TRIAL TALK

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You Get What You Pay For: The Collateral Source Rule Plain and Simple

By Mac Hester, Esq. and Kyle Bachus, Esq.

A. Introduction

This article is written in two parts: The first part (by Mac Hester) re-examines the collateral source rule and focuses on the rule's core concept – fundamental fairness – and how to frame and re-frame the issues and how to structure persuasive arguments through power words and phrases. The second part (by Kyle Bachus) is an exemplar motion for summary judgment to allow the recovery of all damages suffered by the plaintiff (preclude the reduction of the plaintiff's damages by the amount of collateral source payments received by the plaintiff) and also a motion in limine to exclude the admission of evidence of collateral source payments at trial.

B. The Common Law Collateral Source Rule

Prior to the 1986 enactment of C.R.S. §13-21-111.6, the common law collateral source rule was, simply stated,

> Compensation paid to the plaintiff from a collateral source, independent of the tortfeasor, will not diminish the damages owed by the tortfeasor.

In other words, the common law did not allow setoffs against damage awards. Rather, the plaintiff was allowed to recover the full damages awarded against the defendant even though the plaintiff had already received "compensation" from collateral sources.

For example, if an injured plaintiff's medical bills of $5000 were paid by the plaintiff's health insurance (a collateral source), then the plaintiff could still recover $5000 in medical expenses as damages and the defendant would not get a set-off of $5000 against the verdict in favor of the plaintiff.

The Colorado Supreme Court explained the rationale of the common law collateral source rule:

> [C]ourts would not reduce a judgment because the plaintiff had received compensation from a collateral source even if the result was that the plaintiff recovered twice for a single loss.
>
> The purpose of the collateral source rule was to prevent the defendant from receiving credit for such compensation and thereby reduce the amount payable as damages to the injured party. To the extent that either party received a windfall, it was considered more than just that the benefit be realized by the plaintiff in the form of double recovery rather than by the tortfeasor in the form of reduced liability.[1]

However, if the injured party received a gratuitous payment from a governmental entity, then the defendant would receive a setoff of the amount of the gratuity.[2]

It would be fair to deny a "double recovery" in the case of a gratuity because the injured party had not contributed anything to the benefactor.

C. C.R.S. §13-21-111.6: The Statutory "Collateral Source Rule"

C.R.S. § 13-21-111.6 states:

> In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained; except that the verdict shall not be reduced by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person. The court shall enter judgment on such reduced amount.

The statutory "collateral source rule" is thus a trial mechanism that a judge uses after a verdict to reduce the plaintiff's damages (and correspondingly

reduce the defendant's exposure) pursuant to the terms of C.R.S. § 13-21-111.6.

D. The Collateral Source Rule Distinguished from Subrogation

Subrogation is not a trial mechanism that a judge uses after a verdict to reduce the plaintiff's damages pursuant to the terms of C.R.S. § 13-21-111.6.

Subrogation is a method by which a provider of benefits to an injured party can recover the amount of benefits paid to or for the injured party against the party who injured the injured party by asserting the injured party's rights against the at-fault party subject to the at-fault party's defenses against the injured party.

An example is easier to understand: P driver makes a sudden stop to avoid hitting a squirrel. D driver rear-ends P. P's car is damaged. P's auto insurer (A.I.) pays $5000 to the auto repair shop for the repair of P's car. A.I. sues D for $5000. D asserts whatever defenses he would have against P against A.I. P was 40% at fault. A.I. recovers $3000 against D.

The purpose of subrogation is to compel the ultimate payment of damages by the party who, in equity and good conscience, should pay it; e.g., D in the above example to the extent of his liability. Thus, subrogation is an equitable device used to avoid injustice.

Similarly, the common law collateral source rule was an equitable device used to compel the ultimate payment of damages by the at-fault party despite "double recovery" by the injured party – the balance of the equities being in favor of the innocent injured party.

E. "Tort Reform" and the Attempted Reversal of the Common Law Collateral Source Rule

"Tort reform" swept the county in the 1980's and Colorado bore its brunt in 1986 when the legislature overhauled the civil justice system expressly to eliminate and/or reduce personal injury plaintiffs' rights and remedies.

The Colorado legislature originally attempted to reverse the common law collateral source rule by requiring that damages be set off by collateral sources. The original text of Senate Bill 67 creating C.R.S. § 13-21-111.6 stated:

> In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained.

The purpose of the bill was to prevent double recovery by the injured party:

> As Senator Hefley noted during consideration of the proposed § 13-21-111.6, its purpose is to prevent double recovery by the injured party. Thus, he stated, money obtained from a collateral source should be offset because the injured party has been made partially whole.[3]

However, the original version of Senate Bill 67 was not enacted.

Prior to the passage of Senate Bill 67, Senator Meiklejohn expressed his objections to the bill, focusing on unfairness and injustice:

> There's something unfair about me getting killed and my wife suing somebody and collecting, my insurance pays off and that goes as a credit against the judgment. There's something unfair about that. And that's what that section would do if it were the law. . .
>
> I don't think a person ought to collect more than once, you know, for the hospitalization costs and things like that. The question really is who should pay that, you know, if my insurance company pays my hospitalization as a result of an accident, shouldn't they be allowed to collect from the tortfeasor to get their money back. That's the way I think it ought to be. I agree that the injured party should collect once on those economic losses like that, but the retirement benefits, life insurance, perhaps other things that I just think it's an injustice to say that that would apply against the damages in a lawsuit….[4]

Following Senator Meiklejohn's objections, Senate Bill 67 was amended by adding the "exception clause"

> except that the verdict shall not be reduced by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person. The court shall enter judgment on such reduced amount.

Senate Bill 67 as amended by the exception clause was then enacted.

The original version of Senate Bill 67 did reverse the common law collateral source rule; however, Senate Bill 67 as amended and as enacted essentially reinstated the common law collateral source rule – as is illustrated by subsequent Colorado appellate court decisions.

F. Collateral Sources Payments that Are not Set off against the Verdict

Every Colorado case that has addressed collateral source payments (except Medicaid) has denied a setoff to the defendant. See the table at right.

G. Earned Collateral Benefits

The term "collateral sources" used to drive me crazy. I could never remember what it really meant. And "collateral sources" sound like the benefits are not

earned, but free – a windfall. So I had to come up with a term that I could understand and remember. I came up with "earned collateral benefits." Earned collateral benefits are benefits that the plaintiff earned either through purchase or through employment or other consideration.

Stop calling the benefits that the plaintiff has earned through his or her hard earned money, time, or services "collateral sources" and call them "earned collateral benefits." Why? Because it is darned hard to take away an earned benefit and give it to somebody who did not earn it.

These are the magic words I mentioned in the Introduction. Use them early and often.

H. Collateral Source Payments that Are Set off against the Verdict

I am aware of only one collateral source payment that is set off against the verdict: Medicaid.[5] The setoff of Medicaid is based upon the gratuitous governmental benefit rule of *Englewood v. Bryant*.[6]

Collateral Source Payments that Are NOT Set off Against the Verdict

	Collateral Source	Authority
1	Health insurance	*Publix Cab. Co. v. Colo. Nat'l Bank of Denver,* 338 P.2d 701 (Colo.1959); *Jones v. USAA Cas. Ins. Co.,* 952 P.2d 819 (Colo.App.1997).
2	Sick Pay	*Jones v. USAA Cas. Ins. Co.,* 952 P.2d 819 (Colo.App.1997).
3	Pension Benefits	*Moyer v. Merrick,* 392 P.2d 653 (Colo.1964); *Van Waters & Rogers, Inc. v. Keelan*, 840 p.2d 1070 (Colo.1992).
4	Contracts for Payments	*Frost v. Schroeder & Co., Inc.,* 876 P.2d 126 (Colo.App.1994).
5	Social Security Disability	*Steckler v. United States*, 549 F.2d 1372 (10th Cir.1977); *Barnett v. Am. Fam. Mut. Ins. Co.,* 843 P.2d 1302 (Colo.1993).
6	Medicare	*Powell v. Brady*, 496 P.2d 328 (Colo.App.1972) *aff'd Brady v. City and County of Denver,* 508 P.2d 1254 (Colo.1973).
7	Workers Compensation	*Combined Commun. Corp., Inc. v. Pub. Serv. Co.*, 865 P.2d 893, 901-902
8	Settlement Payments	*Montoya v. Grease Monkey Holding Corp.,* 883 P.2d 486 (Colo.App.1994); *Smith v. Vincent,* 77 P.3d 927 (Colo.App.2003); *see Smith v. Zufelt*, 880 P.2d 1178 (Colo.1994).

The cases listed above generally denied setoffs to the defendants because the plaintiffs either purchased the collateral source benefits or earned them through employment or other consideration.

I. Unearned Collateral Benefits

Gratuitous benefits and benefits that are not earned are "unearned collateral benefits." Why? Because "gratuitous" is another one of those words that is confusing. "Unearned" is not confusing.

Currently, there is only one unearned collateral benefit in the reported Colorado cases: Medicaid.

Using the terms "earned" and "unearned" keeps the focus on the exception.

J. Readoption of the Common Law Collateral Source Rule

Although *Van Waters* states that "the general goal of section 13-21-111.6 was to limit double recoveries"[7] and although Colorado courts routinely parrot the "double recovery" language, the decisions have actually eviscerated the double recovery rationale and have placed an "earned collateral benefit" rationale in its stead.

In other words, the exception has swallowed up the rule.

The only time in which a defendant is entitled to a setoff in Colorado is when the plaintiff receives Medicaid benefits. Thus, we are back to the pre 1986 common law collateral source rule: the defendant never gets a setoff unless the plaintiff receives a gratuitous benefit from a governmental entity – an unearned collateral benefit.

K. There Is No Exception to the Exception

If the plaintiff proves the exception by showing that he or she earned the collateral benefit, then the plaintiff wins the issue. Period. End of story. No setoff.

There is no exception to the exception.

L. Restatement of C.R.S. § 13-21-111.6 in Plain English

After the verdict, the judge will reduce the verdict by the amount of collateral source payments – except that the verdict cannot be reduced by compensation paid to the plaintiff as a result of a contract entered into and paid by or on behalf of the plaintiff.

M. Even Better Restatement of C.R.S. § 13-21-111.6

After the verdict, the judge will reduce the verdict by the amount of unearned collateral benefits.

N. Get What You Pay For

The true rationale of C.R.S. § 13-21-111.6 is:

You get what you pay for; you don't get what you don't pay for.

These are magic words. This is the theme, the mantra. Use them early and often.

O. Not "Prevent Double Recovery"

The battle is half lost, or more, as soon as the plaintiff uses the words "double recovery." These are poison words. Don't use them.

P. Not "Allow Double Recovery"

C.R.S. § 13-21-111.6 has nothing to do with allowing the plaintiff to obtain a double recovery.

Getting what one has paid for or earned is not a recovery. It is the consideration received in return for the earlier consideration provided, whether in money, time or services.

Q. There Is No Such Thing as a "Billed vs. Paid" Issue in the Collateral Source Arena

Talking about "billed vs. paid" is a good way to lose when you should easily win. If the benefit is in the table in section F, then you already have a case to shoot down the setoff. If the benefit is in the section F table and the judge still wants to ignore the express holdings of those cases, then you will have to use the magic words "earned collateral benefit" and "You get what you pay for; you don't get what you don't pay for."

The focus should be on the plaintiff earning the benefit (getting what he or she paid for) and the defendant not getting what he or she did not pay for. If the judge is particularly obtuse and/or obstinate, then you will have to focus on the "fundamental unfairness" of the at fault defendant being relieved of liability while the innocent plaintiff is punished for his or her foresight in paying for the benefits.

R. There Is a "Correct Measure of Damages" Issue, but not in the Collateral Source Arena

Talking about the "correct measure of damages" is another good way to lose when you should easily win. Again, use the table in section F. The cases in the table in section F are applications of the exception. Apply the exception.

If you apply the exception, then you win the issue; i.e., no setoff. There is no setoff in the reported Colorado cases except for Medicaid. Therefore, you should win easily in all the section F table cases. The significant word is "should." Judges are known to enjoy ignoring the express holding of cases. A particularly egregious example is health insurance. There is no intellectually honest argument for a setoff when health insurance is at issue.

If there's no setoff, then there's no rational reason to try to determine the correct measure of damages with respect to the earned collateral benefits.

However, defense counsel have been somewhat successful with their red herring arguments of "billed vs. paid" and "correct measure of damages."

Of course the jury must apply the correct measure of damages and of course the judge must instruct the jury on the correct measure of damages, but it is improper to introduce evidence of

the collateral benefits because the jury might improperly set off those benefits at arriving at a verdict.[8] The correct measure of damages is the reasonable value of the medical services provided. The plaintiff introduces evidence of the medical bills. The defendant can attack the reasonableness of the medical bills, just not with evidence of the collateral benefits (e.g., the health insurance discounted bills). The judge simply instructs the jury to award the reasonable value of the medical expenses.

S. The Wrong Sequence of Argument

The plaintiff's counsel often makes the mistake of arguing: 1) The correct measure of damages, 2) billed vs. paid, 3) the collateral source payments are not admissible, and 4) the defendant is not entitled to a setoff.

T. The Correct Sequence of Argument

1) The defendant is not entitled to a setoff (a section F table case applies; the exception applies) (plaintiff gets what he paid for; defendant does not get what he did not pay for; 2) there is no exception to the exception; 3) it would be fundamentally unfair to reward the at fault defendant and punish the innocent plaintiff by depriving him of his earned collateral benefits; and 4) the collateral benefits are not admissible.

U. The Shorthand Analysis

Q. Who paid for it or earned it?

A1. Plaintiff. Earned collateral benefit. Plaintiff gets it. No setoff.

A2. Defendant. Not a collateral source (must be independent of defendant). No setoff.

A3. Santa Claus. Unearned collateral benefit. Defendant gets a setoff.

The only time that the defendant gets a setoff is when the collateral benefit is gratuitously given to the plaintiff from a source independent of the defendant (that is, when Santa Claus, or a Santa Claus equivalent, gives a gift to the plaintiff without the plaintiff having given any consideration for the gift).

V. Motion for Summary Judgment or Determination of Question of Law that the Verdict Should not Be Reduced by the Amount of the Plaintiff's Earned Collateral Benefit

The plaintiff should file a motion for determination of question of law that the verdict should not be reduced by the amount of the plaintiff's earned collateral benefits (the defendant is not entitled to a setoff).

W. The Defendant Has the Burden of Proof to Show Entitlement to a Setoff

I am not aware of a case expressly holding that the defendant has the burden of proving that he is entitled to a setoff, but if the plaintiff shows that a benefit from the table in Section F is at issue (which is usually the case), then the defendant has, as a practical matter, the burden of overcoming the express holdings of the Section F table cases. Additionally, the defendant would have the burden of overcoming the true rationale of C.R.S. § 13-21-111.6 – you get what you pay for - (assuming plaintiff's counsel has briefed it adequately).

X. Motions in Limine

Plaintiffs often have their healthcare expenses paid by health insurance, medical payments insurance or governmental benefits. If evidence of such insurance or benefits is admitted (or conveyed to the jury), then the jury might reduce their verdict by the amount of such insurance or benefits. Then, if the judge reduces the verdict by the amount of such insurance or benefits, the plaintiff will suffer a double loss (rather than just the single loss imposed by the judge if he/she reduces the verdict by the earned collateral benefit). Therefore, plaintiff's counsel should file a motion in limine to exclude evidence of amounts actually paid by collateral sources. (See example beginning on page 16.)

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J. Kyle Bachus is a founding partner of Bachus & Schanker, LLC. He actively litigates cases involving catastrophic injuries, serious personal and financial damage, wrongful death, insurance bad faith and medical malpractice, limiting his practice to the representation of victims and their families. He is a member of the Board of Directors of CTLA. You can reach him at Kbachus@coloradolaw.net or 303-322-4300.

Endnotes:

1 *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1074 (Colo.1992).

2 *Englewood v. Bryant*, 68 P.2d 913, 914-15 (Colo.1937).

3 Tape recording of testimony before Senate Business & Labor Comm. on Sen. Bill 67, Feb. 18, 1986, 55th Colo. Gen. Assembly. *Van Waters,* 840 P.2d 1070, 1077.

4 *Van Waters,* 840 P.2d. at 1078.

5 *Gomez v. Black*, 511 P.2d 531 (Colo.App.1973).

6 *Englewood v. Bryant*, 68 P.2d 913.

7 *Van Waters,* 840 P.2d. at 1078.

8 *Moyer v. Merrick*, 392 P.2d 653, 656-657 (Colo.1964).

DISTRICT COURT COUNTY OF _____, COLORADO Court Address: Phone Number: _____ **Plaintiff(s):** **Defendant(s):**	▲ COURT USE ONLY ▲
Attorney: Phone Number: Fax Number: E-mail: Atty. Reg. #:	Case Number: Division:

PLAINTIFF'S EXEMPLAR MOTION FOR SUMMARY JUDGMENT AND MOTION IN LIMINE

COMES NOW the Plaintiff, by and through her undersigned attorneys, and as her Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment Regarding Exclusion of Evidence of Collateral Source Benefits From Plaintiff's Health Insurer and Plaintiff's Motion in Limine Regarding Exclusion of Collateral Source Benefits from Plaintiff's Health Insurer states the following:

I. INTRODUCTION

In this Reply, Plaintiff addresses both her Motion for Summary Judgment and Motion in Limine. In her Motion for Summary Judgment, the Plaintiff seeks resolution of two issues as a matter of law. First, the Plaintiff has been wholly or partially indemnified or compensated by a benefit conferred upon her by collateral sources (i.e. her health insurance). Second, evidence of collateral source benefits is inadmissible for any purpose at trial. In addition, Plaintiff respectfully requests this Court rule that, due to the irrelevant and highly prejudicial nature of evidence of a collateral source benefits, such evidence should be excluded in limine.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

There is no genuine issue as to any material fact regarding the issues upon which Plaintiff seeks summary judgment and therefore Plaintiff is entitled to judgment as a matter of law. *See,* C.R.C.P 56(c).

A. Plaintiff has been wholly or partially indemnified or compensated by a benefit conferred upon her by collateral sources

The Defendant agrees in this case that Plaintiff has been wholly or partially indemnified by a benefit conferred upon her by a collateral source (i.e. her health insurance). There is simply no dispute that collateral source benefits have been conferred on Plaintiff. In his response to Plaintiff's motion, counsel for Defendant even confesses that "Defendant is not and shall not argue that Plaintiff's actual damages should be reduced by an amount paid by a collateral source." *See Defendant's Response to Plaintiff's Motion, page 2.*

B. Evidence of collateral source benefits is inadmissible for any purpose at trial

1. Colorado law prohibits admissibility of collateral source payments

In Colorado, evidence of collateral source payments is irrelevant and inadmissible at trial. *Myers v. Beem*, 712 P.2d 1092, 1093 (Colo. App. 1985). Colorado has historically permitted an injured party to collect damages for the full amount of the costs of all medical, hospital and healthcare-related expenses, without reduction for benefits conferred by plaintiff's health insurance carrier. For that reason, evidence of benefits conferred by a health insurance carrier is inadmissible. *Publix Cab Co. v. Colorado National Bank of Denver*, 338 P.2d 702 (Colo. 1959). This is based upon the reasoning that such a policy is made between the insured and the insurer and does not mitigate the damages to the tortfeasor. *Id. See also, Evans v. Colorado Permanente Medical Group, P.C.*, 902 P.2d 867 (Colo. App. 1995); s*ee also* cited cases in Annotation at 77 ALR 3rd 415.

Pursuant to C.R.S. § 13-21-111.6, to the extent the collateral source is a private insurance company to which premiums were paid by or on behalf of the Plaintiff, the benefits conferred are a specified exception to C.R.S. § 13-21-111.6 and no reduction of Plaintiff's award is justified. *See generally, Combined Comm. Corp., Inc. v. Public Service*, 865 P2d 893 (Colo. App. 1993) and *Van Waters & Rogers v. Keelan*, 840 P.2d 1070 (Colo. 1992) (collateral source statute clearly denies set off of benefits resulting from private insurance contracts for which someone pays monetary premiums).

2. Colorado follows the Collateral Source Majority Rule

In holding that evidence of collateral source payments is irrelevant and inadmissible, Colorado follows the majority rule. *See, Robinson v Bates*, 828 N.E. 2d. 657 (Ohio App. 2005) (practical effect of collateral source rule is jury is prevented from learning of collateral income so as not to influence damages determination); *Mazon v. Krafchick*, 108 P.3d 139, 146 (Wash. App. 2005) (essence of collateral source rule requires exclusion of evidence of other money received by claimant so fact finder will not infer a windfall and nullify defendant's responsibility). *See also*, *Parker v. Spartenburg Sewer Dist,* 607 S.E.2d 711 (S.C. App. 2005); *Smalley v. Baty,* 22 Cal. Rptr. 3d 575 (Cal. App. 2005).

Even the United States Supreme Court has weighed in on the collateral source issue, holding that evidence of collateral source payments is inadmissible at trial. *Eichel v. New York Central R.R.,* 84 S. Ct. 316 (1963) (collateral source rule prohibits admission of evidence of Rail Road Retirement Act (RRA) disability benefits received by a plaintiff in a FELA case). In *Eichel,* the Supreme Court noted that it had "recently had occasion to be reminded that evidence of collateral benefits is readily

subject to misuse by a jury." *Id. at* 317. *See also, Tipton v. Socony Mobil Oil Co*., 84 S. Ct. 1 (1963); *Green v. Denver & Rio Grande Western Railroad Company*, 59 F3d 1029 (10th Cir. 1995).

The collateral source rule prevents benefits conferred on behalf of a plaintiff from inuring to the benefit of the defendant tortfeasor. This rule is grounded in the long standing policy decision that should a windfall arise as a consequence of an outside agreement regarding benefits, the party to profit from that collateral source is "the person who has been injured, not the one whose wrongful acts caused the injury." *Campbell v. Sutliff*, 214 N.W. 374, 376 (1927). The tortfeasor who is legally responsible for causing injury is not relieved of his obligation to the victim simply because the victim had the foresight to arrange, or good fortune to receive benefits from a collateral source for injuries and expenses.

3. The Collateral Source Rule recognizes no distinction between "billed vs. paid"

In this case, Defendant now acknowledges the application of the collateral source rule to Plaintiff's damages and even acknowledges that Colorado law permits Plaintiff to recover the damages required to "make her whole." However, in his response to Plaintiff's Motion, Defendant claims that collateral source payments to health care providers that have been reduced by contractual arrangements between plaintiff's health insurer and the health care providers are somehow not damages otherwise sustained. Defendant's position is wholly without merit.

In addressing the application of the collateral source rule where contractual arrangements between health insurers and health care providers result in reduced payments, the *Restatement (Second) of Torts*, Section 920A cmt. c. is directly on point:

> Where the plaintiff's health care providers settle the plaintiff's medical bills with the plaintiff's insurers at reduced rates, the collateral source rule dictates that the defendant-tortfeasor not receive the benefit of the written off amount. The benefit of the reduced payments inures solely to the plaintiff.

Consistent with the Restatement (Second) of Torts, numerous appellate courts in jurisdictions throughout the country have repeatedly espoused the same outcome. In *Koffman v. Leichtfuss*, 630 N.W. 2nd 201 (Wis. 2001), the Wisconsin Supreme Court explained that:

> [a]pplying the collateral source rule to payments that have been reduced by contractual arrangements between insurers and health care providers assures that the liability of similarly situated defendants is not dependant on the relative fortuity of the manner in which each plaintiff's medical expenses are financed. One plaintiff may be uninsured…another's insurer may have paid full value for the treatment and yet another insurer may have received the benefit of reduced contractual rates. Despite the various insurance arrangements that exist in each case, the factor controlling a defendant's liability for medical expenses is the reasonable value of the treatment rendered. *Id.* at 210.

The *Koffman* court further held that the collateral source rule ". . . prevents the discounted rates paid on the insurer's behalf from affecting the plaintiff's recovery of the reasonable value of medical services rendered. The rule **renders irrelevant the amounts of the collateral source payments** . . . and precludes a reduction in medical expense damages based on those payments." *Id*. (emphasis added).

Although "discounting" of medical bills is a common practice in modern healthcare, it is a consequence of the power wielded by those entities, such as insurance companies, employers and

governmental bodies, who pay the bills. *Mitchell v. Hayes,* 72 F. Supp. 2d 635, 637 (W.D. Va. 1999); *See* B. Alpert, *Physicians are Selling Their Practices; Should We Be Buying*?, BARRONS, August 1996. While large "consumers" of healthcare such as health insurance companies can negotiate favorable rates, those who are uninsured are often charged the full, undiscounted price. *See* B. Hewitt, M. Harrington & C. Clark, *Target: Medical Bills*, PEOPLE, Oct 6 2003, at 159.

The court in *Arthur v. Catour*, 803 N.E. 2d 647 (Ill. App. 2004) explained it this way:

> [S]imply because medical bills are often discounted does not mean that the Plaintiff is not obligated to pay the billed amount…For the same reason, Plaintiff receives no windfall when she is compensated for her reasonable medical expenses. To the extent she receives an amount greater than that paid by her insurer in satisfaction of the bill, that difference is a benefit of her contract with the insurer, not one bestowed upon her by the defendant.
>
> *Id.* at 649.

As in our case, the defendants in *Arthur* did not dispute that the collateral source rule was applicable. *Id*. at 650. Like Defendant in our case, the defendant in *Arthur* maintained that the rule did not apply to the "illusory" difference between the billed amount ($19,000.00) and the amount paid ($13,577.97) because no one paid or was liable for that amount (a difference of $5,777.28). *Id.* Like the other jurisdictions, the *Arthur* court disagreed with the Defendant, stating:

> Plaintiff was billed over $19,000.00 and *but for her insurance coverage*, she was liable for that amount. Limiting Plaintiff's damages to the amount paid by her insurer confers a significant benefit of that coverage on the defendants. This result is contrary to the collateral source rule goal 'that the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons.'
>
> *Id*. at 650 (emphasis in original), *citing Wilson v. Hoffman Group, Inc.,* 546 N.E. 2d 524, 530 (1989).

In *Acur v. Letourneau*, the Supreme Court of Virginia held that a plaintiff was entitled to recover the full amount of his medical expenses, including the amounts "written off" pursuant to contractual agreements between the health care providers and the insurance carrier. 531 S.E. 2d 316, 322 (2000). That court stated:

> We conclude that [defendant-tortfeasor] cannot deduct…any part of the benefits [plaintiff] received from his contractual arrangement with his health insurance carrier, whether those benefits took the form of medical expense payments or amounts written off because of agreements between his health insurance carrier and his health providers. Those amounts written off are as much a compensating benefit for which [plaintiff] paid consideration as are the actual cash payments made by his health insurance carrier to the health care providers. *Id.*

Finally, in *Hardi v. Mezzanotte*, the court explained the same result by stating that "where the party pays the premium for insurance, she is entitled to the benefit of the bargain contracted for, including any reduction in payments that the health insurance carrier was able to negotiate." 818 A2d 974, 984 (2003). "A reason for the rule is that a party should receive the benefit of a bargain for which he or she has contracted." *Id.* The court further explained that "[plaintiff] paid a private carrier to ensure her for medical expenses. That contractual arrangement was totally independent of [defendant]. [Plaintiff] contracted for them independently of [defendant] and therefore [defendant] is not entitled to a credit for those write-offs." *Id.*

In applying the principles behind the collateral source rule, a defendant-tortfeasor simply cannot reap the benefit of a contract for which he paid no compensation. Thus the extent of a defendant-tortfeasor's liability cannot be measured by deducting financial benefits received by the Plaintiff from collateral sources. Instead, ". . . it is the tortfeasor's responsibility to compensate for all of the harm he causes, not confined to the net loss that the injured party receives." *Restatement (Second) of Torts, Section 920A, cmt. b*.

Colorado's trial courts have been presented with the collateral source issue and have ruled consistent with Plaintiff's position set forth in this Motion. *See Sassano v. Lohman et al*., Jefferson County District Ct., Case No. 2001 CV 2071;*Gary George v. Nash Gonzales*, Pueblo Dist. Ct., Case No. 2004 CV 483; *Vicky Fishman v. Nickolas and Judith Kotts*, Weld County District Ct., Case No. 2003 CV 1744; *Steidinger v Hilton*, El Paso County Dist. Ct., 2005 CV 3320; *Betka v Mullen*, Jefferson County Dist. Ct., 2006 CV 3663; *St John v. Garcia*, El Paso County Dist. Ct., 2006 CV 0215; *Hedberg v. Doucette*, Jefferson County Dist Ct., 2006 CV 3384; *Fuller v. Green*, Denver County Dist. Ct., 2006 CV 4285.

4. Collateral source setoffs are imposed post trial and are therefore irrelevant for purpose of trial

As stated previously, there is no dispute that Colorado's collateral source statute (C.R.S. § 13-21-111.6) applies to the benefits conferred upon Plaintiff by her health insurer. Moreover, C.R.S. § 13-21-111.6 dictates that collateral source setoffs are imposed by the judge (not the jury) in post trial proceedings ". . . ***after the finder of fact has returned its verdict stating the amount of damages to be awarded*** . . ." (Emphasis added). Because collateral source setoffs are not a proper subject for jury consideration at trial, evidence of collateral source payments are irrelevant and inadmissible to the trial proceedings.

III. PLAINTIFF'S MOTION IN LIMINE

As explained above, evidence of collateral source payments is irrelevant and inadmissible at trial. *See supra, Robinson v Bates*, 828 N.E. 2d. 657 (Ohio App. 2005); *Myers v. Beem*, 712 P.2d 1092, 1093 (Colo. App. 1985); *Mazon v. Krafchick*, 108 P.3d 139, 146 (Wash. App. 2005).

Defendant cites *Kendall v. Hargrave* as the sole basis for the admissibility of collateral source payments. 349 P.2d 993 (Colo. 1960). However, the *Kendall* case does not involve collateral source benefits and is inapplicable. In *Kendall* the plaintiff paid all of her medical bills out of her own pocket. *Id. at* 994. **No health insurance or other collateral source benefits were part of the transaction**. At trial, the plaintiff's own lawyer asked her how much she paid her doctors for treatment. *Id.* Defendant's counsel objected to the question, and the trial court sustained the objection. *Id.* On appeal, the court held that the plaintiff's own testimony as to what she herself had paid the doctors would be admissible as some evidence of their reasonable value. *Id.*

The *Kendall* facts are in no way analogous to the facts present in our case. Here a collateral source, Plaintiff's health insurer, made payment to her healthcare providers in accordance with negotiated contractual agreements. Unlike the payments made by the *Kendall* plaintiff to her own doctors, the existence of collateral source payments is a matter statutorily relegated to the trial judge for post-trial consideration. C.R.S. § 13-21-111.6. This distinction is important and exists for good reason. Insurance payment arrangements arising from pooled health insurance premium payments made by thousands of participants can result in discounts off retail healthcare prices. Payment reductions are just one part of the insurance arrangement made between the insurers and the

providers in exchange for large patient pools and prompt guaranteed payment. This renders irrelevant the actual amounts of collateral source payments. *See*, *Koffman v. Leichtfuss*, 630 N.W. 2nd 201 (Wis. 2001).

The Plaintiff in our case, like most who purchase health insurance, makes years of expensive monthly payments to participate in a healthcare arrangement that includes annual premiums, co-pays, individual deductibles, family deductibles, lifetime maximums, specified treatment facilities, in-network providers and limitations on access to covered care. By choosing to participate in the healthcare arrangement, the plaintiff loses the use of the money invested in premiums and the potential income and interest earnings associated with the tens of thousands of dollars invested in the healthcare coverage. In exchange for this investment, the power-wielding health insurers are able to pool the medical needs and the financial resources of all of the plan participants to purchase volume healthcare at below retail rates. One of the results of this arrangement can be payment reduction to health care providers that are unique to its policyholders.

The complex financial arrangement that results in the total benefit package to policyholders renders collateral source payments irrelevant to the determination of "the reasonable value of the medical services" at trial. A defendant-tortfeasor must not be permitted to misuse the complex collateral source arrangement. As the United States Supreme Court stated when it re-affirmed the inadmissibility of collateral source payments in *Eichel v. New York Central R.R.*:

> It has long been recognized that evidence showing that the *defendant* is insured creates a substantial likelihood of misuse. Similarly we must recognize that the [plaintiff's] receipt of…insurance benefits involves a substantial likelihood of prejudicial impact. 84 S. Ct. at 317; s*ee also*, C.R.C.P 403.
>
> Thus, the collateral source rule requires the exclusion of evidence of collateral sources, so that the fact finder will not infer the claimant is receiving a windfall and nullify the defendant's responsibility.

Taken to its logical conclusion, it becomes obvious why admitted evidence of collateral source payments is highly prejudicial and therefore inadmissible. If a jury knows that a health insurer paid a benefit, and does not comprehend that a reimbursement right exists which requires plaintiff to reimburse her health insurer out of any award, the jury might well choose not to compensate plaintiff because they believe she has already been compensated for medical expenses. In this scenario, plaintiff would still be required to contractually reimburse her health insurer, even though the jury wrongfully failed to compensate plaintiff for past medical expenses incurred.

If the defendant-tortfeasor is permitted to reap the benefit of the payment reduction negotiated by plaintiff's collateral source, the result is a windfall to the defendant and an uncompensated financial loss to the plaintiff. This occurs because it is the plaintiff who paid the insurance premium for the discounted benefit without receiving the benefit of her bargain and it is the plaintiff who loses the premium dollars expended and the investment value on the use of those dollars. Conversely, the defendant-tortfeasor who paid not a single dollar toward the health insurance premiums, benefits from plaintiff's bargain.

WHEREFORE, Plaintiff prays that this Court GRANT her Motion for Summary Judgment Regarding Exclusion of Evidence of Collateral Source Benefits from Plaintiff's Health Insurer and issue an Order, in limine, precluding Defendant's evidence, statements, or arguments concerning the existence of Plaintiff's insurance or the benefits paid under her insurance.