EMERGING LEGAL ISSUES IN SPECIAL DAMAGES – COLLATERAL SOURCE, FINANCE AGREEMENTS, AND MORE

BY: ROBERT E. KLEINPETER

LAJ LAST CHANCE CLE CONFERENCE 12/14/2018

I. Introduction

Most claims, cases, and trials are about compensatory damages. These damages are supposed to make plaintiffs whole or, put another way, place them in the position they would have been had the tort not been committed. There are two kinds of compensatory damages—special and general. Special damages are those capable of calculation, unlike general damages, which cannot be determined with such certainty.

To maximize a client's recovery of special damages, the plaintiff's lawyer must be familiar with the proper application of the collateral source rule and defense arguments to diminish the net recovery. This presentation discusses the law of special damages and ways for a plaintiff to retain and increase those damages.

II. Collateral Source

"Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution." *Louisiana Dep't of Transp. & Dev. v. Kansas City S. Ry. Co.*, 02-2349 (La. 5/20/03), 846 So. 2d 734, 739; *Bozeman v. State*, 03-1016 (La. 7/2/04), 879 So. 2d 692, 698. The

collateral source rule is both a rule of evidence (evidence of monies received is inadmissible) and of damages (damages may not be reduced by monies received).

A. Reasons for, and requirements of, the collateral source rule

Several public policy concerns support the collateral source rule. The tortfeasor should not gain an advantage from independent benefits provided to a plaintiff, and without the rule, victims would be dissuaded from purchasing insurance or pursuing other forms of available reimbursement. *Kansas City*, 846 So. 2d at 739. The major policy reason, however, for applying the rule to damages is tort deterrence. "The underlying concept is that tort damages can help to deter unreasonably dangerous conduct. Tort deterrence has been an inherent, inseparable, aspect of the collateral source rule since its inception over one hundred years ago." *Bozeman,* 879 So. 2d at 700. *See also Bellard v. Am. Cent. Ins. Co.*, 07-1335 (La. 4/18/08), 980 So. 2d 654, 668; *Cutsinger v. Redfern*, 08-2607 (La. 5/22/09), 12 So. 3d 945, 952.

The focus of the analysis is on the nature of any reduction **vis-à-vis the tortfeasor**. *Kansas City*, 846 So. 2d at 744; *Bozeman*, 879 So. 2d at 703; *Bellard*, 980 So. 2d at 670, n.6. Any possible windfall should inure to the benefit of the victim, rather than the tortfeasor. The risk of double recovery is preferable to allowing the tortfeasor to escape full responsibility. *Kansas City*, 846 So. 2d at 743–44.

The collateral source rule was clarified in several decisions post-*Bozeman*. In *Bellard* and *Cutsinger*, the plaintiffs settled with the tortfeasor before trial. The issue was whether an uninsured motorist carrier was entitled to a credit for medical and disability wage benefits paid to or on behalf of the injured plaintiff by a worker's

compensation insurer. Application of the collateral source rule in that situation would have allowed the plaintiff to recover the same damages twice—a true double recovery—first from the worker's compensation insurer and then again from the uninsured motorist carrier. The Court found the rule does not operate to override the principles of solidary liability, especially when the tortfeasor would not be affected. A comparable result was reached in *Hoffman v. Travelers Indem. Co. of Am.*, 13-1575 (La. 5/7/14), 144 So. 3d 993, where the Court was called upon to determine the meaning of "incurred" under the medical payments coverage of an uninsured motorist policy. Notably, there was no mention of a tortfeasor.

Bellard, *Cutsinger,* and *Hoffman* differed from *Bozeman* in that they involved contractual obligations independent of the tortfeasor. The tortfeasor was in no way affected by the interplay between the insurers. Thus, the guiding principles are:

> After *Bozeman*, two primary considerations guide our determination with respect to the collateral source rule. The first consideration is whether application of the rule will further the major policy goal of tort deterrence. The second consideration is whether the victim, by having a collateral source available as a source of recovery, either paid for such benefit or suffered some diminution in his or her patrimony because of the availability of the benefit, such that no actual windfall or double recovery would result from application of the rule.

Bellard, 980 So. 2d at 669.

The second consideration focuses on the source of, and facts surrounding, the benefit. Of the three variations to the collateral source rule as it applies to medical expenses, Louisiana embraces the benefit of the bargain approach and compensates the plaintiff the full value of his medical expenses, including the "write-off" amounts, if the plaintiff has paid "some consideration for the benefit." *Bozeman*, 879 So. 2d at

703. When a write-off or other benefit occurs, the collateral source rule applies to damages recoverable against the tortfeasor if (1) the tortfeasor did not procure or contribute to the benefit, and (2) the plaintiff gave some form of consideration, *i.e.*, the plaintiff's patrimony has been diminished, to obtain the benefit.

Bozeman discusses a diminution of the plaintiff's patrimony "in some way." *Id.* at 706. This diminution is commonly found in insurance premiums but has been held to extend to workers' compensation benefits, co-pays for charitable services, and Medicare. *Melancon v. Lafayette Gen. Ins.*, 05-762 (La. App. 3d Cir. 3/29/06), 926 So. 2d 693, 702 (workers' compensation payments of medical expenses came from a diminution in the employee's patrimony, this being his statutory loss of the right to sue the employer who pays them); *Howard v. National Union Fire Insurance Company of Pittsburgh, Pa.*, 17-1221 (La. App. 1st Cir. 2/16/18); 243 So. 3d 4; *Powell v. Chabanais Concrete Pumping*, 11-408 (La. App. 5th Cir. 12/28/11), 82 So. 3d 548, 561 (co-pay made at time of charitable medical service sufficient diminution to justify collateral source rule); *Guilbeau v. Bayou Chateau Nursing Center*, 05-1131 (La. App. 3d Cir. 5/17/06), 930 So. 2d 1167 (contribution to Medicare sufficient diminution).

B. "Foresight" is not a requirement of the rule

Defendants frequently argue that there is some requirement that the plaintiff have "foresight" to obtain the benefits before the incident necessitating them. This condition does not exist anywhere in *Bozeman*'s holding, 879 So. 2d at 706:

> However, in those instances where plaintiff's patrimony has been diminished in some way in order to obtain the collateral source benefits, then plaintiff is entitled to the benefit of the bargain, and may recover the full value of his medical services, including the "write-off" amount.

Nor has foresight been a requirement in other cases. In *Louisiana Dep't of Transp. & Dev. v. Kansas City S. Ry. Co.*, 02-2349 (La. 5/20/03), 846 So. 2d 734, a train derailed in Shreveport in 1966, and the hazardous chemicals it was carrying were buried on site. Years later in the process of building Interstate 49, the DOTD discovered the environmental pollution and paid millions of dollars to clean it up. The Federal Highway Administration reimbursed the DOTD 90% of the remediation costs. The DOTD thereafter sued Kansas City Southern Railway Co. ("KCS") to recover the clean-up costs, alleging that KCS polluted the site. The Court held the DOTD could seek judgment against KCS for the full measure of damages caused by its pollution. In so holding, the Court relied on a number of out-of-state cases where the collateral benefit was obtained after the incident: first, a tort occurs; next, the injured party acquires third party funds to remedy the damage; finally, the injured party sues the tortfeasor for the full extent of damages. *Id.* at 742–43.

To require that the tort victim obtain the collateral benefit **before** the tort occurs flies in the face of *Bozeman* and other cases justifying the collateral source rule. *Bozeman* focused on the purpose of the collateral source rule—tort deterrence. To give tortfeasors the benefit of the very bargain their actions caused to exist (hiring of an attorney and corresponding costs) would violate this policy.

C. Potential for inflated medical bills

Defendants also argue that allowing a plaintiff to recover the write-off amount would create a system where a doctor or attorney can inflate the cost of healthcare, a baseless charge that indicts the ethics of two professions in one statement. In a typical

case, for example, inflated medical bills would be the result of collusion between three separate entities: plaintiff's attorney, the prescribing physician, and another medical provider rendering a service for, say, imaging studies or physical therapy.

Certainly, the greater the plaintiff's damages, the greater fee the attorney would receive under a contingency fee arrangement. But such a one-sided view fails to take into account the inherent risk of a contingency fee contract. Recovery is never guaranteed. The contingency fee attorney has an incentive to not be solely or jointly responsible for unnecessary medical bills that the attorney or the client will ultimately pay. Also, the defense argument presumes that a healthcare provider, and any prescribed third-party provider such as a therapist, imaging facility, or surgeon will needlessly increase treatment, services, or surgery.

If there ever arises a scenario in which a medical provider has inflated its bills solely to benefit a litigant, the scenario should be treated like Louisiana law treats overtreatment. It is well established that a tortfeasor is liable for unnecessary treatment or overtreatment unless the tortfeasor can show the plaintiff underwent the treatment in bad faith. *Orgeron v. Prescott*, 93-926 (La. App. 5th Cir. 1994), 636 So. 2d 1033, 1041; *Mack v. Wiley*, 07-2344 (La. App. 1st Cir. 5/2/08), 991 So. 2d 479, 489. The reason for the rule is that as between the victim and the tortfeasor, the root cause for the excessive expenses is attributable to the party whose fault caused the injury. *Hillebrandt v. Holsum Bakeries, Inc.,* 267 So. 2d 608, 609–10 (La. App. 4th Cir. 1972). Similarly, it is the defendant's burden to prove the plaintiff in bad faith

accepted treatment from a doctor who unreasonably inflated the charges, and if proven, the medical bills would presumably be reduced to some extent.

D. Keeping out evidence of collateral sources

From an evidentiary perspective, the collateral source rule prohibits the introduction of evidence that plaintiff received benefits or payments from a collateral source. *Bozeman*, 879 So. 2d at 699. From a damages perspective, "amounts a tort victim receives from collateral sources (those independent of the tortfeasor) will not reduce the victim's recovery against the tortfeasor." Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law* § 7:02[5] (2d ed. 2014). Justice Knoll, concurring in *Bozeman*, noted there are many forms of collateral source benefits, such as Medicare, Medicaid, private insurance, payment of wages, worker's compensation, sick pay, pension, Social Security, and gratuitous benefits. *Bozeman*, 879 So. 2d at 706. In other words, the rule is properly viewed as an over-arching presumption with limited exceptions carved out.

Medicaid, for example, is one such exception, "because no consideration is provided for the benefit." *Id.* at 705. Also, in *Hoffman v. 21st Century North America Insurance Co.* 14-2279 (La. 10/2/15), 209 So. 3d 702 the Louisiana Supreme Court held that an attorney-negotiated discount is an exception to the collateral source rule. However, post-*Hoffman,* an appellate court concluded that the collateral source rule applied to patient-negotiated medical discount. *Lockett v. UV Insurance Risk Retention Group, Inc.* 15-166 (La. App. 5th Cir. 11/19/15), 180 So.3d 557, 568.

In the usual tort case, application of the collateral source rule should not be a troublesome issue. As a recognized rule of evidence and damages, the district court should (1) exclude (or ignore in the case of a bench trial) evidence of any collateral source benefits, and (2) allow the tort victim to recover the full value of the medical charges or wage loss, whatever the case may be. If the collateral source is Medicaid, it is simply recognized, per *Bozeman*, that the plaintiff can only recover the discounted charges.

The decision on whether the rule applies should be made by the district court prior to trial, such as by motion for summary judgment or motion *in limine*. As observed by the Third Circuit in *Francis v. Brown*, 95-1241 (La. App. 3d Cir. 3/20/96), 671 So. 2d 1041, 1047–48, allowing a jury to hear evidence that the plaintiff's attorney provided funds for the plaintiff's medical expenses is inherently prejudicial. In fact, evidence of **any** collateral payments, not just attorney provided funds, can be prejudicial. Maraist discussed this notion with regard to evidence of worker's compensation payments. In a tort proceeding, Louisiana Code of Evidence article 414 prohibits introduction to the jury of evidence of the nature and extent of a worker's compensation claim or of payment of past or future worker's compensation benefits. As Maraist explained, "[b]ecause the 'limiting instruction' usually is considered ineffective, special legislation has been adopted to insulate a jury deciding the employee's tort claim from evidence of the compensation claim." Frank L. Maraist, *et al.*, 19 La. Civ. L. Treatise, *Evidence and Proof* § 5.10 (2d ed.). Jurors will surely be confused and/or prejudiced by arguments directed to application of the collateral

source rule, and for that reason, it should be treated as a legal question to be decided by the court.

The Louisiana Supreme Court recently granted writs in a case questioning whether worker's compensation benefits are subject to the collateral source rule. *Simmons v. Cornerstone Investments, LLC*, 252 So. 3d 491 (Mem), *writ granted*, 18-0735 (La. 9/21/18). The lower courts granted the third-party defendants' request to limit the plaintiff's medical bill recovery to only the amount paid under the worker's compensation schedule of benefits.

III. Finance Agreements

Plaintiffs must sometimes obtain financing for their medical expenses because specialized healthcare providers like spine surgeons often do not accept letters of guarantee. Typically, the finance company will purchase accounts receivable from the healthcare providers who provide medical services to plaintiffs. In doing so, the finance company pays a discounted price for the accounts receivable, which is the business rationale for the entire transaction. The arrangement works because the healthcare providers have sufficient security that their bills will be paid, via the reimbursement agreements with plaintiffs, to make the accounts receivable marketable to entities like the finance company. And plaintiffs receive the medical services they need to mitigate their damages.

The various agreements between plaintiffs and healthcare providers, and between healthcare providers and finance companies, are not true assignments in the sense contemplated by the codal articles on assignment of litigious rights; the

agreements merely provide for reimbursement out of the funds recovered in the litigation. None of the parties to the agreements intend for anyone but plaintiffs and their attorneys to prosecute the lawsuit to settlement or verdict.

A. Typical finance payments for medical services provided to plaintiffs are not subject to the Louisiana Consumer Credit Law

Sometimes a tort defendant contends that the payments made by a finance company to the healthcare providers are a "consumer loan," a term which is defined by La. R.S. § 9:3516(14) (emphasis added):

> (14) "Consumer loan" means ***a loan*** of money or its equivalent made by a supervised financial organization, a licensed lender, or lender in which the debtor is a consumer, and ***the loan*** is entered into primarily for personal, family, or household purposes and includes debts created by the use of a lender credit card, revolving loan account, or similar arrangement, as well as insurance premium financing.

The authority sometimes cited by defendants in support of their contention that the "funding arrangements" at issue are "consumer loans" is Attorney General Opinion 01-160, (Appendix). As the opinion recognizes, this definition for "consumer loans" is limited to "loans," and under Louisiana law, "a loan is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that he borrows." Ag. Op. 01-160. Applying this precept, the Attorney General reached the following conclusion regarding when an agreement related to litigation constitutes a "consumer loan" within the meaning of the LCCL:

> Applying the provisions of the Louisiana Civil Code to the question at hand, an obligation (or debt) is created when [funding company] contracts with the litigant for the advancement of funds. In exchange for the advance, the litigant is bound to assign priority rights of the anticipated recovery in favor of [funding company]. An obligation is

> created even though the obligation to repay the debt is suspended until the case is successfully resolved.
>
> It is therefore our opinion that the advancement of funds to a litigant by [funding company] creates a reciprocal obligation, or a debt, on the part of the litigant. Because the litigant is bound to assign priority right to the proceeds of the litigation and the funds are repaid at the time the case is resolved, we conclude that the advancement of funds is a "loan" subject to the Louisiana Consumer Credit Law.

The "funding arrangements" in a typical case bear none of the indicia of a "consumer loan" identified by the Attorney General. Usually a medical finance company does not advance funds to plaintiffs in return for plaintiffs' obligation to repay those funds. Rather, the finance company purchases the rights of creditors (the healthcare providers) against debtors (plaintiffs). There are well-established codal distinctions between loans to debtors and the purchase of creditor rights. *Shell Offshore, Inc. v. Marr*, 916 F.2d 1040, 1045–48 (5th Cir. 1990) (describing characteristics of the contract of "loan" under Civil Code) (applying Louisiana law); *In re Successions of Pelicano*, 05-495 (La. App. 5th Cir. 12/27/05), 920 So. 2d 248, 250 (rejecting the argument that agreement that clearly called for a sale of succession property was in fact a "loan" to be deducted from a portion of the estate).

A defendant's argument that not only the finance company, but also the healthcare providers, are "lenders" who made "consumer loans" to plaintiffs is also without merit. This theory is premised upon the notion that the healthcare providers, by delaying the timetable for plaintiffs' obligation to repay their medical bills in return for plaintiffs' waiver of any challenge to the amount of those bills, have given them a "loan;" and thus, anytime a creditor provides a debtor a forebearance in regard to repayment, it has made a "consumer loan" for which licensure by the Office of

Financial Institutions is required. Not true. When a person purchases a promissory note, account receivable, or other debt, the purchaser does not make a new "loan" to the debtor; rather, that person becomes the new creditor. The fact that the original creditor receives a discounted amount of the original obligation is not only typical, it is the business rationale for the entire transaction, since the original creditor is typically in the business of providing goods and services, while the purchaser/new creditor is typically in the business of collecting debts.

Basically, tort defendants view it as somehow unfair that the transactions allow plaintiffs to delay repayment of the healthcare providers, and desire that courts should treat the situation as if the healthcare providers would be required to accept a discounted amount since plaintiffs lack the wherewithal to pay the full amount due. This, of course, defeats the nature of the compensatory remedy provided by tort law, by forcing plaintiffs to conduct their affairs vis-à-vis repair of the damage done by the tortfeasor as if that remedy did not exist. If a defendant has evidence that the charges were unreasonable *and that plaintiffs had incurred the treatment in bad faith*, it would be entitled to present expert evidence to that effect.

B. Plaintiffs usually do not assign the finance company or healthcare provider their rights to pursue recovery from the defendants in their litigation

1. If there is an assignment, the defendant may have waived its right to object.

Code of Civil Procedure article 698 provides that when a right has been partially assigned, the right must be enforced by both the assignor and assignee. In a partial assignment when the suit is brought only by the assignor, there is non-

joinder of a necessary party. La. Code Civ. P. art. 698, comment (d); *Soileau v. LaFosse*, 558 So. 2d 294, 297 (La. App. 3d Cir. 1990). If a tortfeasor fails to timely object to the non-joinder of the finance company or the healthcare providers (by dilatory exception pled prior to or in its answer), the objection is waived. La. Code Civ. P. art. 698, comment (d); *Soileau*, 558 So. 2d at 297; *Brown v. Brown*, 635 So. 2d 255, 260 (La. App. 3d Cir. 1994). *See also* Frank L. Maraist, 1 La. Civ. L. Treatise, Civil Procedure § 4:13 (2d ed.) ("If the assignment is partial, both the assignor and assignee are proper parties. If the assignment occurs after suit is filed, substitution is not required; however, the court may direct substitution or joinder." La. Code Civ. P. art. 807). The defendants may waive their right to object to the non-joinder of the finance company and the healthcare providers, and plaintiffs may proceed against the defendants for the full amount of the healthcare providers' invoices.

2. Examine the documents as a whole and see if they are reimbursement agreements, not assignments of litigious rights.

The fact that the agreements between plaintiffs and their healthcare providers mention the word "assignment" is not dispositive. The character of the agreements is determined by examining the document as a whole, rather than selectively. The agreement must be interpreted in light of the common intent of the parties. If intent cannot be discerned from the writing, parol evidence may be admitted. *Caro Properties (A), LLC v. City of Gretna*, 08-248 (La. App. 5th Cir. 12/16/08), 3 So. 3d 29, 32; *Spohrer v. Spohrer*, 610 So. 2d 849, 852 (La. App. 1st Cir. 1992). The preamble to each "Assignment Agreement" frequently suggests that the reason for the agreement is that the healthcare provider has provided medical treatment to plaintiffs, plaintiffs

cannot afford to immediately pay for that treatment, and the healthcare provider is willing to delay payment in return for a promise that the healthcare provider will be reimbursed at a later date. Healthcare providers customarily provide written notice to plaintiffs and their attorneys that payment will occur upon settlement or resolution of the case (see La. R.S. § 9:4752), similar to health insurer subrogation and reimbursement provisions, written acknowledgement of liens, and the like.

There is likely no indication that the healthcare provider has the right to take over the lawsuit or to independently litigate against the defendants. *See LeRay v. St. Paul Fire & Marine Ins. Co.*, 444 So. 2d 1252, 1256 (La. App. 1st Cir. 1983) (where plaintiff retained discretion to settle with defendant or proceed to trial, no true "assignment" was intended between the parties since the purported assignee could not independently litigate its interest). In this respect, the agreements are more like notices of healthcare provider privilege. La. R.S. §§ 9:4752–53. They are written agreements of reimbursement between the clients and the healthcare provider, and they serve to put the clients' attorney on notice of his or her Professional Conduct Rule 1.15(d) safekeeping obligations.

When an agreement for repayment leaves plaintiffs responsible for the debt, regardless of the outcome of the litigation, the agreement cannot be a true assignment. *See, e.g.*, *Lewis v. Kubena*, 00-2362 (La. App. 4th Cir. 10/24/01), 800 So. 2d 68, 72 (when claim for repayment will be unaffected by any judgment on the main demand, the required connexity to support an intervention has not been met). If the

healthcare provider's claim for repayment is insufficient to even support an intervention, it certainly cannot be characterized as an assignment.

Look for language in the written instruments that plaintiffs authorize the healthcare provider to release their medical records to their counsel and to any third party necessary to protect patient's right to pursue personal injury claims against third parties. If there is no mention of the healthcare provider's right to pursue plaintiffs' personal injury claims, it further proves that plaintiffs, not the healthcare provider, are the proper parties in the litigation to recover their full medical expenses.

Also, look for language that the plaintiffs/patients will be liable for all costs of collection related to Medical Provider's recovery of the Expense Amounts. "Costs of collection" and similar wording can only mean court costs, litigation expenses, and attorney's fees that plaintiffs have and will continue to incur in prosecuting a lawsuit. If the writings and agreements as a whole reveal they are not intended to be assignments of litigious rights, then they should not be treated as something they were never intended to be. And the same result should apply to any similar agreements with plaintiffs' other healthcare providers.

3. *Even if found to be assignments, an agreement may authorize plaintiffs to recover from the defendants any expense amounts owed to the healthcare providers.*

Assuming only for purposes of argument that plaintiffs have partially assigned their litigious rights to various healthcare providers, plaintiffs would still be the proper parties in interest to recover the full amount of the bills from the tortfeasors if the healthcare providers have contracted to await payment until plaintiffs resolve

their lawsuit. In *Soileau v. LaFosse*, 558 So. 2d 294 (La. App. 3d Cir. 1990), the assignment agreement stated that the plaintiff-assignor would make payment to the assignee at the time of the disposition of the assignor's claim, whether by compromise or judgment. The court reasoned,

> There is a clear implication from this language that [assignee] has authorized plaintiff to pursue recovery in this case. As we see it, [assignee] has contracted to await payment of the assigned amount until plaintiff makes a recovery. For these reasons the defense of assignment of plaintiff's rights must fall. Under the paragraph quoted above, payment to [assignee] of any sum which may be due it is strictly between it and plaintiff. We reject the assignment defense.

Id. at 297. If plaintiffs' agreements with their healthcare providers have similar language whereby at the end of the litigation, the healthcare providers will seek reimbursement from plaintiffs, either out of the litigation proceeds or otherwise, then plaintiffs could be characterized as agents for the healthcare providers, authorized to recover the healthcare providers' expense amounts from the defendants. Like *Soileau*, plaintiffs should recover all of their medical expenses, and there would be no need to join the healthcare providers in a lawsuit.

IV. Appendix

A. Motion in Limine
B. LAJ Amicus Brief - *Simmons v. Cornerstone Investments, LLC*, 252 So. 3d 491 (Mem), *writ granted*, 18-0735 (La. 9/21/18)
C. Attorney General Opinion 01-160

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

SUIT NUMBER: 000,000 SECTION: "1"

JOHN SMITH

versus

CASUALTY INSURANCE COMPANY and SCOTT JONES

PLAINTIFF'S MOTION IN LIMINE

NOW INTO COURT, through undersigned counsel, comes plaintiff, John Smith, in the above entitled and numbered cause who, pursuant to Louisiana Code of Evidence article 104 and for the reasons set forth in the accompanying memorandum, respectfully moves to prohibit and prevent any question and any reference whatsoever, orally or written, concerning the following matters during the trial of this case:

1. The existence or identity of third parties who have paid medical bills on behalf of, or provided financial assistance to, John Smith, including Blue Cross, Funding, LLC, and Mr. Smith's attorneys.

2. That damages should be reduced because of money/benefits received by Mr. Smith from collateral sources.

3. Attorney referrals to Mr. Smith's treating physicians.

4. Timing and circumstances of Mr. Smith's retention of counsel.

5. Any prior lawsuits and claims made on behalf of Mr. Smith, and any settlements resulting therefrom.

6. That insurance rates or premiums may or may not increase dependent upon the amount a jury compensates Mr. Smith.

7. The filing of this Motion or any ruling by the Court in response.

WHEREFORE, for the foregoing reasons, plaintiff, John Smith, prays that defendants, Casualty Insurance Company and Scott Jones, be ordered to show cause why Plaintiff's *Motion in Limine* should not be granted.

Respectfully submitted:

LAW FIRM, LLC

By: _____

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Plaintiff's Motion in Limine* has this 14th day of December, 2018 been served via electronic mail on counsel for all parties in these proceedings, as follows:

Counsel for Casualty Insurance Company and Scott Jones
Joe Attorney
LAW OFFICES OF DEFENDANTS
3434 Claims Street
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_____
Jane Attorney

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

SUIT NUMBER: 000,000 SECTION: "1"

JOHN SMITH

versus

CASUALTY INSURANCE COMPANY and SCOTT JONES

RULE TO SHOW CAUSE

Considering the foregoing Motion:

IT IS HEREBY ORDERED that defendants, Casualty Insurance Company and Scott Jones, show cause on the _____ day of _____, 2018, at _____ o'clock __.m., why *Plaintiff's Motion in Limine* should not be granted as prayed for therein.

SIGNED this _____ day of _____, 2018 at Baton Rouge, Louisiana.

_____
Honorable Joe Brown
Judge, Nineteenth Judicial District Court

PLEASE SERVE

Casualty Insurance Company and Scott Jones
Through their counsel of record:
Joe Attorney
Law Offices of Defendants
3434 Claims Street
Baton Rouge, Louisiana 88888

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

SUIT NUMBER: 000,000 SECTION: "1"

JOHN SMITH

versus

CASUALTY INSURANCE COMPANY and SCOTT JONES

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE

MAY IT PLEASE THE COURT:

I. BACKGROUND

On July 25, 2015, Scott Jones was driving his father's Toyota 4Runner northbound on Siegen Lane, approaching North Rieger Road. While looking and reaching below the steering wheel to grab his cell phone, Mr. Jones attempted to execute a left turn across four lanes of Siegen traffic. He crashed into the driver's side of a pickup truck driven by plaintiff, John Smith. The force of the collision pushed Mr. Smith's truck into a third vehicle.

The jury trial of this matter is scheduled for May 29 – June 1, 2018 (second setting) and September 4–7, 2018 (first setting).

II. LAW AND ARGUMENT

A trial judge has great discretion in determining the relevancy, probative value, and ultimate admissibility of evidence. *Elbert v. Elbert*, 08-2139 (La. App. 1st Cir. 5/13/09), 15 So. 3d 236, 238. This memorandum addresses categorically by individual paragraphs, plaintiff, John Smith's, seven matters *in limine* which would be inadmissible in evidence for any purpose on proper and timely objection, in that they have no bearing on the issues in this case. Permitting questioning of witnesses, comments to jurors or prospective jurors, or offers of evidence concerning any of the matters set forth below would prejudice the jury; and sustaining objections to such questions, statements, or evidence introduced by counsel or witnesses will not prevent prejudice, but will only reinforce the development of improper evidence.

1. **The existence or identity of third parties who have paid medical bills on behalf of, or provided financial assistance to, John Smith, including Blue Cross, Funding, LLC, and Mr. Smith's attorneys.**

"Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution." *Bozeman v. State*, 03-1016 (La. 7/2/04), 879 So. 2d 692, 698. The collateral source rule is both a rule of evidence (evidence of benefits received is inadmissible) and of damages (damages may not be reduced by benefits received). *Id.* at 609–701.

Mr. Smith's medical bills have been paid by collateral sources, including Blue Cross, Funding, LLC, and Mr. Smith's attorneys. Mr. Smith has also received financial assistance from his attorneys for his necessary living expenses. As a rule of evidence, the collateral source rule prohibits Defendants from mentioning or inquiring about the identity of these payors or the fact that Mr. Smith received payments/benefits from them. *Bozeman*, 879 So. 2d 692; *Francis v. Brown*, 95-1241 (La. App. 3d Cir. 3/20/96), 671 So. 2d 1041, 1047 ("To allow a jury to hear evidence that plaintiff's attorney provided the funds for her medical expenses only fanned the flames of the prejudice that now exists against civil litigants and their attorneys."). To accomplish the purpose of the collateral source rule, any insurance and payment information, as well as the names of payors and guarantors, must be redacted from all medical bills and records, and any other pleadings and documents, prior to allowing their admission into evidence. *McCann v. ABC Ins. Co.*, 93-1789 (La. App. 4th Cir. 7/14/94), 640 So. 2d 865, 873. Mr. Smith prays that an order be issued prohibiting Defendants from making reference to financial assistance or to the identity of any collateral sources, through witnesses, exhibits, or argument.

2. That damages should be reduced because of money/benefits received by Mr. Smith from collateral sources.

A plaintiff is entitled to recover his full past medical expenses if the expenses are supported by the medical bills and if the evidence shows a causal connection between the plaintiff's injuries and the traumatic event. It is manifest error for a jury to compensate less than the full amount of medical expenses which the plaintiff has proven by a preponderance of the evidence. *Mack v. Wiley*, 07-2344 (La. App. 1st Cir. 5/2/08), 991 So. 2d 479, 489. Mr. Smith's medical bills currently reflect charges of at least $87,404.80 (he is still treating). At trial, Mr. Smith will prove through his own and his physicians' testimony that his treatment was causally related to the July 25, 2015

collision. The medical bills with causation testimony is sufficient for the jury to include the full amount of Mr. Smith's past medical expenses in its verdict. *White v. Longanecker*, 637 So. 2d 1213, 1218 (La. App. 1st Cir. 1994).

Mr. Smith anticipates that Defendants may try to limit his tort recovery because his medical bills were paid by third parties such as Blue Cross, Funding, LLC, and Mr. Smith's attorneys. As a rule of damages, the collateral source rule prohibits a plaintiff's damages from being reduced by any benefits received from collateral sources. For example, a plaintiff with private health insurance can recover the full medical bills, even the write-off amounts. The Louisiana Supreme Court has recognized only two exceptions: Medicaid (*Bozeman*) and attorney-negotiated discounts (*Hoffman*). The major policy reason for applying the collateral source rule to damages is tort deterrence—discouraging unreasonably dangerous conduct by fully compensating the injured victim. *Bozeman*, 879 So. 2d at 700; *Bellard v. Am. Cent. Ins. Co*., 07-1335 (La. 4/18/08), 980 So. 2d 654, 668; *Cutsinger v. Redfern*, 08-2607 (La. 5/22/09), 12 So. 3d 945, 952; *Hoffman v. 21st Century N. Am. Ins. Co.*, 14-2279 (La. 10/2/15), 209 So. 3d 702, 705.

Since the collision of July 25, 2015, Mr. Smith has incurred expenses for his medical treatment, and his healthcare providers have a first-dollar statutory privilege on the net amount payable to him in this litigation. La. R.S. § 9:4752. Due to health insurance not covering all the treatment, Mr. Smith turned to Funding, LLC ("Funding")for help paying his providers. Using Funding works because the healthcare providers have sufficient security that their bills will be paid, and Mr. Smith receives the medical services he needs to mitigate his damages. What distinguishes Funding from a typical collateral source situation *(i.e.*, Medicare, private health insurance) is that Mr. Smith owes the full amounts charged by his healthcare providers; there is no write-off in his favor. To collect the debt, Funding has essentially stepped into the shoes of the healthcare providers who would otherwise have a privilege on, and would be reimbursed, their full charges.

Even under the framework of the collateral source rule, Mr. Smith would still be permitted to recover the full amount of his healthcare providers' charges because:

(1) a reduction in Mr. Smith's damages would only benefit the tortfeasors—Casualty Insurance Company and Scott Jones;

(2) a reduction would promote, rather than deter, Defendants' tortious conduct;

(3) Defendants did not procure or contribute to Mr. Smith's medical benefits;

(4) there is a right of reimbursement in favor of Funding for the full amount of the healthcare providers' charges, which prevents a windfall or double recovery to Mr. Smith; and

(5) if the Court reduces Mr. Smith's recoverable medical specials, Mr. Smith will still owe the full charges, so the reduction would effectively punish Mr. Smith for procuring the treatment he needed to mitigate the damage caused by Defendants.

See Bozeman, *Bellard*, and *Cutsinger* (non-exclusive factors which favor application of the collateral source rule to a plaintiff's medical damages).

The only evidence of Mr. Smith's medical bills that should be admitted at trial are the gross charges ($87,404.80+) for his medical treatment. This gross-charges restriction would not apply to the two bright line exclusions recognized by the Louisiana Supreme Court: Medicaid discounts or write-offs negotiated by the plaintiff's attorney, for which the plaintiff has given up no patrimony. *Bozeman*, 879 So. 2d at 705; *Hoffman*, 209 So. 3d at 706. In lieu of admitting the actual bills into evidence (which contain collateral source information), Mr. Smith intends to introduce a summary of medical bills pursuant to Louisiana Code of Evidence article 1006. The summary will reflect each healthcare provider, dates of treatment, and total charges. In the case of any attorney-negotiated discounts, the summary will reflect only the actual amounts paid by the attorney.

3. Attorney referrals to Mr. Smith's treating physicians.

Unlike retained experts, treating physicians are not hired and paid to provide opinions in a case. "[P]recautions must be taken lest a **retained** expert's testimony, 'dressed up and sanctified as the opinion of an expert,' be permitted to unduly influence the jury." *Rowe v. State Farm Mut. Auto. Ins. Co.*, 95-669 (La. App. 3d Cir. 3/6/96), 670 So. 2d 718, 725 (emphasis added). A treating physician's main objective is to provide appropriate medical care for the plaintiff. Incidentally, because the physician is familiar with the plaintiff's condition, he or she can offer opinions about causation and future medical needs. Obviously, the only reason for a defendant to question a licensed treating healthcare provider about whether the plaintiff's attorney referred the patient is to infer that something unseemly has occurred, which jurisprudence does not permit unless there is evidence of bad faith. Absent evidence of bad faith, the fact that an attorney referred a plaintiff

to a treating physician does not tend to make the existence of a consequential fact more or less probable. La. Code of Evid. art. 401. And if admitted into evidence, the fact of attorney referral would be unduly prejudicial, encouraging the jury to infer bad faith. La. Code of Evid. art. 403. *See, e.g., Boutte v. Winn-Dixie Louisiana, Inc.*, 95-1123 (La. App. 3d Cir. 4/17/96), 674 So. 2d 299, 306–07 (defense counsel's insinuation that plaintiff's medical treatment derived from a "conniving medical/legal machine" was unduly prejudicial and diverted the jury from deciding the case based on evidence). Defendants should be prohibited from eliciting testimony that Mr. Smith was, or might have been, referred to some of his treating physicians by his attorneys, and any evidence of such referral in the medical records should be redacted.

4. Timing and circumstances of Mr. Smith's retention of counsel.

No one can reasonably be expected to recall exactly when an attorney retention occurred. If that person needed his recollection refreshed, it would violate Louisiana Code of Evidence article 506(B), which provides, in pertinent part, that "[a] client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication, whether oral, written, or otherwise, made for the purpose of facilitating the rendition of professional legal services to the client." The timing and circumstances of Mr. Smith's retention of counsel, which is privileged, has no bearing on any of the issues in this case. Accordingly, this line of questioning and any evidence related thereto should be excluded.

5. Any prior lawsuits and claims made on behalf of Mr. Smith, and any settlements resulting therefrom.

Mr. Smith has a very limited claims history. In 2005, he had soreness in his shoulder at work. A report was made, but he received no medical treatment or compensation for the incident. And in July 2012, Mr. Smith's wife was in a collision, and a loss of consortium claim was made on behalf of Mr. Smith. He thinks his name was on his wife's settlement check but does not remember the amount of the check nor whether any part of that settlement was for his loss of consortium.

Although injuries that Mr. Smith sustained prior to the motor vehicle collision at issue might be relevant, the fact of filing a lawsuit, making an insurance claim, or making a workers' compensation report, is not. Absent a showing of fraud on the part of Mr. Smith, which has never

been alleged, the fact that Mr. Smith has previously filed a lawsuit or made a claim is irrelevant to this litigation and therefore inadmissible. La. Code of Evid. arts. 401 and 402. Mr. Smith is not seeking recovery for any damages submitted for recovery in any prior settlement agreements, which is the only reason evidence of prior claims/settlements would be relevant to this case. *Page v. Guidry*, 506 So. 2d 854 (La. App. 1st Cir. 1987); *Daigle v. Coastal Marine, Inc.*, 482 So. 2d 749, 750–51 (La. App. 1st Cir. 1986), *rev'd in part on other grounds*, 488 So. 2d 679 (La. 1986).

6. That insurance rates or premiums may or may not increase dependent upon the amount a jury compensates Mr. Smith.

Such information would be prejudicial in leading jurors to believe that they possess an indirect pecuniary interest in the outcome of the case which would render them *per se* incapable of the impartiality required of a juror. *Andry v. Cumis Insurance Society, Inc.*, 387 So. 2d 1374 (La. App. 4th Cir. 1980).

7. The filing of this Motion or any ruling by the Court in response.

Such references are inherently prejudicial in that they suggest or infer that Mr. Smith has sought to prohibit proof or that the Court has excluded evidence damaging to Mr. Smith's case.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, plaintiff, John Smith, prays this Court grant his *Motion in Limine* and enter an order prohibiting and preventing any question and any reference whatsoever, orally or written, concerning the noted matters:

1. The existence or identity of third parties who have paid medical bills on behalf of, or provided financial assistance to, John Smith, including Blue Cross, Funding, LLC, and Mr. Smith's attorneys.

2. That damages should be reduced because of money/benefits received by Mr. Smith from collateral sources.

3. Attorney referrals to Mr. Smith's treating physicians.

4. Timing and circumstances of Mr. Smith's retention of counsel.

5. Any prior lawsuits and claims made on behalf of Mr. Smith, and any settlements resulting therefrom.

6. That insurance rates or premiums may or may not increase dependent upon the amount a jury compensates Mr. Smith.

7. The filing of this Motion or any ruling by the Court in response.

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I hereby certify that a copy of the foregoing *Memorandum in Support of Plaintiff's Motion in Limine* has this 14th day of December, 2018 been served via electronic mail on counsel for all parties in these proceedings, as follows:

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SUPREME COURT

STATE OF LOUISIANA

DOCKET NO. 2018-CC-0735

KERRY SIMMONS

Applicant/Plaintiff

VERSUS

CORNERSTONE INVESTMENTS, LLC AND
UNITED FIRE & CASUALTY INDEMNITY COMPANY

Respondents/Defendants

On Application for Supervisory Writ from
Court of Appeal, Third Circuit
Docket No. CW 17-01077

Ninth Judicial District Court, Parish of Rapides
Docket No. 246,084
Hon. W. Gregory Beard, Presiding

A Civil Proceeding

AMICUS CURIAE BRIEF OF THE LOUISIANA ASSOCIATION FOR JUSTICE

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Exhibits

1. T. Iizuka, DOES HIGHER MALPRACTICE PRESSURE DETER MEDICAL ERRORS? *Journal of Law and Economics,* Vol. 56, No. 1 (Feb. 2013)

2. Z. Zabinski & B. Black, THE DETERRENT EFFECT OF TORT LAW: EVIDENCE FROM MEDICAL MALPRACTICE REFORM (working paper 2015)

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T. Iizuka, DOES HIGHER MALPRACTICE PRESSURE DETER MEDICAL ERRORS? *Journal of Law and Economics,* Vol. 56, No. 1 (Feb. 2013) 6, 7

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W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 2, 3

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INTRODUCTION

The Louisiana Association for Justice is the largest voluntary bar organization in the state. The association's mission aims to "protect the interests and rights of individuals and consumers" and "to promote justice for the public good." Its membership focuses primarily on the representation of individuals and small businesses as plaintiffs in civil litigation. The Louisiana Association for Justice submits this *amicus curiae* brief in support of the position of applicant/plaintiff, Kerry Simmons, with respect to the application of the collateral source rule to workers' compensation benefits.

The Louisiana Supreme Court has repeatedly emphasized that one of the primary purposes of tort law is to deter dangerous conduct. That deterrent effect is best served by a damages rule which provides recovery for the full amount of compensatory damages, rather than one which allows tortfeasors to benefit from reductions due to collateral sources. This brief will discuss the doctrinal support for the deterrent effect of tort law, the jurisprudence of this Court recognizing that purpose of the law, and recent social science papers that have found that reducing tort liability reduces safety. All of these factors support reversing the judgments of the lower courts.

Of course, other significant policy considerations exist. Louisiana wants workers injured in the course and scope of their employment by third parties to seek medical treatment in accordance with established workers' compensation procedures. Why should third parties found to be at fault save money at the expense of an innocent worker? And it is likely that prompt use of workers' compensation health care providers will, in the end, save money for at-fault tortfeasors. Don't we want injured workers to benefit—or at least not be penalized—from the advantages and savings associated with the so-called grand compromise? Regardless, this brief will focus on the value of tort law's deterrent effect.

STATEMENT OF THE CASE

Applicant/Plaintiff, Kerry Simmons, suffered an injury while in the course and scope of his employment with Cintas Corporation No. 2. The injury was allegedly caused by a defective door owned by Cornerstone Investments, LLC. Mr. Simmons brought a suit against defendants, Cornerstone Investments, LLC and its insurer, United Fire & Casualty Indemnity Company, to recover tort damages. Because the injury occurred at his place of employment, Mr. Simmons' medical bills and compensation indemnity benefits were paid pursuant to the Louisiana Workers' Compensation fee schedule. The amounts paid to the healthcare providers were less than the amounts charged by the healthcare providers.

The trial court ruled that in Mr. Simmons' tort suit against third party defendants, Mr. Simmons could only recover the amount of medical expenses actually paid by his employer rather than the full charges of the healthcare providers. The Third Circuit denied Mr. Simmons' writ application.

ARGUMENT

A tort victim's damages should not be reduced by workers' compensation benefits when such reduction would inure to the benefit of the tortfeasor.

I. Deterring dangerous conduct is a doctrinally recognized purpose of tort law.

Legal scholars have long recognized that, in addition to the compensation of victims, one of the primary purposes of the tort law system is the prevention of dangerous behavior. In other words, the promotion of safety. If people are aware that they can be forced to pay for the consequences of their negligence, they are more likely to behave in a responsible and safe manner. As explained in *Prosser and Keeton on the Law of Torts*:

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) §4, p. 25. Professors Maraist and Galligan recognized this principle as well, writing, "recovery of damages serves the deterrence goal of tort law." F. Maraist & T. Galligan, *Louisiana Tort Law* (2017) §7.02[5], p. 22. Professor William Landes and Judge Richard Posner discussed the deterrent effect of tort law at length in their landmark work on law and economics, *The Economic Structure of Tort Law*. They rejected the claims of some theorists that tort law does not affect human behavior. After describing those arguments, they concluded:

> We are not persuaded, on either empirical or theoretical grounds. The same points (except with regard to liability insurance) could be and have been made to show that the criminal law does not deter violent crime, yet a large body of statistical evidence demonstrates that both the severity and the certainty of criminal punishment have a substantial deterrent effect on such crime. Moreover, although there has been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law likewise deters, even where, notably in the area of automobile accident, liability insurance is widespread (although its economic significance is misunderstood, as we shall see) and personal safety might be expected to be of greater concern than the potential financial consequences of an accident. One way it deters is by forcing up liability insurance rates to the point where people are priced out of driving – notably young people whose parents are unwilling to pay the cost of insurance. In addition, a study by Elisabeth Landes finds that in some states the adoption of no-fault laws may have increased automobile accident death by as much as 15 percent. This finding may seem incredible, because no-fault plans preserve tort liability for fatal and other serious accidents. But care in driving is stochastic (that is, probabilistic); if the incentive to take care is reduced because the scope of liability is reduced, people will be less careful, and the infrequent but cumulatively significant result will be more fatal accidents. A recent survey of the empirical literature relating to the effects of tort law on automobile accidents contains additional evidence that tort law leads to lower accident rates. Moreover, automobile accidents are not the only type of conduct regulated by tort law; and there is widespread agreement that the imposition of tort liability on professionals (for Page 2 example, in the form of medical malpractice), and on business and other enterprises, does affect behavior, does deter – some think too much!

W. Landes & R. Posner, *The Economic Structure of Tort Law* (1987), pp. 10–11 (footnotes omitted).

II. This Court has repeatedly recognized deterrence as a primary basis for the collateral source rule of damages.

The collateral source rule provides that a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the

plaintiff from sources independent of the tortfeasor's procuration or contribution. *Bozeman v. State*, 03-1016, p. 9 (La. 7/2/04), 879 So. 2d 692, 698. The collateral source rule is both a rule of evidence (evidence of benefits received is inadmissible) and of damages (damages may not be reduced by benefits received). *Id.* at 609–701. The major policy reason for applying the rule to damages is tort deterrence—discouraging unreasonably dangerous conduct by fully compensating the injured victim. *Id.* at 700; *Bellard v. Am. Cent. Ins. Co.*, 07-1335, p. 18 (La. 4/18/08), 980 So. 2d 654, 668 ("the major policy reason for applying the collateral source rule to damages has been, and continues to be, tort deterrence"); *Cutsinger v. Redfern*, 08-2607, p. 11 (La. 5/22/09), 12 So. 3d 945, 952; *Hoffman v. 21st Century N. Am. Ins. Co.*, 14-2279, p. 6 (La. 10/2/15), 209 So. 3d 702, 706; *see also Louisiana Dep't of Transp. & Dev. v. Kansas City S. Ry. Co.*, 02-2349 (La. 5/20/03), 846 So. 2d 734 (requiring the environmental polluter to pay full reparation even though the federal government had paid 90% of the clean-up costs because of the public interest in protecting the welfare of Louisiana citizens and deterring future violations).

Beginning with *Bozeman*, this Court favorably listed workers' compensation benefits as a collateral source that cannot reduce the plaintiff's recovery vis-à-vis the wrongdoer. 879 So. 2d at 698. Since that time, the Court has carved out limited exceptions to the collateral source rule's prohibition on a reduction in damages. In *Bellard*, the Court explored the collateral source rule as it applied between the workers' compensation insurer and the employer's uninsured motorist ("UM") carrier, and ultimately ruled that the employer's UM carrier should receive a credit for benefits paid to the plaintiff by the workers' compensation insurer. The three driving factors behind the Court's decision: (1) any reduction would not undermine the deterrent effect of tort law because the reduction would benefit a UM carrier, not the tortfeasor; (2) there was no right of reimbursement or subrogation in favor of the workers' compensation carrier to prevent the plaintiff's double recovery; and (3) the plaintiff suffered no diminution in patrimony. *Bellard*, 980 So. 2d at 669–70. The same factors drove the decision in *Cutsinger*, 12 So. 3d 945, where the Court

reiterated at page 954:

> While it is important to consider whether plaintiff paid for the collateral source or suffered some diminution in her patrimony due to the availability of the benefit to determine whether a double recovery would result from application of the rule, this consideration alone is not the determinative factor in deciding whether the collateral source rule applies. The collateral source rule exists to prevent the tortfeasor from benefitting from the victim's receipt of monies from independent sources. In this way, the collateral source rule furthers the major policy of tort deterrence.

Thus, in deciding whether the collateral source rule applies, diminution of the plaintiff's patrimony is a consideration, but the emphasis is placed on the primary policy goal of tort deterrence. The overriding policy of tort deterrence should outweigh the concern of double recovery.[1]

Limiting a tort victim's damages vis-à-vis a tortfeasor to the amount of medical expenses paid by the workers' compensation insurer violates the collateral source rule because:

(1) a reduction in damages would only benefit the tortfeasor;

(2) a reduction would promote, rather than deter, the tortfeasor's unreasonably dangerous conduct;

(3) the tortfeasor did not procure or contribute to the victim's workers' compensation payments;

(4) there is a right of reimbursement or subrogation in favor of the workers' compensation insurer to prevent the victim's double recovery;

(5) the victim earned his or her workers' compensation benefits by showing up to work every day (as opposed to Medicaid, for example, which a plaintiff does not earn); and

(6) the victim suffers a diminution in patrimony because the workers' compensation insurer has the statutory right to recover the amounts it paid with preference and priority over the injured victim and can thereby

[1] *See, e.g.*, Restatement (Second) of Torts (1979) § 920A, comment b, which includes employment benefits as a collateral source and states: . . . But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor."

potentially be reimbursed out of the victim's compensation for pain and suffering.

Also, unlike the vast majority of states, Louisiana law does not generally provide for punitive damages in quasi-offenses, even when a tortfeasor commits reckless and intentional acts. The unavailability of punitive damages makes application of the collateral source rule more critical to achieve the goal of deterrence.

III. Recent social science research reveals that decreasing liability for compensatory damages decreases safety.

If a purpose of tort law is to deter unsafe behavior, the question becomes how effective it is in doing so? The enactment of so-called "tort reform" measures in many states over the last several decades has afforded social scientists the opportunity to begin to evaluate their long-term effects. Two recent studies in the field of law and economics show that decreasing tort liability – which further limitation of the collateral source doctrine would accomplish – results in decreased safety and increased adverse outcomes.

Toshiaki Iizuka of the Graduate School of Economics of the University of Tokyo set out to investigate the relationship between malpractice pressure and health outcomes in the United States.[2] He was able to use patient safety indicators (PSIs) developed by the Agency for Healthcare Research and Quality (an agency of the U.S. Department of Health and Human Services). As he stated, "One advantage of these PSIs is they are specifically intended to identify potentially preventable medical errors or adverse events." (Exhibit 1, p. 2). He focused on four specific PSIs and in-hospital mortality rates related to obstetrics and gynecology. (Exhibit 1, pp. 2, 6). "I found evidence" he concluded, "that the deterrence effect does exist; higher liability pressure due to tort reform tends to decrease preventable medical complications for the four procedures related to obstetrics and gynecology discussed here. . . .

[2] T. Iizuka, DOES HIGHER MALPRACTICE PRESSURE DETER MEDICAL ERRORS? *Journal of Law and Economics,* Vol. 56, No. 1 (Feb. 2013), pp. 161–188. The paper is also available on the Social Science Research Network, SSRN.com, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001848. A copy is attached as Exhibit 1, and the page reference numbers in the text are to that copy.

Opponents of tort reform often argue that tort reforms may adversely affect patient safety, and the results of this paper suggest that such a concern is legitimate." (Exhibit 1, p. 19).

He also found that the effects of tort reform varied by the specific reform enacted. Significantly for present purposes, he concluded that "collateral source rule reform . . . increase[s] [preventable medical] complications." (Exhibit 1, p. 19).

In a newer paper, Zenon Zabinski, an economist, and Bernard Black, a professor at Northwestern University's Law School and Kellogg School of Management, used a similar methodology to compare patient safety outcomes in five states that adopted caps on non-economic damages since 2000 – Texas, Florida, Georgia, Illinois and South Carolina – to those outcomes in states that did not do so, both before and after the enactment of the damage limitation.[3] They used sixteen PSIs, along with five categories of adverse events that form the cases at risk for PSI-4 (Death of Surgical Inpatients with Serious Treatable Complications). (Exhibit 2, p. 3). Their conclusion:

> We find evidence that reduced risk of med mal litigation, due to state adoption of damage caps, leads to higher rates of preventable adverse patient safety events in hospitals. Our study is the first, either for medical malpractice or indeed, in any area of personal injury liability, to find strong evidence consistent with classic tort law deterrence theory – in which liability for harm induces greater care and relaxing liability leads to less care. The drop in care quality occurs gradually over a number of years following adoption of damage caps. (Exhibit 2, p. 26).

These studies confirm what common sense tells us: reducing the consequences of wrongdoing increases the likelihood that wrongdoing will occur. Allowing tortfeasors the advantages of discounts in workers' compensation payments will weaken the deterrent effect of tort law.

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[3] Z. Zabinski & B. Black, THE DETERRENT EFFECT OF TORT LAW: EVIDENCE FROM MEDICAL MALPRACTICE REFORM (working paper 2015). At the time of this writing, the paper is under review at the Journal of Law and Economics. It is also available on the Social Science Research Network at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2161362. A copy is attached as Exhibit 2, and the page number references are to that copy.

CONCLUSION

The Louisiana Association for Justice respectfully requests the Court reverse the lower courts and find that the collateral source rule applies to workers' compensation benefits and that vis-à-vis third party tortfeasors, victims can recover their full medical charges with no discount.

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I hereby certify that a copy of the above and foregoing *Amicus Curiae* Brief of The Louisiana Association for Justice has been served on the following counsel of record, via e-mail, and by U.S. mail, properly addressed and postage pre-paid, this 16th day of October, 2018.

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/s/ Robert E. Kleinpeter

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October 11, 2001
OPINION 01-160

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61-2.1.1 LAWS – Fair Trade – Consumer Fraud
We conclude that the advancement of funds to a plaintiff contingent upon recovery creates a debt and is therefore a consumer loan as defined in the Louisiana Consumer Credit Law.

John D. Travis, Commissioner
Office of Financial Institutions
P. O. Box 94095
Baton Rouge, LA 70804

Dear Commissioner Travis:

This office is in receipt of your opinion request wherein you ask if the practice of advancing funds to Louisiana litigants constitutes a "consumer loan" as defined in the Louisiana Consumer Credit Law. (LCCL), LSA-R.S. 9:3510 et seq. The Office of Financial (OFI) Institutions licenses and regulates entities that make "consumer loans". The LCCL defines a consumer loan as:

> ". a loan of money or its equivalent made by a supervised financial organization, a licensed lender, or a lender in which the debtor is a consumer, and the loan is entered into primarily for personal, family or household purposes and included debts created by the use of a lender credit card, revolving loan account, or similar arrangement, as well as insurance premium financing… LSA-R.S. 9:3516

Future Settlement Funding Corp. (FSF), a Nevada corporation, is involved in pre-settlement financing. FSF is in the business of providing substance funds to litigants in order that injured individuals are able to pay bills and support families while pursuing a lawsuit. The funds advanced are made for "personal, family, or household purposes and are advanced only after FSF has made a determination that the litigant has a case of "clear liability, documented damages, and adequate insurance coverage". FSF agrees to advance funding in exchange for a lien on the litigant's case. Because repayment of the funds is contingent upon the plaintiff's receipt of money from the claim, FSF argues that the advance of funds is not a "loan".

There is scant Louisiana jurisprudence on this issue. In *Elston, Prince & McDade, Inc. v. First State Bank of Plain Dealing*, 140 So. 510, (La.App. 2Cir. 1932) the court distinguished between a loan and a deposit declaring that a loan is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows.

More recently, the Colorado Supreme Court addressed the issue in the case of *State, ex rel Ken Salazar v. The Cash Now Store, Inc.,* Docket No. 00SC489; decided 9/10/2001. The State of Colorado sued Cash Now Store, Inc. for making "loans" in violation of the Uniform Consumer Credit Code (UCCC). Cash Now entered into contracts with consumers under which it would advance a sum of money in return for an assignment of the individual's right to receive state or federal tax refunds. The refunds had been independently determined to be due, but not yet payable. Colorado argued that the terms of the contract were usurious and in violation of the UCCC. The Colorado Supreme Court ruled that the advancing of funds for consumer purposes constitutes a "loan" under the UCCC because they create a debt.

The Louisiana Civil Code provides that an obligation is a legal relationship created when the obligor (or debtor) is bound to render a performance to another, called the obligee (or creditor). (C.C. Art 1756) An obligation may be conditioned on an uncertain event. If the obligation may not be enforced until the uncertain event occurs it is suspensive. (C.C. Art 1767)

Applying the provisions of the Louisiana Civil Code to the question at hand, an obligation (or debt) is created when FSF contracts with the litigant for the advancement of funds. In exchange for the advance, the litigant is bound to assign priority rights of the anticipated recovery in favor of FSF. An obligation is created even though the obligation to repay the debt is suspended until the case is successfully resolved,

It is therefore our opinion that the advancement of funds to a litigant by FSF creates a reciprocal obligation, or a debt, on the part of the litigant. Because the litigant is bound to assign priority right to the proceeds of the litigation and the funds are repaid at the time the case is resolved, we conclude that the advancement of funds is a "loan" subject to the Louisiana Consumer Credit Law.

Yours very truly,

RICHARD P. IEYOUB
ATTORNEY GENERAL

BY:_____
ISABEL WINGERTER
ASSISTANT ATTORNEY GENERAL

IW:spa

OPINION 01-160

61-2.1.1 LAWS – Fair Trade – Consumer Fraud

LSA-R.S. 9:3510; 9:3516(14); C.C.Art.1756; C.C. Art. 1767

We conclude that the advancement of funds to a plaintiff contingent upon recovery creates a debt and is therefore a consumer loan as defined in the Louisiana Consumer Credit Law.

John D. Travis, Commissioner
Office of Financial Institutions
P.O. Box 94095
Baton Rouge, LA 70804

Date Received:
Date Released: October 11, 2001

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