district court reasoned that “[i]n order to make Plaintiff whole, to reimburse her for costs expended as a result of this accident, Plaintiff need only receive the actual costs of medical care borne by Medicaid.”¹⁰¹ The court therefore granted the defendant's motion in limine, holding that the injured plaintiff was not entitled to recover the written-off portion of the medical bills.¹⁰²

90. *See id.* at pp. 2-3; 879 So. 2d at 694.

91. *See id.* at pp. 3-4; 879 So. 2d at 694-95.

92. *See id.*

93. *See id.* at p. 4; 879 So. 2d at 695.

94. *See id.* at pp. 4-5; 879 So. 2d at 695.

95. *Id.* at 7; 879 So. 2d at 697.

96. *Id.* at p. 22; 879 So. 2d at 694, 705.

97. 980 F. Supp. 181 (W.D. Va. 1997) (granting defendant's motion in limine to exclude evidence of medical expenses in excess of amounts paid by Medicare).

98. *Id.* at 182.

99. *Id.* at 183-84.

100. *Id.* at 185.

101. *Id.*

102. *Id.* at 186.

A Kansas appellate court maintained the same line of reasoning in *Bates v. Hogg*.¹⁰³ In *Bates*, defendant Hogg's pickup truck struck Bates from behind, causing Bates to suffer various injuries.¹⁰⁴ Hogg attempted to limit the evidence of damages to the amount Medicaid actually paid instead of the amount the hospital billed.¹⁰⁵ Though Bates argued that the lower court's decision to exclude evidence of what the hospital billed violated the collateral source rule,¹⁰⁶ the appellate court upheld the exclusion.¹⁰⁷ The court reasoned that a health-care provider, because of its contract with Medicaid, may not seek to recover any amount in excess of the amount paid by Medicaid; consequently, the amount allowable under Medicaid constitutes the actual amount charged.¹⁰⁸ The court further reasoned 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 services from a tort-feasor and pocket the windfall."¹⁰⁹

The issue of whether the collateral source rule applies to Medicaid write-offs is of little contention. A strict interpretation of the collateral source rule demonstrates that the rule only applies to payments, and write-offs do not constitute payments. Furthermore, this interpretation is supported by the rationale that no consideration has been given for the medical benefits received by Medicaid plaintiffs, and to allow them to recover double would be unconscionable. For these reasons, Oklahoma courts should reach the same conclusion as did the courts mentioned above with regard to Medicaid write-offs. It should follow the general consensus and find that the collateral source rule is inapplicable to such write-offs.

C. The Collateral Source Rule's Applicability to Medicare Write-Offs

Courts are fairly consistent in not applying the collateral source rule to Medicaid write-offs, but there is not a consistent approach among jurisdictions in applying the rule to Medicare write-offs.¹¹⁰ Although Oklahoma courts have never addressed this specific issue, examining other jurisdictions' applications of the rule should help Oklahoma craft a reasonable solution.

103. 921 P.2d 249 (Kan. Ct. App. 1996), *superseded by statute on other grounds*, Act of May 15, 1997, ch. 173, § 11, 1997 Kan. Sess. Laws 1191, 1204-09 (amending KAN. STAT. ANN. § 60-226), *as recognized in* *Frans v. Gausman*, 6 P.3d 432, 440 (Kan. Ct. App. 2000).

104. *Id.* at 251-52.

105. *See id.* at 251.

106. *Id.* at 252.

107. *See id.* at 253.

108. *Id.*

109. *Id.* (quoting *Gordon v. Forsyth County Hosp. Auth., Inc.*, 409 F. Supp. 708, 719 (M.D.N.C. 1976)).

110. *See Zorogastua, supra* note 40, at 471.

Accordingly, this subsection evaluates two general approaches to the rule's application to Medicare write-offs in an effort to determine an appropriate solution: (1) the benefit-of-the-bargain theory and (2) the reasonable value theory. This comment proposes that Oklahoma should adopt the variant of the reasonable value theory that measures damages by the amount paid.

1. Benefit-of-the-Bargain Theory

Several cases posit that because Medicare recipients pay some consideration for health-care coverage through their payroll taxes, in effect they bargain for the benefits of the coverage.¹¹¹ Courts utilizing this reasoning allow a plaintiff to receive the entire value of her medical costs, including the amount written off by mandate of federal law.¹¹² They reason that “the contractual adjustments under Medicare . . . [are] simply a bargained-for benefit akin to a discount in price, which one might receive from a private insurance carrier.”¹¹³ These courts liken Medicare payments to private insurance payments, which have historically been subject to the collateral source rule.¹¹⁴

This reasoning also allows courts to distinguish Medicaid patients from Medicare patients. Sometimes defendants involved in a suit by a Medicare patient will cite case precedent that involves a Medicaid patient in order to argue that the write-offs are not subject to the collateral source rule.¹¹⁵ Although both programs' write-offs should be treated the same—that is, the collateral source rule simply should not apply to the write-offs of *either* program—most courts reject these defendants' arguments.¹¹⁶

For instance, in *Hodge v. Middletown Hospital Ass'n*, the Ohio Supreme Court distinguished between Medicaid and Medicare.¹¹⁷ Though the plaintiff received Medicare, the defendant relied on precedent involving other plaintiffs

111. See, e.g., *Rose v. Via Christi Health Sys., Inc.* (*Rose I*), 78 P.3d 798, 806 (Kan. 2003); *Bozeman v. State*, 2003-1016, pp. 18-19 (La. 7/2/04); 879 So. 2d 692, 703-04.

112. *Bozeman*, at p. 18; 879 So. 2d at 703.

113. Olson & Wasson, *supra* note 10, at 175.

114. See *Bozeman*, at pp. 15-22; 879 So. 2d at 701-05 (citing, inter alia, *Rose I*, 78 P.3d 798; *Hodge v. Middletown Hosp. Ass'n*, 581 N.E.2d 529 (Ohio 1991)). Though *Bozeman* did not involve a Medicare recipient, the court examined different approaches to applying the collateral source rule and chose to apply the benefit-of-the-bargain theory. *Id.* at pp. 14-22; 879 So. 2d at 701-06. The court stated that Medicare and Medicaid should only be treated similarly “in those instances[] where plaintiff's patrimony has been diminished in some way in order to obtain the collateral source benefits.” *Id.* at p. 22; 879 So. 2d at 706. In such a case, the “plaintiff is entitled to the benefit of the bargain, and may recover the full value of his medical services, including the ‘write-off’ amount.” *Id.*

115. See, e.g., *Hodge*, 581 N.E.2d at 532.

116. See, e.g., *id.*

117. See *id.*

who received Medicaid.¹¹⁸ In rejecting the defendant's argument and distinguishing between Medicare and Medicaid, the court explained that "Medicaid is a system for providing payment of medical costs for the poor. Neither the beneficiary nor his employer pays premiums or underwrites the cost of the program."¹¹⁹ The Ohio Supreme Court reversed the lower appellate court's affirmation of a reduction to the plaintiff's award, determining that Medicare benefits qualify as insurance under federal law such that the collateral source rule applies.¹²⁰

In *Rose v. Via Christi Health System, Inc. (Rose I)*, the Kansas Supreme Court used similar reasoning when addressing a claim on behalf of Lyle Rose, who, while a patient at Via Christi's St. Francis Hospital, fell from his bed, suffered severe trauma to his head, and ultimately died from a subdural hematoma.¹²¹ Despite the health-care provider's attempt to prevent the introduction of evidence of the amount billed, the trial court applied the collateral source rule and permitted the evidence to come in.¹²² Nevertheless, the trial court allowed the jury's damage award to be offset postverdict.¹²³ Rose's estate appealed the reduction of the award, and the health-care provider cross-appealed the collateral source ruling.¹²⁴

On appeal, the health-care provider relied on existing Kansas precedent, namely, *Bates v. Hogg*,¹²⁵ which held that a Medicaid recipient may only recover the amount actually paid and not the amount billed.¹²⁶ Despite this argument, the *Rose I* court affirmed the trial court's ruling and held that the collateral source rule applies to Medicare write-offs.¹²⁷ In declining to apply *Bates* to the case, the court accepted the plaintiff's argument that "Medicare benefits are purchased by payroll deductions and Medicaid benefits are free to all who qualify."¹²⁸ The court reasoned that, unlike Medicaid patients, Medicare patients provide some consideration for the benefits they receive.¹²⁹

118. *Id.* at 531, 532.

119. *Id.* at 532.

120. *Id.* at 533.

121. *See* 78 P.3d 798, 800 (Kan. 2003).

122. *Id.*

123. *Id.*

124. *Id.* at 800, 802.

125. 921 P.2d 249 (Kan. Ct. App. 1996), *superseded by statute on other grounds*, Act of May 15, 1997, ch. 173, § 11, 1997 Kan. Sess. Laws 1191, 1204-09 (amending KAN. STAT. ANN. § 60-226), *as recognized in* Frans v. Gausman, 6 P.3d 432, 440 (Kan. Ct. App. 2000); *see also* text accompanying notes 103-09.

126. *Rose I*, 78 P.3d at 802; *see also* *Bates*, 921 P.2d at 253.

127. *Rose I*, 78 P.3d at 803, 806.

128. *Id.* at 802-03.

129. *See id.* at 806.

Therefore, because an injured party with private insurance may seek to recover any portion written off under a contract agreement, an injured party with Medicare insurance, “akin to private insurance,” may also seek to recover the portion written off by operation of federal law.¹³⁰ Additionally, “[b]ecause health care providers voluntarily contract with Medicare in the same manner as they contract with other private insurers for reduced rates, the benefit of the write-offs should be attributed to the Medicare participant rather than the health care provider.”¹³¹

Although various courts cite the Kansas Supreme Court’s reasoning to justify categorical application of the collateral source rule to Medicare write-offs,¹³² such reliance is misplaced, because the billing hospital in the *Rose* cases was also the tortfeasor.¹³³ In fact, after an initial remand, the court explicitly found that the Medicare write-off could not be treated as a collateral source, given that (1) neither the plaintiff nor a third party paid the written-off portion, and (2) the write-off “reflected a cost incurred by the defendant” as the medical care provider.¹³⁴ Although other jurisdictions have continued to cite *Rose I* to support holdings in other tort cases,¹³⁵ the Kansas Supreme Court emphasized in the *Rose II* decision that because the defendant was also the health-care provider, it did “not reach the broader issue of whether Medicare or a Medicare write off, when the services are provided by a health care provider that is *not* a defendant, is a collateral source.”¹³⁶ Thus, *Rose I* is ultimately a very narrow decision that applies only when the tortfeasor is also the billing hospital. To use the *Rose I* holding to support something broader is erroneous. The *Rose* cases left open the possibility for later Kansas courts to reach more reasonable conclusions about the inapplicability of the collateral source rule to Medicare write-offs.

The decisions discussed above increase the difficulty of discerning whether the collateral source rule should apply to Medicare write-offs.¹³⁷ Instead of developing a consistent, reasoned approach regarding whether the rule applies, these decisions inject a seemingly illogical and unnecessary factor that must

130. *Id.* at 805-06 (citing, inter alia, *Hardi v. Mezzanotte*, 818 A.2d 974 (D.C. 2003)).

131. *Id.* at 806.

132. *See, e.g.*, *Simpson v. Saks Fifth Ave., Inc.*, No. 07-CV-0157-CVE-PJC, 2008 WL 3388739, at *1 (N.D. Okla. Aug. 8, 2008); *Lindholm v. Hassan*, 2005 DSD 11 ¶ 10 & n.5, 369 F. Supp. 2d 1104, 1108 & n.5; *Papke v. Harbert*, 2007 SD 87, ¶ 69, 738 N.W.2d 510, 532.

133. *See Rose I*, 78 P.3d at 800.

134. *See Rose v. Via Christi Health Sys., Inc. (Rose II)*, 113 P.3d 241, 248 (Kan. 2005).

135. *See, e.g.*, cases cited *supra* note 132.

136. *Rose II*, 113 P.3d at 248 (emphasis added).

137. *See* Natalie J. Kussart, Note, *Paid Bills v. Charged Bills: Insurance and the Collateral Source Rule* *Arthur v. Catour*, 833 N.E.2d 847 (2005), 31 S. ILL. U. L.J. 151, 157-58 (2006).

be dealt with by the courts—a determination of whether the write-off was bargained for.¹³⁸

It is illogical to argue that Medicare beneficiaries bargain for their benefits. A bargain is “[a]n agreement between parties for the exchange of promises or performances,” much like a contract.¹³⁹ A true contract requires an offer, consideration, and *voluntary* acceptance.¹⁴⁰ Medicare receives much of its funding from payroll taxes.¹⁴¹ Mandatory payroll taxes hardly qualify as a voluntary acceptance necessary for contract formation. A “[p]laintiff simply [does] not bargain for Medicaid [or Medicare] the way a party purchasing health insurance or working for the government bargains for benefits.”¹⁴² “Someone who merely pays her FICA taxes does not in any sense bargain for the lower fees paid”¹⁴³

Additionally, since neither Medicare nor Medicaid benefits are bargained for, distinguishing between the programs on the basis of a bargain theory is flawed and unnecessary.¹⁴⁴ Both Medicare and Medicaid are government programs, and neither is freely contracted for—participation in both is involuntarily.¹⁴⁵

Furthermore, it is inappropriate to equate Medicare with private insurance, because doing so grants an injured Medicare patient an unnecessary windfall.¹⁴⁶ An injured patient with private insurance may invoke “the protection of the collateral source rule” and recover all amounts paid and written off as damages from the tortfeasor.¹⁴⁷ Nevertheless, because of the right of subrogation, the private insurance company may recoup the amount the injured patient recovered from the tortfeasor.¹⁴⁸ This makes the injured patient, in theory, whole again—no more, no less.¹⁴⁹ Conversely, if an injured

138. See, e.g., *Bozeman v. State*, 2003-1016, pp. 20-22 (La. 7/2/04); 879 So. 2d 692, 705-06.

139. BLACK'S LAW DICTIONARY 169 (9th ed. 2009).

140. *Midcoast Aviation, Inc. v. Gen. Elec. Credit Corp.*, 907 F.2d 732, 743 (7th Cir. 1990).

141. SOC. SEC. ADMIN., *supra* note 68, at 4.

142. *McAmis v. Wallace*, 980 F. Supp. 181, 186 (W.D. Va. 1997) (granting defendant's motion in limine to exclude medical expenses subject to Medicaid write-off).

143. *Id.*; see also *Olson & Wasson*, *supra* note 10, at 177 (pointing out that, like Medicaid, Medicare is partially funded through FICA taxes).

144. See *Olson & Wasson*, *supra* note 10, at 177.

145. See *Kussart*, *supra* note 137, at 157-58.

146. See *Olson & Wasson*, *supra* note 10, at 175.

147. See *id.*

148. See *id.*; see also *supra* note 37.

149. Private health-care insurers often negotiate with health-care providers to secure write-offs for the insurers' clients. See *Hardi v. Mezzanotte*, 818 A.2d 974, 985 (D.C. 2003). Some courts deem these write-offs subject to the collateral source rule because they represent a benefit of the agreement between the patient and her health-care insurer. See, e.g., *id.* at 984-85. Using the same reasoning, some courts further conclude that if a plaintiff's contract with her insurer

patient with Medicare is permitted to recover the amount written off by the health-care provider, he or she will receive a windfall. This is due to the fact that even though Medicare may exercise a right of subrogation with respect to amounts actually paid to the health-care provider,¹⁵⁰ federal law prohibits health-care providers—and presumably Medicare itself—from seeking the portion written off by the health-care provider.¹⁵¹ “[T]here is no right of subrogation or refund of benefits on a tort recovery for the amount written-off under Medicare”¹⁵² Thus, while health-care providers must accept Medicare payments as payment in full,¹⁵³ the injured Medicare patient receives an amount akin to punitive damages if permitted to keep a damage award that includes the written-off portion of a medical bill. This effect marks a crucial difference between Medicare and private insurance.

All of the deficiencies in the benefit-of-the-bargain theory have led a majority of courts to use the reasonable value theory. Oklahoma courts should follow this majority approach.

2. *The Reasonable Value Theory*

Many courts adopt the reasonable value theory, but they apply it in an inconsistent manner. Proponents of this theory often cite a portion of comment h to section 911 of the Restatement (Second) of Torts, which provides:

When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him.¹⁵⁴

does not provide for subrogation, *see supra* note 37, the lack of such a provision likewise constitutes a benefit of the plaintiff’s bargain with her insurer, thus entitling the plaintiff to recover damages for the amounts written off pursuant to her insurer’s negotiations with her health-care provider. *See Hardi*, 818 A.2d at 984 (holding that the collateral source rule is “applicable when . . . the plaintiff may be said to have contracted for the prospect of a double recovery” (internal quotation marks omitted) (quoting *District of Columbia v. Jackson*, 451 A.2d 867, 873 (D.C. 1982))).

150. *See Rose v. Via Christi Health Sys., Inc. (Rose II)*, 113 P.3d 241, 247-48.

151. *See* 42 C.F.R. § 489.21(a) (2009).

152. *See Olson & Wasson, supra* note 10, at 175.

153. *See* 42 C.F.R. § 489.21(a); *Olson & Wasson, supra* note 10, at 172.

154. RESTATEMENT (SECOND) OF TORTS § 911 cmt. h (1979).

Under this theory, an injured plaintiff who was a Medicare recipient, or a Medicaid recipient, arguably would pay less than the exchange rate for the actual medical services he received. Therefore, the plaintiff should not be able to recover more than the amount paid—i.e., he should only be able to recover the amount Medicare actually paid to the health-care provider. While this appears to be a straightforward interpretation of the collateral source rule, not all courts have embraced such an interpretation.

Under the reasonable value theory, three main approaches have developed. First, some courts have defined the reasonable value a Medicare recipient can receive as the amount actually paid by Medicare.¹⁵⁵ Second, other courts have determined that the reasonable value should be measured by the amount actually charged by the health-care provider.¹⁵⁶ Lastly, a few courts allow the fact-finder to hear evidence of both the amount paid and the amount billed and use this evidence to determine the reasonable value of the medical services.¹⁵⁷ These three approaches result in disagreement over whether to apply the collateral source rule to Medicare write-offs; however, only the first consistently leads to a logical and fair outcome. Therefore, Oklahoma should adopt the first of these approaches.

(a) *Amount Paid*

Some courts have found that the reasonable value of recovery should be determined by the amount paid. This approach actually encompasses two different jurisprudential methods that reach the same result. One method defines the reasonable value of services as the amount actually paid, thus allowing the jury to hear evidence of the amount written off by Medicare.¹⁵⁸ The second method differs slightly. Courts accept that the collateral source

155. See, e.g., Wildermuth v. Staton, No. CIV.A.01-2418-CM, 2002 WL 922137, at *7-8 (D. Kan. Apr. 29, 2002); Suhor v. Lagasse, 2000-1628, pp. 8-10 (La. App. 4 Cir. 9/13/00); 770 So. 2d 422, 427; Terrell v. Nanda, 33-242, pp. 7-9 (La. App. 2 Cir. 5/10/00); 759 So. 2d 1026, 1031; Moorhead v. Crozer Chester Med. Ctr., 765 A.2d 786, 789 (Pa. 2001), *abrogated on other grounds* by Northbrook Life Ins. Co. v. Commonwealth, 949 A.2d 333 (Pa. 2008); cf. Dyet v. McKinley, 81 P.3d 1236, 1239 (Idaho 2003) (affirming the trial court's decision to allow the jury to consider pre-write-off medical expenses, but also affirming the trial court's reduction of the jury's award by the write-off amount).

156. See, e.g., Lindholm v. Hassan, 2005 DSD 11 ¶¶ 7-15, 369 F. Supp. 2d 1104, 1107-1110; Bynum v. Magno, 101 P.3d 1149, 1160 (Haw. 2004); Wills v. Foster, 892 N.E.2d 1018, 1034 (Ill. 2008); Baptist Healthcare Sys., Inc. v. Miller, 177 S.W.3d 676, 683-84 (Ky. 2005).

157. See, e.g., Haselden v. Davis, 579 S.E.2d 293, 294-95 (S.C. 2003); Lagerstrom v. Myrtle Werth Hosp.-Mayo Health Sys., 2005 WI 124, ¶ 74, 285 Wis. 2d 1, ¶ 74, 700 N.W.2d 201, ¶ 74.

158. See, e.g., Moorhead, 765 A.2d at 789; Hanif v. Hous. Auth. of Yolo County, 246 Cal. Rptr. 192, 195 (Cal. Ct. App. 1988).

rule excludes evidence of what Medicare actually paid unless the collateral source rule has been modified or abrogated.¹⁵⁹ Some courts, however, go further and interpret the language of the collateral source rule strictly and find that the rule simply does not apply to write-offs, because write-offs are not “payments.”¹⁶⁰ The distinction between these two methods is purely academic because, as a practical matter, the result is the same for each method. Because both methods essentially consider the reasonable value recoverable by a plaintiff to be the amount actually paid by Medicare, this comment considers them the same.

The general premise, as well as the most compelling and simple explanation, for limiting the amount recoverable to the amount actually paid is that the collateral source rule simply does not apply to write-offs. The common law iteration of the collateral source rule provides that “[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability.”¹⁶¹ By definition, Medicare, and even Medicaid, write-offs are not payments at all. The case of *Moorhead v. Crozer Chester Medical Center* illustrates this concept.¹⁶² In *Moorhead*, the decedent, a Medicare recipient, was injured as a result of a fall at the appellee’s medical center.¹⁶³ Her medical bills totaled \$108,668.31, but because she was a Medicare recipient, the health-care provider received \$12,167.40 as payment in full, leaving the provider to write off \$96,500.91.¹⁶⁴ The Pennsylvania Supreme Court determined that the decedent’s estate could sue for the reasonable value of her hospital expenses.¹⁶⁵ The only question for the court was how to calculate that reasonable value.¹⁶⁶ Affirming both the trial and appellate courts, the Pennsylvania Supreme Court held that the collateral source rule did not apply to the \$96,500.91 that was written off by the health-care provider.¹⁶⁷ In support of its conclusion that the amount paid by the health-care provider constituted the reasonable value, the court laid out its reasoning quite clearly:

159. See, e.g., *Simpson v. Saks Fifth Ave., Inc.*, No. 07-CV-0157-CVE-PJC, 2008 WL 3388739, at *5 (N.D. Okla. Aug. 8, 2008).

160. See, e.g., *Dyet*, 81 P.3d at 1239; *Kastick v. U-Haul Co. of W. Mich.*, 740 N.Y.S.2d 167, 167 (App. Div. 2002).

161. RESTATEMENT (SECOND) OF TORTS § 920A (1979) (emphasis added).

162. See 765 A.2d 786.

163. *Id.* at 787.

164. *Id.* at 788.

165. *Id.* at 789.

166. *Id.*

167. See *id.* at 788, 790-91.

[T]he essential point to recognize is that Appellee is not seeking to diminish Appellant's recovery by [the amount actually paid by Medicare]. Rather, the issue is whether Appellant is entitled to collect the additional amount of \$96,500.91 as an expense. Appellant did not pay \$96,500.91, nor did Medicare . . . pay that amount on her behalf. The collateral source rule does not apply to the illusory "charge" of \$96,500.91 since that amount was not paid by any collateral source.¹⁶⁸

The court concluded that allowing the appellant to recover the \$96,500.91 would amount to a windfall profit for the plaintiff and would contradict the idea of fair compensation.¹⁶⁹

Other jurisdictions have reasoned similarly. In *Hanif v. Housing Authority of Yolo County*, a personal injury suit arose when the plaintiff was struck by an automobile while on the defendant's property.¹⁷⁰ The California Court of Appeals addressed the question "whether the 'reasonable value' measure of recovery means that an injured plaintiff may recover from the tortfeasor more than the actual amount he paid or for which he incurred liability for past medical care and services."¹⁷¹ The trial court, relying in part on the principle that tort damages are meant to restore an injured plaintiff to his former position,¹⁷² as well as California's bar against double recovery,¹⁷³ had held that the reasonable value of recovery equaled the actual amount paid by Medi-Cal,¹⁷⁴ California's form of Medicare. The appellate court affirmed the trial court's decision finding the defendant negligent but lowered the recoverable damages to the amount paid by Medi-Cal.¹⁷⁵

Similarly, a Kansas appellate court addressed a slip-and-fall scenario similar to the hypothetical in Part II.¹⁷⁶ In *Liberty v. Westwood United Super, Inc.*, the plaintiff slipped and fell while in the defendant's grocery store; she sustained injuries and later filed suit.¹⁷⁷ The plaintiff lost at trial and was denied a new trial.¹⁷⁸ She subsequently appealed, contending in part that the trial court erred

168. *Id.* at 791 (citing *McAmis v. Wallace*, 980 F. Supp. 181 (W.D. Va. 1997)).

169. *Id.* at 790.

170. 246 Cal Rptr. 192, 192 (Cal. Ct. App. 1988).

171. *Id.* at 194-95.

172. *Id.* at 195.

173. *Id.* at 197.

174. *Id.*

175. *See id.* at 194, 198.

176. *See Liberty v. Westwood United Super, Inc.*, No. 89,143, 2005 WL 1006363, at *1 (Kan. Ct. App. Apr. 29, 2005) (per curiam).

177. *Id.*

178. *Id.*

by disallowing evidence of Medicare write-offs that she believed were recoverable damages.¹⁷⁹ The court held that the collateral source rule did not apply to Medicare write-offs, observing that applying the rule in such a context would “require[] a great deal of creativity.”¹⁸⁰ Instead of applying the collateral source rule, the court calculated the reasonable value of the plaintiff’s personal injuries.¹⁸¹ The court concluded that the reasonable value of the plaintiff’s injuries was equal to the customary charge allowed by Medicare.¹⁸² Relying on its earlier decision in *Bates v. Hogg*,¹⁸³ the court found that because any health-care provider was contractually prohibited from charging the plaintiff for the portion of her bills written off by Medicare, the amount due from Medicare was the customary charge,¹⁸⁴ thus, the amount paid by Medicare constituted the reasonable value.¹⁸⁵

The Idaho Supreme Court reached a similar conclusion in *Dyet v. McKinley*, wherein Dyet, traveling in a car, collided into McKinley as McKinley attempted to make a left-hand turn in front of Dyet.¹⁸⁶ The crash caused Dyet to require a number of surgeries, with her resulting medical bills totaling \$89,367.71.¹⁸⁷ Dyet was on Medicare, and the hospital received \$21,712.49 as payment in full for Dyet’s medical bills, forcing it to write off \$67,655.22 as required by law.¹⁸⁸ At trial, the court granted Dyet’s motion in limine and permitted her to exclude from evidence the fact that she had received payment assistance from any collateral sources, including Medicare.¹⁸⁹ Nevertheless, the trial court reduced her damages award by the exact amount written off by Medicare.¹⁹⁰ The Idaho Supreme Court’s decision turned on whether Medicare write-offs could be treated as a collateral source under Idaho law.¹⁹¹ The court followed justifications set forth in the New York case of *Kastick v. U-Haul Co. of Western Michigan* and held that because “the write-off technically [was] not

179. *Id.*

180. *Id.* at *5.

181. *Id.* at *5-6.

182. *Id.* at *6.

183. 921 P.2d 249 (Kan. Ct. App. 1996), *superseded by statute on other grounds*, Act of May 15, 1997, ch. 173, § 11, 1997 Kan. Sess. Laws 1191, 1204-09 (amending KAN. STAT. ANN. § 60-226), *as recognized in* *Frans v. Gausman*, 6 P.3d 432, 440 (Kan. Ct. App. 2000); *see also* text accompanying notes 103-09.

184. *Liberty*, 2005 WL 1006363, at *5-6 (quoting *Bates*, 921 P.2d at 253).

185. *Id.* at *6.

186. 81 P.3d 1236, 1237 (Idaho 2003).

187. *Id.*

188. *Id.* at 1237; *see also* 42 U.S.C. § 1395cc(a)(1)-(2) (2006); 42 C.F.R. § 489.21(a) (2009).

189. *Dyet*, 81 P.3d at 1238.

190. *Id.*

191. *Id.* at 1239.

a payment from a collateral source within the meaning of [the collateral source statute], it [was] not an item of damages for which plaintiff [might] recover because plaintiff ha[d] incurred no liability therefore [sic].”¹⁹²

The U.S. District Court for the District of Kansas in *Wildermuth v. Staton* articulated perhaps the most straightforward reasoning for not allowing injured plaintiffs to recover the amount written off by Medicare under the collateral source rule.¹⁹³ Wildermuth and several other plaintiffs were involved in a motor vehicle accident and claimed that they had incurred physical injuries because of the negligent driving of Staton.¹⁹⁴ Medicare paid part of the health-care expenses for some of the plaintiffs, and because of the agreement between these plaintiffs’ health-care providers and Medicare, the providers wrote off the unpaid portion of the expenses.¹⁹⁵ The main issue before the district court was “whether Plaintiffs [might] introduce evidence of the full amount of their medical expenses even though their health care providers wrote off a portion of the charges pursuant to their agreements with Medicare.”¹⁹⁶ The plaintiffs contended that limiting the amount of damages recoverable from Staton violated Kansas’s collateral source rule.¹⁹⁷ The court disagreed.¹⁹⁸

The district court divided its decision into two main parts. First, the court determined that Medicare beneficiaries do not “bargain for” Medicare write-offs in the same sense that beneficiaries of private insurance might be said to “bargain for” write-offs when they purchase private insurance.¹⁹⁹ Instead, the court observed, Medicare “write-offs are required by operation of federal law, and Medicare providers are prohibited under Medicare law and regulations from seeking reimbursement of the written-off amounts from any source.”²⁰⁰ In other words, federal law “simply extinguishe[s]” the difference between the amount billed by the health-care provider and the amount paid by Medicare.²⁰¹ Second, the court determined that there is no need for a distinction between Medicare and Medicaid, because “[w]hat is it [sic] at issue is the *write-off* and not the Medicare payment itself.”²⁰² The distinction between the programs is

192. *Id.* (quoting *Kastick v. U-Haul Co. of W. Mich.*, 740 N.Y.S.2d 167, 169 (App. Div. 2002)).

193. *See* No. CIV.A.01-2418-CM, 2002 WL 922137 (D. Kan. Apr. 29, 2002).

194. *Id.* at *1.

195. *Id.*

196. *Id.* at *3 (emphasis omitted).

197. *Id.*

198. *See id.* at *5-6, *8.

199. *See id.* at *5.

200. *Id.* (citing 42 U.S.C. § 1395cc (2000); 42 C.F.R. § 489.21(a) (2001)).

201. *Id.* (quoting *Suhor v. Lagasse*, 2000-1628, p. 9 (La. App. 4 Cir. 9/13/00); 770 So. 2d 422, 427).

202. *Id.*

irrelevant, because the collateral source rule applies only to “evidence of benefits *paid* by a collateral source”;²⁰³ thus, by its very language, the rule does not apply to expenses never paid.²⁰⁴

Additionally, the district court looked at the policy implications of allowing an injured plaintiff to recover the written-off portion of a medical bill.²⁰⁵ Although the collateral source rule is meant to prevent a tortfeasor from escaping full liability and receiving a windfall, the court noted that the rule “is not intended to provide a windfall to plaintiffs.”²⁰⁶ In fact, using the language of the Kansas Supreme Court, the court concluded that “the basic principle of damages is to make a party whole by putting it back in the same position, not to grant a windfall.”²⁰⁷ This case depicts the type of reasoning that Oklahoma courts should adopt in their interpretation of Oklahoma’s collateral source rule.²⁰⁸

In *Maurer v. Iehl*, a federal district court in Indiana applied reasoning similar to that in *Wildermuth v. Staton*.²⁰⁹ Like *Wildermuth*, Maurer attempted to increase her possible recoverable damages by filing a motion in limine to prevent the defendants from entering any evidence regarding Medicare write-offs.²¹⁰ Maurer argued that the collateral source rule covered write-offs and that evidence concerning the write-offs was therefore inadmissible and could not lower her recoverable damages.²¹¹ Judge Springmann noted that Indiana’s legislature had abrogated the common law collateral source rule and that evidence of collateral source payments was now allowed unless the payments fell into a statutory exception.²¹² The court mentioned that part of the stated purpose behind Indiana’s new collateral source rule was to limit injured plaintiffs to one recovery.²¹³ Judge Springmann held that because Maurer did

203. *Id.* (quoting *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939, 949 (Kan. 1985)).

204. *Id.*

205. *See id.*

206. *Id.*

207. *Id.* (quoting *State ex rel. Stephan v. Wolfenbarger & McCulley, P.A.*, 690 P.2d 380, 385 (Kan. 1984)).

208. *See* discussion *infra* Part IV.

209. *See Maurer v. Iehl*, No. 3:07-CV-218-TS, 2008 WL 4238942 (N.D. Ind. Sept. 10, 2008).

210. *See id.* at *1.

211. *Id.*

212. *Id.* at *2; *see also* IND. CODE ANN. § 34-44-1-2(1) (West 2008) (retaining the collateral source rule with respect to “(A) payments of life insurance or other death benefits; (B) insurance benefits for which the plaintiff . . . [has] paid for directly; or (C) payments made by: (i) the state or the United States; or (ii) any agency, instrumentality, or subdivision of the state or the United States”).

213. *Maurer*, 2008 WL 4238942, at *2 (quoting IND. CODE ANN. § 34-44-1-1(2)).

not establish that Medicare write-offs fell into one of the statutory exceptions, the evidence of the write-offs would be allowed.²¹⁴

The foregoing cases illustrate the reasoning employed by those jurisdictions that hold that the reasonable value of recovery for an injured plaintiff includes only the amount paid by Medicare rather than the full amount billed by the health-care provider. Courts following this approach have often reasoned that the language of the collateral source rule simply does not encompass Medicare write-offs. The common law rule specifically prohibits evidence of *payments* by a collateral source.²¹⁵ Because 42 U.S.C. § 1395cc(a)(1)(A) federally mandates that the portion of medical bills not paid by Medicare be written off, the portion written off, by definition, does not constitute a payment. In light of the sound logical reasoning and justifications illustrated in the decisions discussed above, Oklahoma should follow suit and adopt this interpretation of the collateral source rule with regard to Medicare write-offs.

(b) Amount Billed

Another portion of the states embracing the reasonable value theory hold the reasonable value equivalent to the amount billed by the health-care provider, including the portion written off after payment by Medicare. Courts have varied in the justifications offered in support of this position, as the following discussion demonstrates.²¹⁶

In *Baptist Healthcare Systems, Inc. v. Miller*, Kentucky's supreme court addressed the issue of whether reasonable value equals the amount billed,

214. *Id.* at *4.

215. See RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979).

216. See, e.g., *Acuar v. Letourneau*, 531 S.E.2d 316, 320-23 (Va. 2000). This case did not involve Medicare; however, it does provide a good example of the reasoning employed by those jurisdictions holding that the reasonable value equals the amount billed. In this personal injury action, the Virginia Supreme Court interpreted Virginia's collateral source rule and held that Letourneau, a recipient of private insurance, was entitled to recover the amount originally billed despite the fact that a portion of the bill was written-off. See *id.* at 321-23. The court justified its decision on the policy rationale that

[t]he collateral source rule is designed to strike a balance between two competing principles of tort law: (1) a plaintiff is entitled to compensation sufficient to make him whole, but no more; and (2) a defendant is liable for all damages that proximately result from his wrong. A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall. Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer.

Id. at 323 (quoting *Schickling v. Aspinall*, 369 S.E.2d 172, 174 (Va. 1988)). In other words, the court relied on the traditional justifications for double recovery to hold that the reasonable value of recoverable damages equates to the amount billed.

including the amount of Medicare write-offs.²¹⁷ In this medical malpractice suit, Baptist Healthcare argued on appeal that the trial court erred by allowing Miller, the injured plaintiff, to recover the portion of the medical expenses written off by Medicare.²¹⁸ The Kentucky Supreme Court discussed the common law collateral source rule, which Kentucky has long followed, and held that Medicare benefits fall subject to the rule, similar to other medical insurance benefits.²¹⁹ Despite Baptist's argument that a Medicare write-off creates no obligation to pay and thus does not constitute a payment under the collateral source rule,²²⁰ the court determined otherwise.²²¹ The court held that the tortfeasor's "duty to pay the reasonable value" of the medical expenses does not go away when the health-care provider contracts with Medicare to accept payments lower than the billed rates.²²²

The Illinois Supreme Court followed suit in *Wills v. Foster*, where Wills filed a complaint against Foster for personal injuries arising out of an automobile accident.²²³ The case presented the issue of whether the award of medical expenses was limited to the amount paid by Medicaid and Medicare or whether Wills could recover the amount billed.²²⁴ Wills's bills from the accident totaled \$80,163.47; however, Medicare paid only \$19,005.50.²²⁵ After a trial, the jury awarded Wills the entire amount originally billed, but the trial court granted the defendant's motion to reduce this award, and the intermediate appellate court affirmed the reduction.²²⁶ On appeal, the Illinois Supreme Court determined that Illinois follows the reasonable value approach and concluded that the reasonable value equates to the amount billed.²²⁷ Specifically, it reasoned that "[a]llowing evidence of both the billed and discounted amounts compromises the collateral source rule, confuses the jury, and potentially prejudices both parties in the case."²²⁸ Under Illinois law, the collateral source rule "prevent[s] the jury from learning *anything* about collateral income."²²⁹ As a result of the court's reasoning, defendants in

217. See 177 S.W.3d 676, 682-84 (Ky. 2005).

218. *Id.* at 682.

219. See *id.* at 682-84.

220. See *id.* at 682.

221. See *id.* at 683-84.

222. *Id.*

223. See 892 N.E.2d 1018, 1020, 1030 (Ill. 2008).

224. *Id.* at 1020.

225. *Id.*

226. *Id.*

227. See *id.* at 1030-33.

228. *Id.* at 1032 (quoting *Arthur v. Catour*, 833 N.E.2d 847, 862 (Ill. 2005) (McMorrow, C.J., dissenting)).

229. *Id.* at 1033 (quoting *Arthur*, 833 N.E.2d at 852 (majority opinion)).

Illinois may not enter evidence of Medicare write-offs in an attempt to lower injured plaintiffs' recoverable damages.²³⁰

Although reaching a similar conclusion, the Supreme Court of Hawaii proffered a different rationale for equating the reasonable value of medical services to the amount actually billed in *Bynum v. Magno*.²³¹ While vacationing in Hawaii, Bynum experienced chest pains, sought treatment at a local hospital, and ultimately received care from Dr. Magno following a transfer to another hospital.²³² Even though Dr. Magno was aware of Bynum's history of respiratory failure, she allowed him to undergo bypass surgery, a particularly risky procedure for a patient in his position.²³³ During the surgery, Bynum suffered respiratory problems and, consequently, became permanently dependent on a ventilation machine.²³⁴ Bynum was a Medicare and Medi-Cal (California's Medicaid) recipient.²³⁵ His family sued on his behalf for the amount equivalent to the standard charges for the services the health-care facility and doctors provided him.²³⁶

The Bynums filed suit in the U.S. District Court for the District of Hawaii, where they received a judgment that included the entire amount billed by Dr. Magno.²³⁷ Dr. Magno appealed to the Ninth Circuit Court of Appeals, which reversed and remanded the case to the district court.²³⁸ Following the Ninth Circuit's guidance, the district court determined in a new trial that the question of how to correctly measure the damages the Bynums were entitled to receive was better suited for the Hawaii Supreme Court.²³⁹ The district court therefore certified to the Hawaii Supreme Court the question whether the discounted amount (i.e., the amount paid) or the amount billed represented the amount Bynum's family was entitled to recover.²⁴⁰

The state court acknowledged that some cases hold the collateral source rule inapplicable to Medicare and Medicaid write-offs, but found the rationales of those cases unpersuasive given that the collateral source rule "applies to both

230. *See id.*

231. *See* 101 P.3d 1149, 1156-57 (Haw. 2004).

232. *Id.* at 1151.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 1151-52.

238. *Id.* at 1152.

239. *Id.*

240. *Id.* at 1150.

gratuities and social legislation benefits.”²⁴¹ The court first noted that the collateral source rule applies to situations involving gratuitous services.²⁴² The court found that “because a plaintiff would be able to recover the ‘reasonable value’ of medical services if such services were rendered gratuitously, it would appear to follow that a plaintiff should be allowed to recover the ‘reasonable value’ of such services, even if Medicare/Medicaid had already paid a . . . discounted amount.”²⁴³ Consequently, the court concluded that the portion written off by the health-care provider could be viewed as gratuitous.²⁴⁴

The court also noted that the collateral source rule applies to “certain ‘types’ of benefits such as social legislation benefits.”²⁴⁵ The court cited the second Restatement, observing that “social security benefits, welfare payments, [and] pensions under special retirement acts” are subject to the rule.²⁴⁶ Ultimately, the court reasoned that Medicare and Medicaid payments are social legislation benefits²⁴⁷ and thus subject to the collateral source rule, preventing the Bynums’ damages award from being reduced by the portion of Dr. Magno’s bills that was written off.²⁴⁸

Similarly, a New Mexico federal court interpreted New Mexico law as requiring that the amount of a Medicare write-off be viewed “as a benefit or contribution received by the plaintiff from a source collateral to the tortfeasor.”²⁴⁹ In *Pipkins v. TA Operating Corp.*, the defendant conceded that the collateral source rule could not reduce the amount plaintiffs were entitled to recover for wrongdoing; nevertheless, it argued that the rule did not apply to Medicare write-offs and sought to exclude both evidence of and recovery of the written-off portion of the bill through a motion in limine.²⁵⁰ In its analysis, the district court treated Medicare write-offs as similar to gratuitous medical services for which a plaintiff has no financial liability; yet because the injured plaintiff received a benefit, the court held that the collateral source rule

241. *See id.* at 1155.

242. *Id.* (“[T]he fact that the doctor did not charge for his services . . . does not prevent [the plaintiff’s] recovery for the reasonable value of the services.” (quoting RESTATEMENT (SECOND) OF TORTS § 920A cmt. c(3) (1979))).

243. *Id.* at 1156.

244. *Id.*

245. *Id.*

246. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 920A cmt. c(4)).

247. *Id.*

248. *Id.* at 1157.

249. *Pipkins v. TA Operating Corp.*, 466 F. Supp. 2d 1255, 1261 (D.N.M. 2006) (denying defendant’s motion in limine to exclude evidence of billed amounts subject to Medicare write-off).

250. *Id.* at 1256-57.

still applied.²⁵¹ The court supported its conclusion by reiterating New Mexico's policy that if one party is to receive a windfall, it is better that it be the injured party rather than the tortfeasor.²⁵² Thus, the court denied the defendant's motion.²⁵³

In *Lindholm v. Hassan*, the U.S. District Court for the District of South Dakota encountered a situation similar to that in *Bynum* and *Pipkins*, and reached the same conclusion.²⁵⁴ In this medical malpractice action, Dr. Hassan sought to keep Lindholm from entering evidence of the amount billed for medical services,²⁵⁵ reasoning that amounts actually paid by Medicare—that is, amounts remaining after the operation of federally mandated write-offs—best reflect the reasonable value of services rendered.²⁵⁶ The district court, however, found the mandatory nature of write-offs irrelevant to the analysis.²⁵⁷ Instead, the court took the position that these write-offs are virtually identical to gratuitous services or social legislation benefits; thus, Lindholm was entitled not only to the amount actually paid on his behalf but also to the reasonable value of the medical services provided.²⁵⁸ This value would be determined by a jury presented with evidence of the amount billed but not the amount written off.²⁵⁹

The foregoing cases stand in direct opposition to the cases discussed in Part III.C.2.a. They underscore the traditional policy rationales for the collateral source rule's existence by advancing the idea that if one of the two parties must obtain a windfall, the injured, or non-negligent, party should be the one to receive it rather than the tortfeasor. Many of these cases did not distinguish between Medicaid and Medicare write-offs, instead considering them the same.

Additionally, some courts tried to force Medicare write-offs into one of the types of benefits discussed in the Restatement—gratuitous services or social legislation benefits—an effort which is tantamount to attempting to fit a square peg into a round hole. These courts' characterization of Medicare write-offs as a form of gratuitous health-care service is nonsensical. Gifts, by definition, are “voluntary transfer[s] of property to another without compensation.”²⁶⁰

251. *Id.* at 1260 (“Gratuitous treatment . . . constitutes a collateral contribution and triggers application of the collateral source rule.”).

252. *Id.* at 1262.

253. *Id.*

254. *See* 2005 DSD 11 ¶¶ 1, 15-18, 369 F. Supp. 2d 1104, 1106, 1110.

255. *Id.* ¶ 1, 369 F. Supp. 2d at 1105-06.

256. *See id.* ¶¶ 10-15, 369 F. Supp. 2d at 1108-10.

257. *Id.* ¶¶ 14-15, 369 F. Supp. 2d at 1110.

258. *See id.* ¶¶ 15-17, 369 F. Supp. 2d at 1110-11.

259. *See id.*

260. BLACK'S LAW DICTIONARY 757 (9th ed. 2009) (emphasis added).

The opposite is true of Medicare write-offs. Medicare write-offs occur because federal law *mandates* that they occur.²⁶¹ Mandating that health-care providers write off a portion of a Medicare recipient's medical bill means, almost by definition, that the health-care services are not gratuitous. To label mandatory write-offs as voluntary gifts is oxymoronic.

Furthermore, while it may be fair to call Medicare or Medicaid *payments* social legislation benefits, the same does not hold true for Medicare and Medicaid *write-offs*. The fact that some courts conflate write-offs with payments only creates more difficulty in deciding whether to apply the collateral source rule to Medicare and Medicaid write-offs.

Although most courts use the amount billed or the amount paid to determine reasonable value, a few leave the reasonableness determination to the fact-finder, as the next subsection discusses.

(c) Fact-Finder's Prerogative

A minority of courts allow the jury to hear evidence of both the amount billed by the health-care provider and the amount paid by Medicare and allow the jury determine what constitutes a reasonable value.²⁶² Both the South Carolina Supreme Court and the Wisconsin Supreme Court have recently used this approach when calculating the reasonable value of damages for patients with Medicare and Medicaid coverage.²⁶³

In *Lagerstrom v. Myrtle Werth Hospital-Mayo Health System*, the Wisconsin Supreme Court addressed the issue of whether the state's collateral source rule allowed evidence of collateral source payments, including Medicare benefits, in a medical malpractice suit.²⁶⁴ The eighty-seven-year-old Lagerstrom fell and broke his hip, requiring him to be admitted to Myrtle Werth Hospital.²⁶⁵ Following his hip-replacement surgery, doctors noticed that Mr. Lagerstrom had lung congestion.²⁶⁶ At about the same time, doctors decided to insert a feeding tube to make sure he was receiving the nutrients his body required.²⁶⁷ The doctors misplaced the feeding tube, however, and instead of pumping nutrients into Mr. Lagerstrom's stomach, the tube pumped nutrients into his left lung.²⁶⁸ Mr. Lagerstrom suffered multiple complications

261. See 42 U.S.C. § 1395cc(a)(1)-(2) (2006); 42 C.F.R. § 489.21(a) (2009).

262. See Zorogastua, *supra* note 40, at 475.

263. See Haselden v. Davis, 579 S.E.2d 293, 295 (S.C. 2003); Lagerstrom v. Myrtle Werth Hosp.-Mayo Health Sys., 2005 WI 124, ¶ 5, 285 Wis. 2d 1, ¶ 5, 700 N.W.2d 201, ¶ 5.

264. See 2005 WI 124, ¶ 3, 285 Wis. 2d 1, ¶ 3, 700 N.W.2d 201, ¶ 3.

265. *Id.* ¶ 11.

266. *Id.*

267. *Id.* ¶ 12.

268. *Id.*

as a result of this mistake and died of pneumonia within a couple of months.²⁶⁹ Lagerstrom's representatives brought a wrongful death action against the hospital in state court and received a favorable jury verdict,²⁷⁰ but the jury was able to take collateral source payments into account when calculating damages postverdict.²⁷¹ The plaintiff appealed, and the court of appeals certified to the Wisconsin Supreme Court the issue of the constitutionality of a Wisconsin statute that modified the collateral source rule in medical malpractice cases.²⁷²

The Wisconsin Supreme Court held that the collateral source payments from Medicare and evidence of the write-offs were admissible under Wisconsin's collateral source rule.²⁷³ The court mentioned the traditional policy rationale for the collateral source rule and stated that an award of damages may not be reduced by collateral source payments, but the court ultimately held that the jury could use evidence of all collateral source payments in calculating the reasonable value of the health-care provider's services.²⁷⁴

Haselden v. Davis involved a similar medical malpractice suit, though the patient in this case was covered by Medicaid, not Medicare.²⁷⁵ The defendant, Davis, contended that the trial court should limit the amount of Haselden's recoverable damages to the amount actually paid by Medicaid;²⁷⁶ however, that court allowed the jury to consider both the amount paid and the amount billed, and the appellate court affirmed.²⁷⁷ The South Carolina Supreme Court likewise affirmed the decision, explaining that "[a]lthough the amount paid may be relevant in determining the reasonable value of . . . [medical] services, the trier of fact must look to a variety of other factors in making such a finding," including "the amount billed to the plaintiff."²⁷⁸ In other words, the jury should be able to consider more than just the amount paid by Medicaid to the health-care provider. Accordingly, the court declined to limit the damages to the amount paid by the health-care provider, because such a limitation

269. *See id.* ¶¶ 13-14.

270. *Id.* ¶¶ 2, 15.

271. *See id.* ¶ 3.

272. *See id.* ¶¶ 1, 3-7.

273. *Id.* ¶ 27.

274. *Id.* ¶¶ 27, 57-58.

275. *See* 579 S.E.2d 293, 294 (S.C. 2003). This case is discussed here rather than in Part III.B, because it illustrates how some courts leave the determination of the reasonable value of damages to jurors. It should be noted that this case appears to represent a rather isolated departure from the majority view that the collateral source rule is inapplicable to Medicaid write-offs. *See* discussion *supra* Part III.B.

276. *Haselden*, 579 S.E.2d at 294.

277. *Id.*

278. *Id.* at 295.

would be “contrary to the purposes behind the collateral source rule,” and it would potentially allow the tortfeasor to receive a windfall.²⁷⁹

These two cases reflect the reasoning of the minority of jurisdictions that use the jury-prerogative form of the reasonable value approach. While this method seems rational because it allows the jury to hear all the evidence, allowing both the billed amount and paid amount into court may actually confuse the jury.²⁸⁰ This method also ignores the fact that Medicare and Medicaid payments are not the same as Medicare and Medicaid write-offs, and courts should not treat them as such.

These three approaches to calculating reasonable value represent different rationales and attempts to find common ground between two competing interests pertaining to recoverable damages: making the plaintiff whole versus requiring a tortfeasor to be responsible for all damages.²⁸¹ The amount paid rationale rests on the notion that a plaintiff should recover only the amount paid because the injured plaintiff has presumably already been made whole through medical services, and anything extra moves further away from the tort objective of merely making the plaintiff whole. The amount billed rationale emphasizes the traditional idea that a defendant should be responsible for all of a plaintiff’s injuries, even if the plaintiff receives a windfall. The jury-prerogative method permits the jury to examine both Medicare and Medicaid payments and Medicare and Medicaid write-offs to determine what is reasonable in a particular instance. Although Oklahoma can find precedent and theoretical support for each of these methods, the state should determine that the collateral source rule does not apply to Medicare and Medicaid write-offs, limiting a plaintiff’s damages to the amount paid to the health-care provider.

IV. The Inapplicability of Oklahoma’s Collateral Source Rule to Medicare and Medicaid Write-Offs

Though several jurisdictions apply the collateral source rule to Medicare and Medicaid write-offs, this comment contends that the collateral source rule should not apply to these write-offs in Oklahoma. While Oklahoma courts have yet to decide this specific issue,²⁸² Oklahoma’s new collateral source rule and the state’s desire to bring down health-care costs indicate that the rule

279. *Id.*

280. *See supra* text accompanying note 228.

281. *See* 22 AM. JUR. 2D *Damages*, *supra* note 35, § 392.

282. At least one federal court in Oklahoma has recently addressed the issue with regard to Medicare. *See Simpson v. Saks Fifth Ave., Inc.*, No. 07-CV-0157-CVE-PJC, 2008 WL 3388739 (N.D. Okla. Aug. 8, 2008).

should not apply to these write-offs. Evidence of these write-offs should be admissible in medical malpractice cases and, arguably, in other personal injury cases as well. This comment argues two points: (1) Medicare and Medicaid write-offs do not fall subject to the collateral source rule in general; and (2) Oklahoma's new focus on decreasing health-care costs supports applying the state's new collateral source rule differently than its common law rule, especially in medical liability cases.

Part A of this section discusses the traditional justifications for and interpretations of Oklahoma's collateral source rule in regard to Medicare and Medicaid write-offs. Part B discusses how statutory interpretation of the collateral source rule in Oklahoma does not bar the entrance of Medicare and Medicaid write-offs into evidence, because these write-offs do not constitute payments. Alternatively, if Oklahoma courts decide that these write-offs do fall subject to the collateral source rule, this comment contends that Oklahoma's collateral source rule allows write-offs to be entered into evidence in medical liability cases and also in other personal injury cases, given the prevailing policy rationales that undergird the new codification of the rule.

A. Oklahoma's Traditional Collateral Source Rule and an Example of Its Erroneous Application to Write-Offs

Oklahoma case precedent reflects a history of disallowing evidence of collateral source payments in general.²⁸³ Oklahoma's collateral source rule originated in the supreme court's interpretation of title 23, section 61 of the Oklahoma Statutes in *Denco Bus Lines*,²⁸⁴ wherein the court cited a formulation of the rule very similar to that set forth in the Restatement (Second) of Torts.²⁸⁵ Using this definition, "Oklahoma decisions [have] generally appl[ied] the collateral source rule broadly in favor of a plaintiff and

283. See, e.g., *Blythe v. Univ. of Okla.*, 2003 OK 115, ¶ 1, 82 P.3d 1021, 1023 (holding that the collateral source rule codified in the state workers' compensation statute, 85 OKLA. STAT. § 45(A) (2001), keeps an injured party's recovery from being diminished by an employee's insurance); *Denco Bus Lines v. Hargis*, 1951 OK 11, ¶ 26, 229 P.2d 560, 564 (holding that compensation paid by a collateral source to an injured party does not lower the amount recoverable from the tortfeasor); *Coble v. Shepard*, 2008 OK CIV APP 71, ¶ 17, 190 P.3d 1202, 1206 (citing *Baker v. Barnes*, 1997 OK CIV APP 77, ¶¶ 4-5, 949 P.2d 695, 696) (holding that the collateral source rule is meant to prevent defendants from receiving a windfall).

284. *Denco Bus Lines*, ¶¶ 23-26, 229 P.2d at 564. The statute, which has never been amended since its passage in 1910, reads, "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." 23 OKLA. STAT. § 61 (2001).

285. *Denco Bus Lines*, ¶ 24, 229 P.2d at 564; compare RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979), with 15 AM. JUR. *Damages* § 198 (1938).

exclude[d] evidence of an alternative or collateral source that would [have] lessen[ed] a plaintiff's damages."²⁸⁶

Given Oklahoma courts' historical refusal to admit evidence of collateral source payments, it can be argued that these courts would reach the same result when applying the collateral source rule to Medicare and Medicaid write-offs. Though no Oklahoma state court has ever decided this issue, the U.S. District Court for the Northern District of Oklahoma recently ruled on a motion in limine in *Simpson v. Saks Fifth Avenue, Inc.*²⁸⁷ and barred the admission of a Medicare write-off in a personal injury case.²⁸⁸ In that case, Simpson, a Medicare recipient, sued Saks after a slip-and-fall incident.²⁸⁹ Saks filed a motion in limine, arguing that "medical bills written off by providers to accommodate Medicare's payment schedule are not admissible to prove damages, because no one paid the written-off amounts and no one ever will be obligated to pay them."²⁹⁰

Despite Saks's argument, the district court held that Medicare payments are a collateral source such that the collateral source rule applies to them and the portions of medical bills written off.²⁹¹ In reaching its conclusion, the district court attempted to surmise what the Oklahoma Supreme Court would say.²⁹² Relying on the reasoning of the Tenth Circuit's decision in *Macsenti v. Becker*, it "erred on the side of caution and interpreted Oklahoma's collateral source broadly to exclude evidence of payments by third-parties when it was unclear how the Oklahoma Supreme Court would resolve the specific application of the collateral rule."²⁹³ Ultimately, the court in *Simpson* denied the defendant's motion with respect to both Medicare payments and write-offs.²⁹⁴

The *Simpson* court ignored the distinction between Medicare payments and Medicare write-offs, leading to a misapplication of the collateral source rule. Other courts have ignored this distinction as well, applying the collateral source rule to both the payment and the write-off.²⁹⁵ This distinction is an

286. *Simpson*, 2008 WL 3388739, at *2.

287. *Id.* at *1 ("Oklahoma courts have not addressed the precise issue raised by defendant, but courts in other jurisdictions have considered the admissibility of Medicare write-offs to reduce a plaintiff's claim for damages.").

288. *Id.* at *2.

289. *See id.* at *1 n.2.

290. *Id.* at *1 (alteration and internal quotation marks omitted).

291. *Id.* at *2.

292. *Id.*

293. *Id.* (citing *Macsenti v. Becker*, 237 F.3d 1223, 1240-41 (10th Cir. 2001)). *Macsenti* was a medical malpractice case brought by a patient against his dentist in which the plaintiff's attorney actually paid part of the plaintiff's medical bills. *See* 237 F.3d at 1226, 1240.

294. *Simpson*, 2008 WL 3388739, at *9.

295. *See, e.g.,* *Rose v. Via Christi Health Sys., Inc.* (*Rose I*), 78 P.3d 798, 804-05 (Kan.

important one that has a significant impact on recoverable damages in Oklahoma and, consequently, the cost of health care in Oklahoma. The district court's failure to draw this distinction provides Oklahoma courts with faulty persuasive authority.

The *Simpson* case exemplifies the need for Oklahoma courts to interpret Oklahoma's new collateral source rule and the policy rationales supporting it. Because both the United States and Oklahoma court systems rely heavily on case precedent, both binding and persuasive, it is important for courts to provide a correct interpretation of a law early in its existence, before incorrect interpretations become persuasive or even binding. This comment argues that Oklahoma courts should follow the rationale presented in *Moorhead v. Crozer Chester Medical Center*²⁹⁶ and *Wildermuth v. Staton*.²⁹⁷

B. Arguments Against Excluding Evidence of Medicare and Medicaid Write-Offs

To begin, the correct interpretation of the collateral source rule is one where the rule does not apply to Medicare and Medicaid write-offs at all.²⁹⁸ Although many jurisdictions reason differently and apply the collateral source rule to these types of write-offs, the injured party should only be allowed to recover the amount actually paid by the health-care provider. The collateral source rule only applies to “[p]ayments made to or benefits conferred on the injured party from other sources.”²⁹⁹ By definition, Medicare and Medicaid write-offs do not constitute “payments” since they are never paid, as explained in *Wildermuth*.³⁰⁰ From a policy standpoint, it seems unfair to allow “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.”³⁰¹ This is not to say that those who receive

2003); *Wal-Mart Stores, Inc. v. Frierson*, 2000-CA-00364-SCT (¶¶ 7-8) (Miss. 2002), 818 So. 2d 1135, 1140.

296. 765 A.2d 786 (Pa. 2001) (holding that the collateral source rule does not apply to Medicare write-offs because they constitute an illusory charge), *abrogated on other grounds* by *Northbrook Life Ins. Co. v. Commonwealth*, 949 A.2d 333 (Pa. 2008); *see also supra* text accompanying notes 162-69.

297. No. CIV.A.01-2418-CM, 2002 WL 922137 (D. Kan. Apr. 29, 2002) (finding that the collateral source rule only applies to benefits actually paid by a collateral source); *see also supra* text accompanying notes 193-207.

298. Thornton, *supra* note 79, at 316 (asserting that “most jurisdictions hold that Medicaid/Medicare write-offs are not a collateral source”).

299. RESTATEMENT (SECOND) OF TORTS § 920A (1979) (emphasis added).

300. *See* 2002 WL 922137, at *5; *see also supra* text accompanying notes 202-04.

301. *Terrell v. Nanda*, 33,242, p. 3 (La. App. 2 Cir. 5/10/00); 759 So. 2d 1026, 1028 (quoting *Gordon v. Forsyth County Hosp. Auth., Inc.*, 409 F. Supp. 708, 719 (M.D.N.C. 1976)); *see also*

Medicare and Medicaid should not be allowed to sue for damages against a negligent party. Rather, this approach would merely limit an injured plaintiff's recovery to the amount *actually paid* by Medicare or Medicaid. This would allow the injured party to recover some amount in damages while staying in line with the policy objective of damages, which is to put an injured party back into the position he or she was in before the incident occurred.³⁰²

Shifting interests in Oklahoma support this interpretation of the collateral source rule's inapplicability to Medicare and Medicaid write-offs. Traditionally, there were two justifications for the collateral source rule: First, if either the tortfeasor or the injured plaintiff had to receive a windfall, public policy sided with the injured plaintiff.³⁰³ Second, allowing plaintiffs to recover amounts paid by collateral sources encouraged citizens to carry insurance.³⁰⁴ Despite these traditional justifications, newer policy rationales seem to be prevailing, justifying a shift away from the collateral source rule's traditional, broad application.

The promotion of economic interests is arguably the controlling interest in Oklahoma currently. This policy favors a narrower collateral source rule. In 2003, Oklahoma governor Brad Henry started the Economic Development Generating Excellence (EDGE) project to "significantly improve Oklahoma's economy and quality of life."³⁰⁵ This initiative included a tort reform proposal, which partly consisted of altering the collateral source rule to help reduce business costs.³⁰⁶ This tort reform became known as the Affordable Access to Health Care Act and was passed to "keep medical malpractice insurance rates affordable and improve access to quality health care," which, as Governor Henry explained, is good for "state economic development efforts."³⁰⁷ Therefore, the policy objective of the AAHCA and the new collateral source

supra text accompanying note 109.

302. See Thornton, *supra* note 79, at 316.

303. See, e.g., Green v. Denver & Rio Grande W. R.R. Co., 59 F.3d 1029, 1032 (10th Cir. 1995) (citing FDIC v. United Pac. Ins. Co., 20 F.3d 1070, 1083 (10th Cir. 1994)).

304. See, e.g., *id.* (citing Quinones v. Pa. Gen. Ins. Co., 804 F.2d 1167, 1171 (10th Cir. 1986)).

305. EDGE STEERING COMM., OKLAHOMA'S EDGE EXECUTIVE SUMMARY: ACTION PLAN 2004, at 2 (2004), available at <http://www.ok.gov/edge/documents/exec-summary-final%202004.pdf>. The complete action plan is on file with the Law and Legislative Reference Division of the Oklahoma Department of Libraries.

306. See *id.* at 3.

307. Press Release, Office of Governor Brad Henry, Henry Signs Tort Reform into Law (June 4, 2003), available at http://www.governor.state.ok.us/display_article.php?article_id=74&article_type=1. *Editors' Note:* Once Governor Henry's term of office expires, his official papers will be placed on file with the Oklahoma Department of Libraries, Oklahoma State Archives Division.

rule appears to be providing affordable health care to individuals, rather than preventing a defendant from receiving a windfall.

If economic interests such as keeping health-care costs lower and giving more people access to health care are now the controlling interests, then the argument that Medicare and Medicaid write-offs are not subject to the collateral source rule is strengthened. “Doctors and hospitals already [have] a disincentive to take on Medicare patients” because of low profit margins,³⁰⁸ and the same can be argued with respect to Medicaid patients. If injured plaintiffs were allowed to recover the amount paid by Medicare or Medicaid as well as the amount written off, health-care providers might have an even greater disincentive to provide health services to these types of patients. Why? Because Medicare and Medicaid write-offs “often constitute a significant percentage of the total amount billed”;³⁰⁹ thus, health-care providers’ costs could dramatically increase. With approximately 16% of Oklahoma’s population already on Medicare³¹⁰ and approximately 20% already on Medicaid,³¹¹ Oklahoma cannot afford for health-care providers to turn down these types of patients. Such a result would frustrate the Oklahoma Legislature’s goal of providing more people with access to health care.

The author maintains that the correct interpretation of the collateral source rule is that the rule is inapplicable to Medicare and Medicaid write-offs. Nonetheless, if Oklahoma courts were to classify these write-offs as “payments,” thereby subjecting them to the collateral source rule, the newly codified rule under the AAHCA would still make the write-offs admissible in medical liability cases. Title 63, section 1-1708.1D of the Oklahoma Statutes provides the newly codified collateral source rule:

A. In every medical liability action, the court shall admit evidence of payments of medical bills made to the injured party, unless the court makes the finding described in paragraph B of this section.

B. In any medical liability action, upon application of a party, the court shall make a determination whether amounts claimed by a health care provider to be a payment of medical bills from a collateral source is [sic] subject to subrogation or other right of

308. *Health Care Costs: Boon or Bane?*, *ECONOMIST*, Jan. 26, 2008, at 34.

309. Thornton, *supra* note 79, at 315.

310. StateHealthFacts.org, Medicare Enrollment as a Percent of Total Population, 2008, <http://www.statehealthfacts.org> (follow “Medicare” hyperlink; then follow “Medicare Enrollment as a % of Total Pop” hyperlink) (last visited Apr. 20, 2010).

311. StateHealthFacts.org, Medicaid Enrollment as a Percent of Total Population, 2006, <http://www.statehealthfacts.org> (follow “Medicaid & CHIP” hyperlink; then follow “Medicaid Enrollment as a % of Total Pop” hyperlink) (last visited Apr. 20, 2010).

recovery. If the court makes a determination that any such payment is subject to subrogation or other right of recovery, evidence of the payment from the collateral source and subject to subrogation or other right of recovery shall not be admitted.³¹²

The plain language of Oklahoma's new collateral source rule indicates that Medicare and Medicaid write-offs are admissible into evidence in medical liability cases. Medical liability actions include "any civil action involving, or contingent upon, personal injury or wrongful death brought against a health care provider based on professional negligence."³¹³ So long as a party meets the statutory requirements and the case involves a medical liability action, this statute "requires the court to admit evidence of payments made to the plaintiff from collateral sources" except where particular "payment[s] [are] subject to subrogation."³¹⁴ Thus, even if a court erroneously classified write-offs as payments, the write-offs would still be admissible into evidence. This is because Medicare and Medicaid write-offs are not subject to subrogation,³¹⁵ so they do not fall within the paragraph B exception of the Oklahoma statute, which excludes those payments subject to some right of recovery.³¹⁶

Since this comment specifically focuses on Oklahoma's goal of keeping health-care costs down, it is primarily concerned with the inapplicability of the state's collateral source rule to Medicare and Medicaid write-offs in medical liability cases. Nonetheless, another possible question needs to be addressed: does the collateral source rule exclude evidence of write-offs in personal injury cases against a party other than a health-care provider? Proponents of excluding these write-offs would likely contend that cases like *Simpson* are not medical liability cases, but rather personal injury cases in which Oklahoma's traditional collateral source rule should be followed. There are two basic responses to this argument: First, as this comment has contended all along, such write-offs—no matter the type of injury—are not recoverable for reasons already described herein. Second, though the specific language of title 63, section 1-1708.1D of the Oklahoma Statutes arguably applies only to personal injury cases where the injury was caused by a health-care provider, the policy

312. 63 OKLA. STAT. § 1-1708.1D (Supp. 2003).

313. *Id.* § 1-1708.1C(3).

314. Beth Reynolds, *A Review of Oklahoma's 2003 and 2004 Tort Reform*, 57 OKLA. L. REV. 935, 938 (2004).

315. Olson & Wasson, *supra* note 10, at 175 ("[T]here is no right of subrogation or refund of benefits on a tort recovery for the amount written-off under Medicare or Medicaid."); *see also supra* text accompanying notes 150-53.

316. While the portions written-off by federal law are not subject to subrogation, "benefits actually paid may be recovered" by Medicare. Olson & Wasson, *supra* note 10, at 175; *see also* *Rose v. Via Christi Health Sys., Inc. (Rose II)*, 113 P.3d 241, 247-48 (Kan. 2005).

goal of lowering health-care costs in Oklahoma supports an extension of the statutory rule to write-offs in *all* personal injury cases. Conversely, if Oklahoma courts decide that the policy justifications are not strong enough and they decide to apply the collateral source rule to Medicare and Medicaid write-offs, then it is up to the Oklahoma Legislature to clarify that it wants the new rule to apply in other personal injury suits as well.

One reasonable solution would be to borrow the current rule from Texas, an approach which was considered during tort reform discussions after passage of the AAHCA.³¹⁷ At the time Oklahoma passed the AAHCA, Texas had not yet altered its collateral source rule;³¹⁸ however, just one week later, Texas updated its reform by addressing recoverable medical damages.³¹⁹ After Texas's update and urging from Oklahoma House Republicans, Governor Henry publicly proposed additional Oklahoma initiatives for tort reform.³²⁰ He suggested borrowing many of Texas's reforms, because Texas had "enacted a balanced reform package that helped business and protected the rights of the individual."³²¹

Oklahoma should take another look at Texas's reforms, because Texas did precisely what Oklahoma should do with respect to Medicare and Medicaid write-offs. Texas's statute very clearly provides that "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."³²² It also makes explicit that "claimants are not entitled to recover write-offs, whether by Medicaid[] [or] Medicare,"³²³ in any type of case. The statute undoubtedly limits the amount an injured

317. See Ray Carter, *Henry Studies Texas Tort Reforms*, J. REC. (Okla. City), Jan. 27, 2004, at 10; see also Affordable Access to Health Care Act, ch. 390, 2003 Okla. Sess. Laws. 1678 (codified as amended at 63 OKLA. STAT. § 1-1708.1A-.1I (Supp. 2009)). Despite the state legislature's effort to achieve Texas-size reform through the AAHCA, the Act ultimately reflected a compromise between different public interests, and it did not reach as far as Governor Henry had initially wanted. See Higgins, *supra* note 62, at 921.

318. Higgins, *supra* note 62, at 926.

319. See Act of June 11, 2003, ch. 204, § 13.08, 2003 Tex. Gen. Laws 847, 889 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (Vernon 2008)). Oklahoma's Affordable Access to Health Care Act passed on June 4, 2003. See ch. 390, 2003 Okla. Sess. Laws. 1678, 1691.

320. See Carter, *supra* note 317, at 10.

321. Press Release, Office of Governor Brad Henry, Governor Henry Announces Comprehensive Tort Reform Initiative (Jan. 30, 2004), available at http://www.gov.ok.gov/display_article.php?article_id=223&article_type=1; see also *supra* note 307.

322. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105.

323. Thornton, *supra* note 79, at 317. The Texas statute also appears to preclude recovery of amounts written off by health-care providers pursuant to contracts with private insurers. See *id.*

plaintiff can recover to the *amount paid*,³²⁴ which does not include the portion of medical bills written off. It also limits the recoverable amount to the expenses *incurred*,³²⁵ which excludes write-offs since no party ever incurs an that is expense written off.³²⁶ Though a reasonable interpretation of Oklahoma's collateral source rule indicates that it is inapplicable to Medicare and Medicaid write-offs, adoption of Texas's law would definitively resolve the issue of whether write-offs are recoverable in medical liability and other personal injury actions.

V. Conclusion

Although Oklahoma courts have been silent on the issue of whether the collateral source rule applies to Medicare and Medicaid write-offs, it is important that courts understand the reasoning and justification for the rule so that they can formulate rational and logical precedent on this issue. "In health care liability claims, and in most personal injury claims for that matter, medical expenses related to the care and treatment of the injury alleged by the claimant often constitute a significant portion of the damages that might be recovered at trial."³²⁷ Understanding exactly what claimants can recover and what rules apply is essential to calculating an appropriate amount of damages. The collateral source rule is one of the tools that guide this endeavor.

In Oklahoma, the collateral source rule should not be used to prevent defendants from entering evidence of Medicare and Medicaid write-offs, because, as the Pennsylvania Supreme Court found, the rule is simply not applicable to illusory charges.³²⁸ The rule only applies to payments, and write-offs clearly are not any sort of payment. Thus, the rule does not apply to write-offs by its own terms.

This interpretation of the collateral source rule makes even more sense in Oklahoma, given the state's new policy shift toward economic interests and providing accessible and affordable health care to its citizens. Larger settlements and jury awards increase the overall cost of health care.³²⁹ Allowing claimants to recover Medicare and Medicaid write-offs would only

324. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105.

325. *Id.*

326. *See* *McAmis v. Wallace*, 980 F. Supp. 181, 184 (W.D. Va. 1997) ("An expense can only be incurred . . . when one has paid it or become legally obligated to pay it." (quoting *Va. Farm Bureau Mut. Ins. Co. v. Hodges*, 385 S.E.2d 612, 612 (Va. 1989))).

327. Thornton, *supra* note 79, at 315.

328. *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 791 (Pa. 2001), *abrogated on other grounds by* *Northbrook Life Ins. Co. v. Commonwealth*, 949 A.2d 333 (Pa. 2008); *see also* text accompanying note 168.

329. Mello et al., *supra* note 11, at 2283.

increase settlements and jury awards, thereby increasing the overall cost of health care. Classifying these write-offs as recoverable would ultimately impede the very goal the Oklahoma Legislature is trying to achieve—more affordable health care.

The U.S. District Court for the Western District of Virginia provided the best rationale for allowing defendants to enter evidence of Medicare and Medicaid write-offs:

Discounting is a reality of modern medical economics and it does no violence to the collateral source doctrine to bring to the tort compensation system the same intended savings. By allowing the plaintiff to show the discounted medical expenses as evidence of his damages, even though he paid no part of them, but refusing any evidence of the write-offs that no one incurred, there is a proper balance of [all] the competing interests at issue.³³⁰

Thus, the conclusion that the collateral source rule does not apply to Medicare and Medicaid write-offs is not only supported by Oklahoma's economic justifications for the new rule, but it also strikes a closer balance of the traditional competing interests. Specifically, if the rule were not applied, an injured plaintiff would receive "compensation sufficient to make him whole, but no more," and the tortfeasor would still be responsible for the damages that he proximately caused.³³¹ Allowing the plaintiff to recover Medicare or Medicaid write-offs would grant an unnecessary windfall.

Oklahoma courts must correctly address this issue early and avoid reliance on erroneous, yet persuasive, authority. An Oklahoma federal court has already applied the collateral source rule to Medicare write-offs,³³² mistakenly relying on *Rose I* and other similar cases. It is imperative for Oklahoma courts to diverge from this ruling in order to meet the policy goals set forth by the Oklahoma Legislature and Governor Henry. This comment strongly urges Oklahoma courts to decide this specific issue and interpret the collateral source rule as inapplicable to Medicare and Medicaid write-offs, regardless of the type of legal cause of action.

Michael W. Cromwell

330. *Mitchell v. Hayes*, 72 F. Supp. 2d 635, 637-38 (W.D. Va. 1999).

331. *Brandon HMA, Inc. v. Bradshaw*, 2000-CA-00735-SCT (¶ 49) (Miss. 2001), 809 So. 2d 611, 625 (Smith, J., concurring in part and dissenting in part).

332. *See Simpson v. Saks Fifth Ave., Inc.*, No. 07-CV-0157-CVE-PJC, 2008 WL 3388739, at *2, *5, *9 (N.D. Okla. Aug. 8, 2008).