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FRANK J. GAROFALO III

The purpose of the tort compensation system is to make an injured party whole; no less, but no more. With that concept in mind, Connecticut first codified its "collateral source" reduction rules in 1985, which were designed to prevent an injured party from obtaining a "double recovery" of economic damages already paid to the injured party, or paid on the injured party's behalf through an outside source, such as insurance.[1] *In* Marciano v. Jimenez*, however, the Connecticut Supreme Court interpreted section 52-225a to declare that when "any" right of reimbursement or subrogation exists to any portion of the claimed economic damages, there should be no collateral source reduction.*[2] *As a result of this precedent, trial courts now routinely deny collateral source reductions in an overbroad manner. As of today, in any case involving the presence of a lien placed on the lawsuit for medical expenses paid, such as in cases with plaintiffs covered by Medicare or Medicaid, the* Marciano *decision has been interpreted to require the denial of any collateral source reduction. This includes the portions of the bill that were contractually written off by the provider and were never incurred by plaintiff. Judicial interpretation of section 52-225a in this manner, however, is inapposite with the legislative intent behind the statute's enaction. A plaintiff's recovery of financial damages for medical expenses that were never incurred or owed is the type of windfall benefit section 52-225a was designed to avoid. In light of such harsh results, the* Marciano *decision needs to be rectified upon reconsideration of the*

1. 1985 Conn. Acts 574 (Reg. Sess.) (codified as CONN. GEN. STAT. §§ 52-225a to 225c).

2. Marciano v. Jimenez, 151 A.3d 1280 (Conn. 2016) (citing CONN. GEN. STAT. § 52-225a).

decision by the Connecticut Supreme Court or through legislative action.

INTRODUCTION

The concept of awarding damages in a civil lawsuit for personal injuries is to make the injured party "whole," i.e., in the same position as if the defendant's negligence never happened.[3] The United States Supreme Court has firmly defined "compensatory damages" as "intended to redress the *concrete loss* that the plaintiff has suffered by reason of the defendant's wrongful conduct."[4] Indeed, every juror sitting on a civil trial in Connecticut is instructed that he or she must "attempt to put the plaintiff [back] in the same position . . . that [the plaintiff] would have been in had the defendant not been negligent" by virtue of any award of damages.[5]

Striving to make an injured party whole, however, is complicated by the complex world of health insurance. In civil lawsuits for personal injuries, a plaintiff is permitted to—and in nearly all cases will—seek reimbursement for his "economic damages," which include medical expenses incurred due to injuries sustained as a result of the defendant's negligence.[6] Many plaintiffs, however, have health insurance that pay some, if not all, of their medical expenses. A damage award that fails to account for these payments creates a situation where the plaintiff is paid twice for their medical expenses: first by their insurer, and again by the defendant.

In order to prevent the plaintiff from receiving a "double recovery" for payments already made to the plaintiff from a "collateral source" independent from the defendant (e.g., an insurer), the legislature has specifically adopted Connecticut General Statutes section 52-225a *et seq.*, commonly referred to as Connecticut's "collateral source" rule.[7] The collateral source rule requires that after a trial in which "damages are awarded to compensate the [plaintiff]," the trial judge is mandated to reduce the awarded "economic damages" in an amount equal to the total amount determined to have been paid by collateral sources, less any

3. Langs v. Harder, 338 A.2d 458, 461–62 (Conn. 1973).

4. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (emphasis added).

5. CIV. JURY INSTRUCTION COMM., CONNECTICUT JUDICIAL. BRANCH CIVIL JURY INSTRUCTIONS 3.4-1, https://jud.ct.gov/JI/Civil/Civil.pdf (last modified Sept. 23, 2019) [https://perma.cc/52AU-LG3SCiv].

6. *See* CONN. GEN. STAT. § 52-572h (2020) (defining "economic damages" as "compensation determined by the trier of fact for pecuniary losses including, but not limited to, the cost of reasonable and necessary medical care").

7. Jones v. Kramer, 838 A.2d 170, 177–78 (Conn. 2004).

credits for the amount paid "to secure [the plaintiff's] right to any collateral source benefit."[8]

To illustrate, consider the following hypothetical: a personal injury plaintiff, John Doe, is awarded a $100,000 verdict at trial, $50,000 of which represents economic damages. In this hypothetical, also assume that the entire amount of the $50,000 awarded in economic damages represents medical bills, that were fully paid by John Doe's private health insurance. Further, assume that John Doe paid $20,000 in premiums for this coverage. Under these facts, the application of the collateral source rule in a post-verdict hearing would result in a collateral source reduction of $30,000. Otherwise, Doe would recover "twice." First, through his indemnification by his insurer for those expenses; second, by receiving compensation from the defendant for those same expenses.

In addition to direct payments or reimbursement for medical expenses, health insurance beneficiaries also receive the benefit of "contractual adjustments" and "write-offs" for amounts billed by a healthcare provider that are beyond an insurance carrier's agreed-upon rate for the item or service billed. Each health insurance carrier, including Medicare and Medicaid, sets a pre-determined "physician fee schedule," which indicates the maximum reimbursable amount for each specific service for healthcare providers in their network.[9] Any amounts billed by healthcare providers in excess of these "fee schedules" cannot be billed to the patient and must be written off or adjusted.[10]

Returning to the example with John Doe, assume instead that of the $50,000 awarded for economic damages, the insurance carrier only paid

8. CONN. GEN. STAT. § 52-225a (2020); *see also* § 52-225b (defining a "collateral source" as: "any payments made to the claimant, or on his behalf, by or pursuant to: (1) Any health or sickness insurance, automobile accident insurance that provides health benefits, and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or provided by others; or (2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services"); and § 52-572h (defining "economic damages" as "compensation determined by the trier of fact for pecuniary losses including, but not limited to, the cost of reasonable and necessary medical care, rehabilitative services, custodial care and loss of earnings or earning capacity excluding any noneconomic damages.").

9. 42 C.F.R. § 413.30(a)(2) (2020) (the U.S. Centers for Medicare & Medicaid Services (CMS) is given the authority to establish "estimated cost limits for direct or indirect overall costs or for costs of specific services or groups of [services]," and generally, "[r]eimbursable provider costs may not exceed the costs CMS estimates to be necessary for the efficient delivery of needed health care costs"). *See also An Act Concerning the Reduction of Economic Damages in a Personal Injury or Wrongful Death Action for Collateral Source Payments: Public Hearing on S.B. 969 Before the Judiciary Comm.*, 2019 Reg. Sess. 169–77 (Conn. 2019) [hereinafter *S.B. 969 Public Hearing*] (statement of Omar Ibrahimi, M.D.).

10. *See S.B. 969 Public Hearing*, *supra* note 9, at 170–71 (statement of Omar Ibrhimi, M.D.).

$35,000 towards the claimed medical bills, while the physician wrote-off the remaining $15,000. Thus, in this scenario, both the $15,000 write-off as well as the $35,000 payment by Doe's insurance carrier are considered collateral source payments subject to reduction.[11]

The caveat, however, with the collateral source reduction comes with the rule's application to amounts awarded to the plaintiff that are subject to a "right of subrogation." Generally, under section 52-225c, an insurer is prohibited from recovering the amount of "collateral source" benefits it paid on a plaintiff's behalf from the defendant or any other person.[12] In the earlier hypothetical involving John Doe, the plaintiff's insurer could not seek to recover from the defendant the $35,000 it paid to Doe for his medical expenses. But, as federal law preempts state law, certain plans, including Medicare, Medicaid, and Employee Retirement Income Security Act (ERISA) plans, are permitted by federal statute to seek reimbursement for amounts paid.[13]

Another question presents itself upon a slight modification of the John Doe hypothetical. Instead of paying premiums for his health insurance, assume that Doe was a Medicaid beneficiary who paid no premiums towards his healthcare. Further, assume that the Department of Administrative Services placed a lien on the lawsuit for the $35,000 it paid for Doe's medical expenses. As $35,000 is subject to a right of subrogation, there would be no collateral source reduction of this amount. However, the question then becomes what to do with the $15,000 write-off since a right of subrogation had been asserted.

Our tort system is designed to make a plaintiff "whole" after suffering a loss caused by the defendant's wrong. Thus, it seems logical that a plaintiff should not be permitted to recover written-off amounts despite the right of subrogation existing to the actual amounts paid to the plaintiff's medical providers. In the third version of the hypothetical, Doe was never charged any portion of the $15,000 that was written off and will never become liable for these expenses, so the written-off amounts are not pecuniary losses that Doe ever sustained due to the defendant's

11. *See* CONN. GEN. STAT. § 52-225a(b) (2020).

12. *See id.*

13. *See* 29 U.S.C. § 1144(a) (declaring that ERISA supersedes state law); 42 U.S.C. § 1395y(b)(2) (2020); 42 C.F.R. § 411.24(b) (2021) (authorizing CMS to recover monies paid for items or services when payment is made, or could be made, under a worker's compensation plan or by a liability insurer); *see also* Friedman v. Stackhouse, No. CV095022942, 2009 WL 4068706, at *3 (Conn. Super. Ct. Oct. 29, 2009) (the Employment Retirement Income and Security Act of 1974, or "ERISA," exempts self-funded ERISA plans from state laws that prohibit subrogation of personal injury claims); McInnis v. Hosp. of St. Raphael, No. CV030480767, 2008 WL 4150056, at *2 (Conn. Super. Ct. Aug. 15, 2008).

negligence. From this perspective, awarding these "written-off" amounts makes a person *more than* whole, and—at least financially—in an *even better* position than he or she was before; in essence, a "windfall." Precluding a plaintiff for recovering insurance write-offs—whether a right of subrogation exists or not—seems to be precisely what the legislature envisioned when section 52-225a was enacted.[14]

Prior to the Connecticut Supreme Court's 2016 decision in *Marciano v. Jimenez*, it was widely accepted, starting with *Hassett v. City of New Haven*,[15] that contractual write-offs should be reduced from awarded economic damages in accordance with section 52-225a and the legislative intent behind the abrogation of the common law rule.[16] However, *Marciano* interpreted the statute without resorting to the legislative intent, concluding that the "plain text" of the statute precludes any collateral source reduction when *any* right of subrogation exists.[17] As a result of this overbroad interpretation of the "right of subrogation" exception of section 52-225a, the $15,000 write-off in the hypothetical case of John Doe almost certainly would not be reduced from a verdict as of today.

This Article will further explore the legislative intent behind the "collateral source" rule and will provide a more detailed analysis of the *Hassett* decision and the reasoning of pre-*Marciano* cases as to how write-offs were handled during collateral source hearings. This Article will then closely examine the reasoning of *Marciano*. Suggestions for clarifications and a reconsideration of the opinion by the Connecticut Supreme Court will be offered in light of the text of the statute, the legislative intent, and the negative policy implications this decision has had. In addition, a call to the legislators will be made to expressly amend the text of the law in light of *Marciano*. As it currently stands, the *Marciano* decision unfairly results in a windfall for plaintiffs and has shattered the "equitable balance" the legislature sought to achieve when it enacted section 52-225a.[18] This inequity will continue if the present situation remains the status quo and it should be rectified, whether it be by the Connecticut Supreme Court or

14. *See Joint Standing Committee Hearing, Judiciary, Pt. 6*, 1985 Reg. Sess. 1908 (Conn. 1985) (statement of Sen. Richard B. Johnston).

15. Hassett v. City of New Haven, 880 A.2d 975 (Conn. App. Ct. 2005). *See* discussion *infra* Section I.B.2.

16. *See* Perillo v. Jacobs, No. CV066000215S, 2009 WL 1333920, at *11 (Conn. Super. Ct. Apr. 20, 2009) ("[O]ther trial courts have examined *Hassett* and taken away from it a clear implication; namely, that where a medical provider writes off a plaintiff's medical bills pursuant to a contract or agreement, those write-offs do qualify as collateral source payments capable of reducing the plaintiff's recoverable economic damages.").

17. Marciano v. Jimenez, 151 A.3d 1280, 1284–85 (Conn. 2016).

18. Jones v. Riley, 818 A.2d 749, 756 (Conn. 2003).

the legislature.

I. THE LEGISLATIVE HISTORY AND JURISPRUDENCE OF § 52-225A PRIOR TO *MARCIANO*

A. *Initial Enaction of the Statutory Collateral Source Rule in Connecticut*

1. The Enactment of a "Collateral Source" Statute in 1985

Prior to 1985, a plaintiff was entitled to collect the full amount of his or her claimed medical bills regardless of any payments made by an insurer on behalf of the plaintiff.[19] This included the full amount of the bill before any contractual adjustments were applied.[20] However, awarding the plaintiff damages in this manner permitted insured plaintiffs to obtain a "double recovery" for damages awarded for medical bills; once from an insurance carrier that paid the medical bills directly or reimbursed the plaintiff for the bills, and then a second time from the defendant. Such a scenario created a windfall for plaintiffs to be paid twice and to be compensated more than what was required to restore them to their prior position. Recognizing the inequity of allowing a plaintiff to receive "double recoveries" in such a circumstance, Connecticut first adopted a statutory "collateral source" rule as part of tort reform in 1985.[21] In a Joint Standing Committee Hearing on April 12, 1985 concerning the proposed collateral source rule, House Bill No. 5364, Senator Richard Johnston remarked: "No one is talking of not fully compensating a victim, isn't that right? I mean the plaintiff would be fully compensated for injuries. What the legislative intent is to ensure that a plaintiff would not suffer a windfall judgment."[22]

2. The Amendment of Section 52-225a in 1986

Initially, the codified collateral source rule was meant solely to apply in medical malpractice cases, but that issue was revisited in 1986, at which time the legislature extended the statutory collateral source rule to all

19. Jones v. Kramer, 838 A.2d 170, 176 (Conn. 2004) ("Prior to the enactment of § 52–225a in 1985, Connecticut adhered to the common-law collateral source rule, which provides that a defendant is not entitled to be relieved from paying any part of the compensation due for injuries proximately resulting from his act where payment [for such injuries or damages] comes from a collateral source, wholly independent of him.") (internal quotation marks omitted).

20. *Id.*

21. *See id.* at 176.

22. *Joint Standing Committee Hearing, Judiciary, Pt. 6*, 1985 Reg. Sess. 1908 (Conn. 1985) (statement of Sen. Richard B. Johnston).

personal injury actions.[23] In a debate over House Bill 6134 before the Connecticut House of Representatives on May 6, 1986, Representative Robert Jaekle perfectly illustrated the spirit of the rule:

> We are saying that if somebody gets maybe a $50,000 judgment and $10,000 of medical bills have been paid for under a medical or accident policy, that if I bought my own insurance policy out of my pocket, I'd get $10,000 reduced from my judgment and that's fair because I already had it in this pocket and what have you, and I'd end up with a $40,000 judgment which made me whole . . . . And the whole idea of collateral source was to make sure there wouldn't be double recoveries. Make sure that somebody is still whole for their damages. They get from the defendant what wasn't compensated or paid for, or reimbursed for under some type of an insurance contract, and isn't that fair?[24]

These remarks make clear that the legislative intent was to ensure that the plaintiff was fully compensated for his losses while also prohibiting the plaintiff from receiving any additional damages that would make him *more than* whole. From 1986 through 2012, there were some minor modifications to the collateral source rule, though the rule was largely left intact as it existed originally.[25]

B. Hassett *and the Pre*-Marciano *Era*

1. The Medical Bill: How Healthcare Providers Set Their Charges and Why Write-Offs Occur

It is imperative to understand how medical providers set their bills when considering how a "write-off" amounts to a windfall and why these amounts should be included in collateral source reductions. This scenario occurs, in large part, due to a physician's pay structure. Rather than receive a salary, most physicians and healthcare providers are paid on a "fee-per-service" basis.[26] In a fee-per-service model, a physician is paid

23. *Jones*, 838 A.2d at 176.

24. *An Act Concerning Tort Reform: Hearing Before the House of Representatives, 29 H.R. Proc, Pt. 16*, 1986 Reg. Sess. 8074–76 (Conn. 1986) (statement of Rep. Robert G. Jaekle).

25. In 1987, the statute was amended to delete settlements from the definition of collateral sources. 1987 Conn. Acts 227, sec. 5 (Reg. Sess.) (codified at CONN. GEN. STAT. § 52-225b). In 2007, the statute was rephrased, and the collateral reduction exceptions were further emphasized with subheadings, but no substantive changes were made. 2007 Conn. Acts 217, sec. 191 (Reg. Sess.). In 2010, the statute was amended to also include amounts "contributed or forfeited," in addition to amounts "paid," to be collateral sources. 2010 Conn. Acts 36, sec. 9 (Reg. Sess.).

26. Samuel H. Zuvekas & Joel W. Cohen, *Fee-For-Service, While Much Maligned, Remains the Dominant Payment Method for Physician Visits*, 35 HEALTH AFFS. 411, 411

for each service performed on a particular visit by a patient.[27] For example, under the fee-per-service arrangement, if a patient visited a doctor for a check-up, during which an x-ray and an EKG are also performed, the provider would bill and be paid for: (1) the x-ray, (2) the EKG, and (3) the provider's examination.

Under the fee-per-service model, healthcare providers set their rates for each of their services in order to ensure the maximum reimbursement possible.[28] The reality of our current healthcare system is that most doctors do not know how much they are paid to see a patient due to the varying nature of health insurance payments.[29] Different insurance companies will approve and disapprove of different services and may pay a different amount for the same billing code.[30] In some instances, the same insurance company may even pay different amounts for the same billing code depending on the type of policy a patient has.[31] There is also no way to find out in advance how much an insurance company will pay for a patient visit, and it is difficult to ascertain how much particular insurance companies have paid in the past due to the multitude of different policy types.[32] Furthermore, the provider's computer billing system uses one billable amount for each code and for each insurer, despite the variety of different plans that may exist.[33]

As a result, providers face significant challenges when determining how much to charge for each service. Providers cannot bargain or negotiate the rates in an insurance carrier's fee schedule; the rates are set solely by each individual insurance carrier and the providers can either opt in or opt out.[34] Moreover, providers cannot communicate with one another to determine a "fair market value" for each specific charge because doing so would violate anti-trust laws.[35]

Accordingly, the strategy healthcare providers utilize is to bill for

(2016).

27. *Fee for Service*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/fee-for-service/ (last visited Nov. 1, 2020) [https://perma.cc/M32N-DF5L].

28. *See* David Belk, *Office Billing*, TRUE COST OF HEALTH-CARE, https://truecostofhealthcare.org/outpatient_charges/ (last visited Nov. 1, 2020) [https://perma.cc/N75E-A2FV].

29. *Id.*

30. *Id.*

31. *Id*

32. *Id.*

33. *See S.B. 969 Public Hearing*, *supra* note 9, at 170–71 (statement of Omar Ibrahimi, M.D.).

34. *Id.*

35. *Id.*

more than what they expect in payment.[36] Providers will set fees in this manner to prevent shorting themselves from a reduced reimbursement.[37] As a result, billing charges have exploded in healthcare because the best strategy is to "bill high for every service," then take whatever is given.[38] "Discounting is the rule rather than the exception in healthcare today. '[O]nly a small fraction of persons receiving medical services actually pay original amounts billed for those services.'"[39] As billing rates are set only to ensure the maximum amount of reimbursement, healthcare providers do not expect that the full amount of their bill will be paid or incurred by an insurance carrier, or by their patients. [40]

Looking at contractual write-offs from this backdrop, a double recovery would occur if these amounts are awarded. For example, the plaintiff receives compensation for his charged medical expenses, in part, by amounts subtracted out of his bill due to the write-off. But he would then recover for it again if the defendant is ordered to pay these sums. For that reason, some have dubbed an award of economic damages that includes amounts that were contractually written off as "phantom damages," as these amounts were awarded despite being written off by the physician and not paid by anyone else.[41] Thus, it seems intuitive that a windfall would result if the plaintiff was entitled to retain these "phantom damages" and that they should be reduced from any verdict.

2. How Collateral Source Reductions for Write-offs Were Handled Prior to *Marciano*

Despite clear legislative guidance on the prevention of double recoveries, some superior court judges initially balked at declaring an insurance write-off as a collateral source, arguing that that the term "write-off" was not explicitly listed in the text of the statute defining a "collateral source."[42] A seminal case in this area which ultimately provided guidance on this issue, up to the time of the *Marciano* decision, was *Hassett v. City*

36. *See id.*; *see also* Belk, *supra* note 28 ("Insurance companies will always pay what ever [sic] a medical provider bills up to the maximum amount they're willing to pay for any service.").

37. *Id.*

38. Belk, *supra* note 28.

39. Stayton v. Del. Health Corp., 117 A.3d 521, 530 (Del. 2015).

40. Belk, *supra* note 28.

41. *See S.B. 969 Public Hearing*, *supra* note 9, at 177–79 (statement of M. Karen Noble).

42. *See, e.g.*, Zhuta v. Zhuta, No. CV0440182768S, 2007 WL 2363387 (Conn. Super. Ct. July 27, 2007); Linhard v. Miranda, No. CV020172920S, 2005 WL 2360463, at *3 (Conn. Super. Ct. Aug. 23, 2005); Hernandez v. Marquez, No. 377482, 2004 WL 113616, at *12 (Conn. Super. Ct. Jan. 5, 2004); Sackman v. Sullivan, No. CV970159227S, 2002 WL 31374777, at *1 (Conn. Super. Ct. Sept. 30, 2002).

of New Haven.[43] In *Hassett*, the plaintiff, a police officer for the city of New Haven, sought uninsured motorist benefits stemming from an automobile accident he was involved in with an uninsured motorist while on duty.[44] At trial, the parties stipulated that the plaintiff's related medical expenses amounted to $4,130.50.[45] However, the plaintiff received $3,009.03 in reimbursement for those expenses, and his medical providers, upon receiving payment in that amount, wrote off the remainder off their bills.[46]

The collateral source dispute in *Hassett* centered on whether the amounts written off by plaintiff's treating providers should be subject to a collateral source reduction.[47] In examining the plain text of section 52-225b, the court denied the defendant's collateral source request, finding that the amounts written off by the plaintiff's providers did not fit within the definition of a "collateral source."[48] The court aptly reasoned that the subsequent forgiveness of debt incurred for medical care qualifies as a "payment" to the same extent as a reimbursement or a direct payment of medical bills.[49]

The logic in considering the discharge of a debt as a payment is certainly compelling, especially since both the State of Connecticut and the federal government consider the "discharge of indebtedness" or "debt forgiveness" as "income."[50] However, the critical distinction in *Hassett* in determining whether written-off medical bills constituted collateral sources was whether the write-offs were voluntary or involuntary.[51] Ultimately, the court in *Hassett* noted that in order for the write-off to be considered a collateral source in accordance with section 52-225b, the write-off must have been made pursuant to a contract and not merely gratuitous or voluntary.[52] In *Hassett*, however, the plaintiff's medical providers voluntarily wrote off the balance of the bills, so the court concluded that the write-off did not meet the statutory definition of a

43. Hassett v. City of New Haven, 880 A.2d 975 (Conn. App. Ct. 2005).

44. Hassett v. City of New Haven, 858 A.2d 922, 923–24 (Conn. Super. Ct. 2004).

45. *Id.* at 925–26.

46. *Id.*

47. *Id.* at 923.

48. *Id.* at 924. *See also* CONN. GEN. STAT. § 52-225b.

49. *Hassett*, 858 A.2d at 924. "'Payment' is not a talismanic word. It may have many meanings depending on the sense and context in which it is used." *Id.* (quoting United States v. Consolidated Edison Co. of New York, Inc., 366 U.S. 380, 391 (1961)).

50. Treas. Reg. § 1.61-12 (2020); CONN. AGENCIES REGS. § 1-81-5 (2009).

51. *Hassett*, 858 A.2d at 926.

52. *Id.*

collateral source.[53]

The defending party appealed, in part, because of the court's decision on the collateral source reduction request. On appeal, the appellate court affirmed and adopted the trial court's reasoning as the "proper statement of the issues and the applicable law concerning [collateral source reductions]."[54] After *Hassett* had been affirmed by the appellate court, other superior court judges expanded upon the application of collateral source reductions in the context of involuntary write-offs.[55]

In *McInnis v. Hospital of St. Raphael*, the court applied the *Hassett* reasoning to Medicare and Medicaid write-offs.[56] In *McInnis*, the plaintiff was awarded $903,240.91 in economic damages for medical expenses.[57] Of that amount, the parties stipulated, and the court accepted, "that a total of $430,534.20 worth of economic damages were not collateral sources because the payments were either subject to a right of subrogation or paid directly by the plaintiff."[58] The dispute for a collateral source reduction centered around the remaining portion of the awarded economic damages of $472,706.71, which had been contractually written off.[59]

Applying *Hassett*, the court reasoned that because healthcare providers participating in Medicare and Medicaid are required to write-off unpaid portions of their bill pursuant to federal law, these write-offs are "involuntary" and thus meet the definition of a collateral source under section 52-225b.[60] Furthermore, in a case involving Medicare and Medicaid write-offs, the court noted that the defendant need not produce a copy of the contract into evidence as courts may judicially notice the statutory obligation that Medicare and Medicaid providers have to write unpaid expenses.[61] As a result, the court ordered a collateral source reduction of $472,706.71 from the awarded economic damages, representing the portion of the damages awarded for written-off medical

53. *Id.*

54. *Id.* at 977.

55. *See, e.g.*, McInnis v. Hosp. of St. Raphael, No. CV030480767, 2008 WL 4150056 (Conn. Super. Ct. Aug. 15, 2008); Bonsanti v. Newman, No. CV030401098, 2006 WL 413011 (Conn. Super. Ct. Feb. 3, 2016).

56. *McInnis*, 2008 WL 4150056 at *1.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* Though the plaintiff argued that the analysis in *Hassett* regarding involuntary write-offs was merely dictum, the court in *McInnis* disagreed, noting that the strong language utilized in *Hassett* was "intended to lay down positive law" and that the analysis was also affirmed by the appellate court and uniformly adhered to in subsequent decisions by other judges of the superior court. *See id.* at *3–4.

61. *Id.* at *3.

bills.[62]

Similarly, in *Bonsanti v. Newman*, the *Hassett* opinion was applied in a post-verdict collateral source hearing to the portion of the economic damages awarded representing contractual adjustments made in accordance with an ERISA plan.[63] In *Bonsanti*, the jury awarded the plaintiff $215,702.23 in medical bills, though the ERISA plan paid only $139,619.16 of the bills and the plaintiff's medical care providers adjusted their billing by $76,083.07.[64] The court held that $139,619.16 of the economic damages were not collateral sources, as that amount was subject to a federal right of subrogation by the ERISA plan.[65] The court noted that "[t]he remaining $76,083.07 in medical special damages awarded by the jury is free from any right of subrogation."[66]

The court in *Bonsanti* artfully reasoned why such amounts should be deemed collateral sources. To start, the court noted that *Hassett* was "Appellate Court authority," and under *Hassett*, the involuntary adjustments by the plaintiff's treating providers in *Bonsanti* was an involuntary forgiveness of debt and, accordingly, a "collateral source" under section 52-225b.[67] The court also rejected the plaintiff's arguments that the write-offs were not collateral sources because they were not "specifically included" in section 52-225b.[68] Accepting such a contention would "undermine[] the purpose of the statute 'to prevent plaintiffs from obtaining double recoveries . . . .'"[69]

The court in *Bonsanti* further declared that "[i]n determining the proper amount for a collateral source reduction, consideration should be given to what the plaintiff is actually entitled to recover."[70] The court stated that a plaintiff can only recover "*[t]he actual cost* of medical care which was both reasonable and necessary based on the injury sustained."[71] Thus, the court declared that the "$139,619.16 paid by [the ERISA plan] after contractual adjustments represents the true cost of the plaintiff's medical care."[72] This is because, while the plaintiff will have to reimburse

62. *Id.*

63. Bonsanti v. Newman, No. CV030401098, 2006 WL 413011, at *1 (Conn. Super. Ct. Feb. 3, 2006).

64. *Id.*

65. *Id.* at *3.

66. *Id.*

67. *Id.*

68. *Id.* at *4.

69. *Id.*

70. *Id.*

71. *Id.* (emphasis added) (citing CONN. GEN. STAT. § 52-572h(a)(1)).

72. *Id.* at *5.

the ERISA plan for this sum, he will "never become responsible for the $76,083.07 forgiven by his medical providers."[73] Emphatically, the court held that the verdict was to be reduced by $76,083.07 "because that amount represents a potential windfall for the plaintiff in excess of his cost of reasonable medical care and contrary to the purpose of section 52-225a."[74]

McInnis and *Bonsanti* are illustrative of the large disparity that may exist between the amounts that Medicare or an ERISA plan may pay versus the amounts charged by healthcare providers. These cases are demonstrative of the spirit of the rule as it was intended to function.[75] Not only in light of the text of section 52-225b, but also in regard to the legislative intent of preventing a double recovery.[76] Up until the *Marciano* decision, *Hassett* was widely accepted as binding authority by multiple superior court judges for the collateral source reduction of contractual write-offs.[77]

3. The 2012 Amendment to the Collateral Source Rule

In 2012, the legislature passed Public Act 12-142, which amended section 52-225a in light of *Hassett* to explicitly permit evidence that a medical provider accepted less than the full amount of the charges when determining a collateral source reduction.[78] However, along with amending section 52-225a, Public Act 12-142 also amended section 52-174 to exclude any collateral source information from going to the jury.[79] Instead, in all cases going forward, the jury would only be permitted to learn the "full sticker price" of the medical bills without any contractual

73. *Id.*

74. *Id.*

75. *See Bonsanti*, 2006 WL 413011 at *5; McInnis v. Hosp. of St. Raphael, No. CV030480767, 2008 WL 4150056, *3 (Conn. Super. Ct. Aug. 15, 2008).

76. *See* cases cited *supra* note 75.

77. *See, e.g.*, Baldwick v. McRedmond, No. LLICV156012149S, 2016 WL 5339556, at *2 (Conn. Super. Ct. Aug. 23, 2016); Ventura v. Town of E. Haven, No. CV085024235S, 2015 WL 1588816, at *9 (Conn. Super. Ct. Mar. 13, 2015), *rev'd on other grounds*, 170 Conn. App. 388, 154 A.3d 1020 (2017), *aff'd*, 330 Conn. 613, 199 A.3d 1 (2019); Cima v. Sciaretta, No. UWYCV0096001772, 2011 WL 4509917, at *11 (Conn. Super. Ct. Sept. 14, 2011), *aff'd*, 140 Conn. App. 167 (2013); Olivero v. Ferrante, No. CV044001161S, 2010 WL 1629993, at *2 (Conn. Super. Ct. Mar. 22, 2010); Perillo v. Jacobs, No. CV066000215S, 2009 WL 1333920, at *11 (Conn. Super. Ct. Apr. 20, 2009); *McInnis*, 2008 WL 4150056, at *4; Furlong v. Merriman, No. HHBCV044000416S, 2006 WL 1461112, at *10 (Conn. Super. Ct. Mar. 5, 2013); *Bonsanti*, 2006 WL 413011, at *3.

78. *See Hearing on H.B. 5545 Before the Joint Standing Comm. on Judiciary*, 2012 Leg., 4346–68 (Ct. 2012) (statement of Susan Giacalone, Ins. Ass'n of Conn.).

79. *See Hearing on H.B. 5545 Before the Joint Standing Comm. on Judiciary*, 2012 Leg., 4271–72 (Ct. 2012) (statement of Sen. Eric D. Coleman).

adjustments or insurance payments.[80]

Prior to the enaction of Public Act 12-142, evidence of collateral source payments was admissible for the purpose of assisting the jury in determining the reasonable value of the medical services if the evidence demonstrated that a "windfall recovery" would result.[81] Therefore, the modification to section 52-174 vis-à-vis the enaction of Public Act 12-142 made the post-verdict collateral source hearing substantially more significant. The effect of this legislation was to make the trial judge the only gatekeeper in ensuring the plaintiff did not obtain a windfall judgment.

II. THE *MARCIANO* DECISION AND ITS REASONING TO BROADEN THE "RIGHT OF SUBROGATION" EXCEPTION TO COLLATERAL OFFSETS

The collateral source rule, however, would become severely constrained after the Connecticut Supreme Court's decision in *Marciano v. Jimenez*. At the trial level, the court ordered a collateral source reduction for the portion of the awarded economic damages that were not subject to reimbursement or any other credit. On appeal, the supreme court, however, took an overly broad approach to the "right of subrogation" provision within section 52-225a that has had the effect of nullifying *any* collateral source reduction in cases involving Medicare, Medicaid, and ERISA-plan beneficiaries.

A. *The Procedural History of* Marciano

The *Marciano* case was a personal injury action in which the plaintiff sought injuries in connection with a motor vehicle accident.[82] At trial, the jury awarded the plaintiff $84,283.67 in economic damages and $40,000 in non-economic damages, for a total verdict of $124,283.67.[83] Following the trial, the defendants moved for a collateral source reduction of the plaintiff's economic damages pursuant to section 52-225a, as the plaintiff had only paid $1,941.49 towards his claimed expenses.[84]

In determining the amount of the collateral offset, the trial court found that the plaintiff was entitled to a credit under section 52-225a(c) totaling $51,102.24 for contributions he and his employer paid to procure the insurance coverage over the three-year span of his claimed medical

80. *Id.*

81. Madsen v. Gates, 857 A.2d 412, 418 n.4 (Conn. App. Ct. 2004).

82. Marciano v. Jimenez, 151 A.3d 1280, 1281–82 (Conn. 2016).

83. *Id.*

84. Marciano v. Jiminez, No. CV126019643, 2015 WL 2458076, at *1 (Conn. Super. Ct. May 6, 2015), *rev'd sub nom. Marciano*,151 A.3d 1280.

treatment.[85] The major dispute, unlike in *Bonsanti*, was regarding a lien placed on the plaintiff's lawsuit by his insurance carrier, which was a self-funded ERISA plan.[86] A letter was submitted into evidence that the plaintiff's employer agreed to accept $6,940.19 in full and final satisfaction of the employer's subrogation claim.[87] Accordingly, finding that $51,102.24 was paid to procure the benefits in question and that there was no right of reimbursement to any of the remaining sums awarded to the plaintiff other than $6,940.19, the trial court applied a collateral offset to the awarded economic damages in the amount of $24,299.75.[88]

B. *The Parties' Arguments on Appeal*

The plaintiff in *Marciano* appealed the trial court's decision to order a collateral source reduction.[89] In his attempt to recoup the amount offset by the trial court, the plaintiff argued for the court to reverse the decision solely on the basis that a "right of subrogation," did exist, while acknowledging that his employer indicated a "willingness to accept a lesser amount than full reimbursement."[90] In essence, the plaintiff tacitly acknowledged that he was not going to incur any subrogation demands from his employer for anything beyond $6,940.19, but nonetheless was still seeking the full award.

The defendants pointed out the inequity in such a scenario. Noting that the plaintiff, who already received the benefit of having his claimed medical expenses paid for by his employer, would then obtain a "double recovery" by receiving an additional $24,299.75 for economic damages that he never personally bore.[91] The defendant also argued that the court's interpretation of section 52-225a should be guided by the legislative intent behind the passage of the statute, which the defendant claimed would lead

85. *See id.* at *2 n.4 The trial court, citing *Alvarado v. Black*, 728 A.2d 500, 503 (Conn. 1999), noted that the "payments an employer makes to purchase health insurance for an employee are not gratuitous" and are "made as part of the employee's compensation," so all contributions paid by the plaintiff's employer were also encompassed in calculating the plaintiff's credit against a collateral source reduction pursuant to Connecticut General Statutes § 52-224a(c). *Id.* at *2.

86. *Id.* at *1. ERISA plans are typically self-funded and have been permitted to assert a right of subrogation despite the "anti-subrogation" language of Connecticut General Statutes § 52-225c. *See, e.g.*, Bonsanti v. Newman, No. CV030401098, 2006 WL 413011 (Conn. Super. Ct. Feb. 3, 2006); Gauntlett v. Dean Webb, No. CV980352842, 2003 WL 22079536, at *1 (Conn. Super. Ct. Aug. 13, 2003).

87.) *Marciano*, 2015 WL 2458076, at *1.

88.) *Id.* at *2 n.4.

89.) *Marciano*, 151 A.3d at 1281–82.

90.) *Id.*

91.) *Id.* at 1284–85.

to a partial reduction of the economic damages awarded for any portion of the lien that had been forgiven.[92]

C. *The Supreme Court's Decision*

The Connecticut Supreme Court reversed the trial court's collateral source reduction based on its interpretation of section 52-225a.[93] The court argued that under the "strict interpretation" of the statute and applying the "plain meaning rule," the statute was clear that if there is a right of reimbursement, whether for all or part of the collateral source amount, that there shall be no collateral source reduction.[94] In the court's opinion, the fact alone that a right of subrogation had been asserted nullified the court's ability to order *any* reduction.[95] The court defended this over-expansive approach by stating that there was no "restrictive or qualifying language" that would permit a partial reduction of any sort, and further stated that the legislature's use of the modifier "a" before right of reimbursement supports its interpretation.[96]

Additionally, pursuant to Connecticut General Statutes section 1-2z, the court declined to consult the legislative history holding that its application of the statute did not yield an absurd result.[97] The court noted that the legislature strived to reach an "equitable balance" between preventing plaintiffs obtaining a double recovery on the one hand and preventing defendants from benefiting from reduced judgments due to collateral source payments on the other.[98] The court reasoned that denying a collateral offset in that particular matter was not an "absurd result" because under the common law, a defendant was not entitled to any collateral offset, and it declared insurance proceeds are not "pure double recoveries" since premiums must be paid to obtain the proceeds.[99]

92.) *Id.* at 1284.

93.) *Id.*

94.) *Id.* at 1283–84.

95.) *Id.* at 1284.

96.) *Id.*

97. *See id.* at 1284–85; *see also* CONN. GEN. STAT. § 1-2z ("The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.").

98.) *Marciano*, 151 A.3d at 1285.

99.) *Id.*

III. THE AFTERMATH OF *MARCIANO*: SUPERIOR COURTS NOW APPLY § 52-225A INCONSISTENT WITH LEGISLATIVE INTENT AND THE "EQUITABLE BALANCE" BETWEEN LITIGANTS HAS BEEN DISMANTLED

Since *Marciano*, unfair results have been pronounced in light of the award of "phantom damages," which has become commonplace. Citing *Marciano*, lower-level courts have refused the entry of a collateral source reduction in any case involving the presence of a lien, regardless of the amount. As of today, even sums awarded as economic damages that are not encapsulated by a lien are not being reduced from verdicts, severely tipping the equitable balance between litigants almost back to the way things existed prior to the enaction of section 52-225a.

A. *The Trial Courts Have Interpreted* Marciano *in an Overbroad Manner*

The holding of *Marciano*, though involving an ERISA plan and a provisional agreement to reduce the lien amount *for purposes of settlement*, has resonated in nearly all subsequent trial court decisions in collateral source hearings in cases upon which a federal lien has been asserted.[100] The clear implication that these judges have taken from *Marciano* is that if there is any right of subrogation, there can be no collateral source reduction for any amount, even for write-offs that are not subject to any right of subrogation.[101] For example, in *Zogai v. Jacobs*, the defendants sought to reduce the portions of the plaintiff's claimed economic damages that represented amounts that were contractually written off by Medicare or Medicaid.[102] The court clearly expressed its opinions on the matter and further discussed the constraint placed by the precedence of *Marciano*:

> I would agree . . . that the write-offs are properly addressed in remittitur to reduce economic damages to the true cost of medical services incurred by plaintiff. I would disagree with the argument that

100. *See* Hanley v. Simbus Café, No. CV136012228S, 2020 WL 4815863 (Conn. Super. Ct. July 23, 2020); Zogai v. Jacobs, No. FSTCV186034735S, 2019 WL 7630765 (Conn. Super. Ct. Dec. 4, 2019); Roberto v. Boehringer Ingelheim Pharm., No. HHDCV166068484S, 2019 WL 5068452 (Conn. Super. Ct. Sept. 11, 2019); Sutera v. Nathiello, No. KNLCV146022399, 2017 WL 6417801, at *2 (Conn. Super. Ct. Nov. 20, 2017).

101. *See generally* cases cited *supra* note 100. *But see* Memorandum of Decision RE: Motion For Remittitur (#191), Doucet v. Jameson, No. UWY-CV15-6028456-S (Conn. Super. Ct. Oct. 1, 2019), Entry No. 199.00 (distinguishing *Marciano* and holding that Medicare write-offs were to be reduced from the verdict not due to the collateral source, but because the write-offs exceeded the scope of recoverable economic damages as defined by section 52-572h(a)(1)).

102. *Zogai*, 2019 WL 7630765, at *1–2. Though the defendants filed a Motion for Remittitur, the court treated it as a Motion for Collateral Source Reduction. *Id.*

> because subrogation rights exist for Medicaid payments actually made there is no valid basis for reducing the award of economic damages by write-offs required as a benefit of the federal programs that will never actually be paid or collected by anyone and so are not subject to subrogation. . . . Nevertheless, the Supreme Court made very clear in *Marciano* that "when any right of subrogation exists, whether in full or in part, for a collateral source, § 52-225a precludes the trial court from ordering any collateral source reduction at all. . . . The collateral source here is Medicaid and there is a right to subrogation. . . . Although *Marciano* dealt with deductions for payments from collateral sources not write-offs, the *broad prohibition* by the Supreme Court against collateral source reductions if there is a right to subrogation "in full or in part," leaves no room for this Court to grant the remittitur requested.[103]

In another post-*Marciano* case, *Sutera v. Nathiello*, the plaintiff was awarded $608,534.66 for medical expenses despite his Medicaid coverage paying out only $245,669.53 and the remainder was written off by the providers.[104] As it stood, the plaintiff was set to recover more than $350,000 for medical expenses he never personally incurred.[105] However, the court denied the defendant's request to reduce the portion of the plaintiff's awarded economic damages that represented amounts written off by medical providers, ruling that under *Marciano* "[the] court is precluded from ordering any collateral source reduction" because the State of Connecticut had a right of subrogation for accident-related medical bills.[106]

Similarly, in *Roberto v. Boehringer Ingelheim Pharmaceuticals, Inc.*, the jury awarded the plaintiff $42,464.45 in medical expenses, though the plaintiff's Medicare coverage paid only $7,911.39 of the bills and the plaintiff paid $10.67, while the remaining portions were adjusted or written off.[107] In ruling on the defendant's motion for a collateral source reduction, the court acknowledged the historical approach of superior court judges in ordering collateral source reductions for write-offs, citing specifically to *Bonsanti*, but declared that the Connecticut Supreme Court's decision *Marciano* was its binding precedent.[108] Ultimately, the

103. *Id.* at *4–5 (internal citations omitted) (emphasis added).

104. Sutera v. Nathiello, No. CV146022399, 2017 WL 6417801 at *1 (Conn. Super. Ct. Nov. 20, 2017).

105. *See id.*

106. *Id.* at *2.

107. Roberto v. Boehringer Ingelheim Pharm., Inc., No. HHDCV166068484S, 2019 WL 5068452 at *27 (Conn. Super. Ct. Sept. 11, 2019).

108. *Id.*

court in *Roberto*, citing *Marciano* and *Sutera*, denied the request for a collateral source reduction for the amount of the write-offs pursuant to Medicare on the basis that a right of subrogation existed, which precluded it from making any collateral source reduction.[109]

In another recent case, *Hanley v. Simbus Café*, the plaintiff was awarded $251,641 for her past medical bills.[110] Post-verdict, the defendant sought a collateral source reduction on the basis of the plaintiff's Medicare coverage for her claimed bills.[111] The court in *Hanley* noted that "under the federal statutory scheme governing Medicare, a right to subrogation exists either in part or in full."[112] Accordingly, the court in *Hanley,* citing *Marciano*, also struck down the defendant's request for a collateral source reduction as it found a right of subrogation existed.[113]

B. *The Equitable Balance between Litigants Has Been Dismantled in Light of* Marciano

The "equitable balance" upon which *Marciano* refers is the notion that, on the one hand, while plaintiffs should not get the windfall of a "double recovery," defendants should not get the windfall of a "reduced judgment" due to the plaintiff's insurance.[114] Moreover, the court declared that "[i]f there must be a windfall[,] certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing."[115] This argument, however, is wholly incompatible with the nature of compensatory damages, which is intended to make the plaintiff whole.[116] Rather, requiring that a defendant pay damages to the plaintiff for medical expenses that the plaintiff never incurred is punitive in nature because its only purpose is to punish the defendant.[117]

109. *Id.* at *28.

110. Hanley v. Simbus Café, CV CV136012228S, 2020 WL 4815863 at *1 (Conn. Super. Ct. Jul. 23, 2020).

111. *Id.* at *2.

112. *Id.* at *3.

113. *Id.*

114. Marciano v. Jimenez, 151 A.3d 1280, 1285 (Conn. 2016).

115. *Id.*

116. *See* Gary M. Langlois, Jr., *Louisiana's Collateral Source Rule: Eliminating the "Windfall" Arising from Medical Expense Write-Offs*, 63 LOY. L. REV. 291, 316 (2017).

117. *See id. See also Iino v. Spalter*, 192 Conn. App. 421, 468 n. 14 (2019).

> [P]unitive damages are damages awarded not to compensate the plaintiff for any injury or losses but to punish the defendant for outrageous conduct. . . . Punitive damages may be awarded for conduct that is outrageous, because of the defendant's reckless indifference to the rights of others or an intentional and wanton violation of those rights.

Awarding punitive damages on this basis, when they otherwise would not be available, is wholly inappropriate.[118] In these circumstances, the plaintiff is not just made whole, but is placed in a better financial position than he or she was before the accident. The *Marciano* decision has led, and will continue to lead, to inflated verdicts and settlements. That is shown by the *Sutera* decision above, where the *Marciano* holding permitted the plaintiff to retain $350,000 of the awarded economic damages that most certainly would have been reduced at a collateral source hearing prior to *Marciano*.

As a result, plaintiffs are incentivized to "rack up their damages." In 2012, during debate on the Senate Floor regarding Public Act 12-142, State Senator Kevin Witkos, while discussing the impact an amendment to section 52-174 to allow the "full medical bills" as evidence at trial, gave remarks that are equally applicable to the situation now in which write-offs are not subject to collateral source reduction:

> I think in our society . . . we set things up for lawsuits so somebody can make money. . . . If you know that you, in your mind, as you're going through you say I'm going to file a lawsuit, well, guess what, I want a private room. I want 24 hour care. I want—I want, I want, I want because you know you want to build up that dollar amount. You might not be reimbursed for it all because insurance is only going to pay for part of it. But you can boost up that bill in—because you're going to benefit by that later on down the road. But then everybody else suffers.[119]

That is the situation we presently find ourselves in. In cases where a lien has been asserted, plaintiffs have every incentive to inflate these types of expenses. Under *Marciano*, they can now profit off of these additional bills, for while their insurance pays for their treatment, they will profit when defendant has to pay them for the amounts written off. Moreover, since section 52-174 was amended in 2012 to prohibit the jury from seeing collateral source information, the defendant is left without any recourse to remedy the jury's award of damages for the amounts of physician write-offs when *any* right of subrogation has been asserted.

Accordingly, settlement demands (and verdicts, if matters do make it to trial) are now inflated, as plaintiffs have no incentive to settle a matter unless the settlement encompasses the write-offs.[120] Therefore, a

Id.

118. *See generally* Langlois *supra* note 116.

119. *Hearing before the Senate*, 55 Sen. Proc., Pt. 14, 2012 Sess., 4264-65 (statement of Sen. Kevin D. Witkos).

120. *See S.B. 969 Public Hearing*, *supra* note 9, at 177–79 (statement of M. Karen

significant effect of *Marciano* is that it has crippled the public policy of resolving disputes via settlement, which has the secondary effect of forcing the State of Connecticut to expend judicial resources on trials when those resources could otherwise be put to better use.[121]

Moreover, some are concerned that insurance companies will raise premiums in response to these inflated verdicts and settlements.[122] Indeed, at least one physician has stated that the effect of *Marciano* is to discourage physicians from taking on Medicare and Medicaid patients out of concern for increased medical liability premiums in the event of a malpractice suit which could result in an inflated verdict or settlement.[123] As a result, Connecticut may have a difficult time recruiting talented physicians to come to the state.[124]

IV. THE *MARCIANO* HOLDING SHOULD BE RECONSIDERED IN ORDER TO RESTORE THE EQUITABLE BALANCE BETWEEN LITIGANTS

As the equitable balance has been completely tipped in the plaintiff's favor, the Connecticut Supreme Court should reconsider its holding. The court should reexamine the statute and should consult the legislative intent of section 52-225a, as doing so should compel a different result and should restore the "right of subrogation" exception of section 52-225a to its original meaning. In any event, the court should clarify whether its holding was meant to encompass contractual "write-offs."

A. *The Court's Reasoning in* Marciano *Should Be Reconsidered as It Is Not in Line with the Text of the Statute or Legislative Intent*

The court's reasoning in *Marciano* should be reconsidered as its construction of the plain meaning of section 52-225a is flawed. The court also did not review the legislative history behind section 52-225a, and its holding seems to defy the basic legislative intent behind the law's passage. As such, the court should reconsider its decision in *Marciano* in order to correct the shortcomings of its decision.

1. The Court's Interpretation of the Statute Is Lacking

The court's interpretation of section 52-225a in *Marciano* is an overly broad reading of the narrow exception that the legislature placed into the

Noble).

121. Linda Cheng and Eric Niederer, Marciano v. Jimenez: *The Plaintiff's Windfall*, 30 J. CONN. DEF. LAWS. ASS'N 1, 6 (2017).

122. *See S.B. 969 Public Hearing*, *supra* note 9, at 169–79 (statements of Omar Ibrahimi, M.D., and M. Karen Noble).

123. *See id.* at 169–77.

124. *See id.* at 171–72.

statute. What the court fails to address in its opinion is that under the plain text of the statute, collateral source reductions are precluded only in two distinct circumstances, labeled as exception "(A)" regarding amounts subject to subrogation and exception "(B)" regarding amounts subject to reduction due to the plaintiff's percentage of negligence.[125]

Exception "(A)," upon which the court bases its decision, states explicitly that a court is precluded from ordering a reduction for "*a collateral source* for which a right of subrogation exists."[126] It has to be presumed that the statutorily defined term "collateral source" was deliberately put into this exception in order to limit the scope of the exception's application.[127] Furthermore, as the court noted in *Marciano*, the use of the modifier "a" before "collateral source" encapsulates any and all of the collateral sources in the case, not just one.[128]

The superior court's opinion in *Hassett*, which was affirmed and adopted by the appellate court and remains good law, declared that contractual physician write-offs are collateral sources pursuant to section 52-225b.[129] These write-offs are not subject to reimbursement or subrogation. Thus, exception "(A)" contained within section 52-225a(a) does not apply to these amounts because they are "collateral sources" for which "no right of subrogation exists."[130]

Therefore, the plain text of the statute indicates that the legislature intended to exempt only those collateral reductions that are subject to a right of reimbursement. Had the legislature intended that there would be no collateral source reductions when there is *any* right of reimbursement, it would have said so and would not have included the phrase "a collateral source for which" in exception "(A)."[131]

Ultimately, the holding in *Marciano* fails to consider this crucial phrase. Consequently, the lower-level courts are left with an overly broad exception to the collateral source rule that is leading to inequitable results. Its broad holding that "any right of subrogation" nullifies *all* collateral source reductions should be reconsidered to address the legislature's inclusion of the phrase "a collateral source" in the exception it relies on to make such a declaration.

125. *See* CONN. GEN. STAT. § 52-225a(a) (2014).

126. *Id.* (emphasis added).

127. *See* Cruz v. Montanez, 984 A.2d 705, 713 (Conn. 2009).

128. Marciano v. Jimenez, 151 A.3d 1280, 1284 (Conn. 2016).

129. *See* Hassett v. City of New Haven, 858 A.2d 922, 923–24 (Conn. Super. Ct. 2004), *aff'd*, 880 A.2d 975 (Conn. App. Ct. 2005).

130. *See* CONN. GEN. STAT. § 52-225a(a) (2014).

131. *Id.*

2. The Legislative History Should Have Been Consulted

Despite the "historical underpinnings" of the common-law collateral source rule, the Connecticut Supreme Court had previously acknowledged that section 52-225a *abrogated* the common-law collateral source rule, meaning that the application and policy of the common law collateral source rule has no bearing on whether the court's construction of section 52-225a would yield an "absurd" result.[132] Moreover, the court's argument that insurance proceeds do not constitute "pure double recoveries" due to a plaintiff's payments of premiums is not compelling. Any amount a plaintiff recovers beyond the amounts he expended or incurred would still amount to a windfall, whether it is "pure double recovery" or not.[133] Thus, the court's argument that an "absurd result" does not arise from denying a collateral source reduction for write-offs merely because the plaintiff has paid premiums is weak.

3. The Court Should Declare That Its Holding in *Marciano* Does Not Apply to Contractual Write-Offs

The overbreadth of the application of the court's ruling on the "right of subrogation" exception to section 52-225a in *Marciano* by superior court judges should cause the court to clarify whether its holding was meant to extend to anything beyond a *voluntarily* reduced lien. Since the question in *Marciano* was whether a collateral source reduction exists for the portion of the lien that was subsequently forgiven—not whether collateral sources not subject to the lien could be reduced—the Connecticut Supreme Court should provide clarification on this point.[134]

Hassett and *Marciano* can be reconciled with one another in that both cases stand for the proposition that the *full amount* of the lien, whether forgiven or not, will not be subject to a collateral source reduction. However, these holdings should not preclude a collateral source reduction to other portions of the economic damages awarded that qualify as a "collateral source" and are not themselves subject to a right of subrogation.[135] Rather, the holding of *Hassett* that involuntary write-offs constitute a collateral source should be endorsed rather than an all-out "ban" on collateral source reductions when *any* lien is present. In the appropriate case, the court should consider *Hassett*, as well as *McInnis*

132. Jones v. Kramer, 838 A.2d 170, 177 (Conn. 2004) ("The legislature clearly enacted § 52–225a in derogation of the common-law collateral source rule.").

133. CONN. GEN. STAT. § 52-225a(a) (2014).

134. *See generally* Marciano v. Jimenez, 151 A.3d 1280 (Conn. 2016).

135. *See id.* at 1284–85; *see also* Hassett v. City of New Haven, 858 A.2d 922, 924 (Conn. Super. Ct. 2004), *aff'd*, 880 A.2d 975 (Conn. App. Ct. 2005).

and *Bonsanti*, to clarify that its holding in *Marciano* does not prohibit the collateral source reductions of contractual "write-offs," if the court is otherwise inclined to not overrule *Marciano* in its entirety.

CONCLUSION

In light of the *Marciano* holding, inequitable and fundamentally unfair results have occurred. Plaintiffs can now receive "double recoveries" when a "right of subrogation" exists as to their claimed medical bills. This occurs despite the legislative intent of section 52-225a to prevent "double recoveries" because plaintiffs are now permitted to recover amounts written off contractually by their treating providers, though these amounts were never paid and not subject to subrogation. The current state of jurisprudence as to section 52-225a is inapposite—not only to the text of, and legislative intent behind the statute—but also to the prior statutory application of the collateral source rule starting with *Hassett*. As such, the Connecticut Supreme Court should reconsider the *Marciano* ruling for the reasons expressed above.

In addition, the legislature should also take action in light of the harsh results of *Marciano*. The Connecticut Legislature should want to clarify the court's overly broad expansion of the "right of subrogation" exception to section 52-225a. Presently, a bill has been introduced in the 2021 Session, House Bill No. 6465, that would rectify the *Marciano* holding by amending section 52-225a to declare that only an "amount . . . subject to a right of subrogation" would be exempted.[136] Therefore, in order to clarify the true "right of subrogation" exception consistent with the legislative intent behind the initial enaction of the statute, House Bill 6465 should be considered.[137]

136. H.B. 6465, 2021 Leg., Reg. Sess. (Conn. 2021), https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2021&bill_num=6465.

137. *Id.*