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I. Introduction

The collateral source rule bars a defendant from introducing evidence of payments or benefits a plaintiff received from a third party.[1] While the rule is a longstanding staple of American tort law, it nonetheless invokes fervent debate.[2] On one hand, the rule ratifies a windfall in favor of the plaintiff by allowing her to recover for expenses she never personally incurred.[3] This seems contrary to certain aims of tort law, such as the principle that compensatory damages should make a plaintiff whole.[4] On the other hand, the collateral source rule deters tortfeasors by ensuring that the defendant pays the entirety of the plaintiff's medical expenses, regardless of whether the plaintiff or her health insurance provider were actually required to pay the bills.[5]

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1. *See* RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979) ("Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant.").

2. *Compare* Jamie L. Wershbale, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 357 (2008) ("The collateral source rule is an outmoded common law doctrine, no longer appropriate in the age of insurance, managed care, and public benefit programs."), *with* Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort's Soul*, 48 U. LOUISVILLE L. REV. 1, 1 (2009) ("Indeed, the collateral source rule may be the 'canary in the coal mine': Its modification or elimination might endanger the integrity of tort law and signal the loss of 'tort's soul.'").

3. *See, e.g.*, 2 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 8.6(3) (2d ed. 1993) ("In the most typical case, the rule permits the plaintiff to recover full payment of his medical expenses from his own medical, health, or accident insurance and also to recover the full reasonable value of the same medical expenses from the defendant.").

4. *See* RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979) ("The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury.").

5. *See id.* ("One way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party receives.").

Outside factors such as healthcare reform and tort reform have contributed to the ongoing debate about the continued relevance of the collateral source rule.[6]

The purpose of the collateral source rule is best understood in conjunction with the reasonable value doctrine.[7] That doctrine states that a plaintiff is entitled to recover the reasonable value of her past medical expenses.[8] While not dispositive of the issue,[9] many states presume that the amount billed for medical treatment represents its reasonable value.[10] This presumption creates a disparity, however, when the healthcare provider accepts an amount lower than what was charged in full satisfaction of the bill.[11] Healthcare providers frequently accept these lower amounts through negotiated discount agreements with health insurance carriers.[12] In states where the collateral

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6. *See* Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 MCGEORGE L. REV. 695, 977–87 (2012) (arguing that the renewed debate over the collateral source rule brought on by healthcare reform and tort reform has done little to actually change the rule in most jurisdictions).

7. *See* DOBBS, *supra* note 3, § 8.1(3) (presenting the intersection between the reasonable value doctrine and the collateral source rule).

8. *See id.* ("The value of medical and related treatment reasonably necessary to minimize or alleviate injury itself or the pain or disability that results from it are almost always recoverable as items of damage against the tortfeasor who caused the personal injury.").

9. *See id.* ("The measure of recovery is not the cost of services or appliances needed but their reasonable value.").

10. *See, e.g.*, VA. CODE ANN. § 8.01-413.01 (2015) ("[T]he authenticity of bills for medical services provided and the reasonableness of the charges of the health care provider shall be rebuttably presumed upon identification by the plaintiff of the original bill or a duly authenticated copy and [certain testimony requirements]."); W. VA. CODE § 57-5-4j (2015) ("Proof that medical, hospital and doctor bills were paid or incurred because of any illness, disease or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable.").

11. *See* Rebecca Levenson, Comment, *Allocating the Costs of Harm to Whom They Are Due: Modifying the Collateral Source Rule After Health Care Reform*, 160 U. PA. L. REV. 921, 932 (2012) ("Collateral sources often do not pay for medical services at full price, allowing an insured claimant to receive medical care at a reduced rate.").

12. *See, e.g.*, *What's the Cost?: Proposals to Provide Consumers with Better Information About Healthcare Service Costs: Hearing Before the Subcomm. on Health of the House Comm. on Energy & Commerce*, 109th Cong. 106 (2006) (statement of Dr. Gerard Anderson, Professor, Bloomberg School of Public Health & School of Medicine at Johns Hopkins University; Director, Johns

source rule bars evidence of this discount, a plaintiff may recover the entire billed amount—a sum that some have characterized as a windfall.[13]

This Note addresses whether the collateral source rule should bar a defendant from introducing evidence that a portion of a plaintiff's medical expenses was written off by the healthcare provider pursuant to a negotiated discount agreement with the plaintiff's health insurance carrier. Part II of this Note provides the historical background of the collateral source rule and discusses the arguments supporting and criticizing its continued applicability. Part III introduces the write-off issue and identifies the dominant approaches courts take to solve it. Part IV analyzes these approaches and suggests a workable solution that can serve as a compromise to reduce inflated damage awards while still retaining the important protections of the collateral source rule.

II. Historical Background of the Collateral Source Rule

The collateral source rule first appeared in *Propeller Monticello v. Mollison*.[14] This case arose from a dispute following a collision between a schooner and a propeller on Lake Huron.[15] The propeller, who was found to be at fault, argued that the schooner's recovery should be reduced by the amount the schooner received from insurance for the lost vessel.[16] The

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Hopkins Center for Hospital Finance and Management) [hereinafter *Healthcare Service Costs Hearing*] ("Insurers obtain large discounts off . . . list prices—often as high as 75 percent."); Lucette Lagando, *California Hospitals Open Books, Showing Huge Price Differences*, WALL ST. J. (Dec. 27, 2004), http://www.wsj.com/articles/SB110410465492809649 (last visited Jun. 5, 2015) ("List prices are usually charged only to uninsured patients. Health plans negotiate big discounts and the government essentially dictates what it will pay.") (on file with the Washington and Lee Law Review).

13. *See* Levenson, *supra* note 11, at 933 ("As a result of double payments and inflated awards, opponents blame the collateral source rule for increasing insurance payments and encouraging claimants to go to trial."); Wershbale, *supra* note 2, at 350 ("In tort litigation, the written-off amount may be considered 'phantom' or 'illusory' damages. The amount written-off is often a substantial sum.").

14. 58 U.S. 152 (1854).

15. *Id.* at 153.

16. *Id.*

Supreme Court found that "[t]he contact with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern."[17] Since this rule first appeared, it has been nearly universally accepted as a fundamental pillar of the American tort system.[18]

The collateral source rule is generally conceptualized as having an evidentiary function and a substantive function.[19] As an evidentiary rule, it permits trial courts to exclude evidence of collateral payments, such as payments made by a plaintiff's medical insurance carrier or workers' compensation benefits.[20] As a substantive rule, it permits triers-of-fact to disregard collateral payments when calculating damages after determining liability.[21] The practical effect of the collateral source rule is that a plaintiff may receive compensation from her health insurance carrier to pay her medical bills without diminishing the amount she can recover against the tortfeasor—despite the possibility of a double recovery.[22]

A. Rationales for the Collateral Source Rule

The original justifications for the collateral source rule were that it would deter potential tortfeasors and ensure that tortfeasors would not benefit from the plaintiff's choice to

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17. *Id.* at 155.

18. *See* DOBBS, *supra* note 3, § 8.6(3) ("Except as modified by statute, the rule is almost invariably accepted in the courts."); Krauss & Kidd, *supra* note 2, at 7–9 (documenting the rise of the collateral source rule in American, English, and Canadian law); Todd, *supra* note 6, at 965 ("The rule is, in fact, alive and well in American courthouses despite being subject to forces that many predicted would lead to its demise.").

19. *See* Todd, *supra* note 6, at 969–70 ("Courts treat the collateral source rule as a rule of evidence and a substantive rule of law.").

20. *See id.* at 970 ("It allows courts to exclude evidence during trial concerning collateral compensation . . . .").

21. *See id.* ("It allows courts . . . to calculate damages once the trier of fact establishes liability.").

22. *See id.* ("In the medical insurance context, the collateral source rule allows a plaintiff to receive compensation from her insurer for medical expenses related to her injuries and receive cumulative compensation for the same economic damages from the tortfeasor.").

maintain insurance coverage.[23] Both rationales persist today to justify the rule's continued applicability.[24] As a deterrent, the rule ensures that a tortfeasor pays the entire cost of the harm she causes the plaintiff.[25] As a mechanism to prevent defendants from benefiting from a plaintiff's choice to elect insurance coverage, the rule validates a windfall in favor of the plaintiff to prevent a windfall in favor of the defendant.[26]

The collateral source rule works in conjunction with the reasonable value rule to ensure that triers-of-fact calculate the plaintiff's damages for past medical expenses not by the actual cost the plaintiff incurred, but by the reasonable value of the medical care.[27] Without the collateral source rule, the trier-of-fact could ignore the reasonable value rule and simply award the amount the plaintiff actually paid, without regard for any other expenses the plaintiff may have incurred or whether the amount

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23. *See* Levenson, *supra* note 11, at 927 ("Originally, courts justified the collateral source rule as a means of promoting tort deterrence and ensuring that a defendant tortfeasor would not benefit from the injured claimant's insurance coverage.").

24. *See id.* at 928–31 (presenting arguments supporting the collateral source rule).

25. *See id.* at 928–29 ("[Advocates for the collateral source rule] assert that it is fundamental to tort law for tortfeasors to pay the consequences for their actions, and that the deterrent effect of tort law is undermined when a claimant's medical expenses are covered by his own insurance.").

26. *See* DOBBS, *supra* note 3, § 8.6(3) ("Perhaps the weakest argument made in support of the collateral source rule is the one that has been most mentioned by the courts—the wrongdoing defendant should not get the benefit of any reduction in the plaintiff's damages by a collateral source, since this would be a 'windfall' . . . ."); Krauss & Kidd, *supra* note 2, at 28 (arguing that the collateral source rule ensures that the plaintiff's damages correlate with the defendant's wrongdoing rather than make the plaintiff whole); Todd, *supra* note 6, at 974 ("Notions of fairness and justice favor the defendant-tortfeasor paying for all of the damages of his tortious behavior and not receiving the benefits of collateral source compensation provided to the plaintiff by an insurance policy."); Todd R. Lyle, Comment, *Phantom Damages and the Collateral Source Rule: How Recent Hyperinflation in Medical Costs Disturbs South Carolina's Application of the Collateral Source Rule*, 65 S.C. L. REV. 853, 855 (2014) ("[I]f a windfall is going to occur, it should favor the innocent plaintiff as opposed to the defendant.").

27. *See* DOBBS, *supra* note 3, § 8.1(3) ("Indeed, recovery does not depend on whether there is any bill at all, because under the collateral source rule the tortfeasor is liable for the value of the services even if they are given without charge.").

accepted as payment was reasonable.[28] This rationale is undermined, however, by the fact that many states constrain the role of the trier-of-fact by enacting statutory presumptions that the amount billed for medical services reflects its reasonable value.[29]

A modern rationale for the collateral source rule's continued applicability is that it allows plaintiffs to finance litigation in the face of contingency fees that could total as much as fifty percent of a plaintiff's recovery.[30] In essence, the rule allows plaintiffs to be made whole after insurance premiums, attorney's fees, and other costs that are not reimbursed by a collateral source are factored into the plaintiff's ultimate economic situation after recovery.[31] This justification is not applicable in cases in which courts award attorneys' fees and costs to a plaintiff, yet nonetheless apply the collateral source rule.[32]

In cases in which the collateral source is the plaintiff's insurance carrier, another rationale for the rule is that the plaintiff paid for the benefit of health insurance through monthly insurance premium payments.[33] This rationale does not apply, however, to collateral sources the plaintiff did not pay for, such as gratuitous payments from relatives or other philanthropic third

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28. *See id.* ("Recovery is not limited to expenses of treatment or even to expenses for relief of pain. Any reasonable expense, adequately proved to be a result of the injury, is an item of damage."). *But see id.* ("It has been said, however, that if the provider of medical services charges less than their value without intending a gift, the plaintiff's recovery is limited to the liability incurred.").

29. *See supra* note 10 and accompanying text (providing examples of statutory provisions that give medical bills a presumption of reasonability).

30. *See* DOBBS, *supra* note 3, § 8.6(3) ("[I]t is clear that a winning plaintiff may still recover only half of his losses unless he can pad the award with pain and suffering damages or collateral source rule damages to absorb fees and expenses.").

31. *See* Levenson, *supra* note 11, at 929–30 ("[Advocates for the collateral source rule] argue that collateral sources never pay the full costs of recovery to the plaintiff . . . .").

32. *See* DOBBS, *supra* note 3, § 8.6(3) ("If this were the only reason for adoption of the collateral source rule, the rule should not apply at all in those cases where attorney fees are separately awarded against the losing defendant.").

33. *See id.* ("[I]t is possible to argue that the plaintiff paid for the benefit he is receiving and that the defendant ought not benefit from the plaintiff's investment.").

parties.[34] It has also been criticized on the grounds that a potential plaintiff likely does not maintain her insurance coverage because she expects a double recovery in the event she is wronged.[35] In addition, the amount the plaintiff paid into the insurance fund does not necessarily correlate with the amount of collateral source payments she receives.[36]

A final justification for the rule is that, after her insurance carrier exercises its subrogation rights, the plaintiff has no double recovery.[37] Subrogation is typically accomplished by allowing an insurance carrier to seek reimbursement from the plaintiff following a judgment, although an insurance carrier can also subrogate by directly asserting the rights of the insured against a defendant.[38] Some have suggested that subrogation rights and the collateral source rule work in tandem, each serving as a justification for the other.[39] This rationale is weakened, however, by the fact that courts apply the collateral source rule even in cases in which no subrogation rights exist.[40] A second objection to this rationale is that it ignores the costs associated with subrogation.[41] While the continued application of the collateral source rule and enforcement of subrogation rights may lower premiums for medical insurance carriers, this system

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34. *See id.* ("This argument cannot be made in all cases, because the plaintiff has not chosen to pay for all collateral source benefits.").

35. *See id.* ("Denying the plaintiff a double recovery will thus not frustrate the plaintiff's expectation . . . .").

36. *See id.* ("[A]lthough the plaintiff paid premiums for his insurance, he did not necessarily pay an amount equal to the benefits.").

37. *See* Levenson, *supra* note 11, at 930–31 (describing the effect of subrogation on the plaintiff's ultimate recovery in personal injury litigation); Krauss & Kidd, *supra* note 2, at 31 ("Where subrogation is conventionally agreed to, the application of the [collateral source rule] is not problematic.").

38. *See* Todd, *supra* note 6, at 987 (discussing the role of subrogation in the debate about the collateral source rule).

39. *See* DOBBS, *supra* note 3, § 8.6(3) ("Courts have often suggested that protection of subrogation rights justifies the collateral source rule.").

40. *See id.* ("However, most courts have not limited the collateral source rule to cases in which subrogation rights exist, so this reason applies at best only to one group of collateral source cases."); *see also* Wershbale, *supra* note 2, at 349–50 (indicating that even where subrogation rights exist, insurance carriers often choose not to pursue them due to high administrative costs or potential damage to the insurer's reputation).

41. *See* DOBBS, *supra* note 3, § 8.6(3) ("A more important objection is that there are costs in making subrogation work.").

contributes to higher premiums for liability insurance carriers who bear the bulk of the added expense.[42]

B. Criticism of the Collateral Source Rule

While the collateral source rule still exists in most jurisdictions, it nonetheless garners sharp criticism about its continued relevance.[43] The primary criticism of the collateral source rule is that it is inconsistent with the notion of corrective justice: the view that the goal of tort law should be to make the plaintiff whole.[44] A double-recovery facilitated by the rule does not serve this purpose because the plaintiff is, from a purely economic standpoint, in a better position than she was before the harm.[45] Some argue that allowing the double-recovery amounts to a disguised form of additional punitive damages.[46] This argument largely fails, however, because in many cases there simply is not a double-recovery after the plaintiff's insurance carrier exercises its subrogation rights and the plaintiff pays her attorney.[47]

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42. *See id.* ("Rejection of the collateral source rule might save citizens in general more premium money by providing a credit and eliminating the expense of subrogation itself.").

43. *See* Todd, *supra* note 6, at 971 ("These debates reflect disagreement about the collateral source rule specifically and the nature and purpose of tort law in general."); Krauss & Kidd, *supra* note 2, at 11–12 (enumerating the grounds upon which scholars have attacked the collateral source rule); Levenson, *supra* note 11, at 922 (framing the debate about the collateral source rule over the last few decades).

44. *See id.* ("The collateral source rule is inconsistent with corrective or compensatory notions of justice found in other areas of tort law.").

45. *See id.* at 972 ("This double recovery scenario creates a situation where the plaintiff is put in a better position than before the tort occurred, thereby conflicting with the compensatory function of tort law.").

46. *See* Levenson, *supra* note 11, at 932 ("For those opponents who view the purpose of tort law as solely compensatory, the collateral source rule seems to facilitate the payment of additional punitive damages.").

47. *See* DOBBS, *supra* note 3, § 8.6(3) (describing the effect of subrogation and litigation finance on the plaintiff's perceived double recovery facilitated by the collateral source rule); Krauss & Kidd, *supra* note 2, at 22 ("[T]he [collateral source rule] could also be viewed as a slapdash method by which to compensate for other shortcomings of the tort system, such as non-recoverable attorney's fees."); Todd, *supra* note 6, at 976 (presenting the argument that collateral source rule serves to adequately compensate and otherwise undercompensated plaintiff under the current system).

Another flaw with the corrective justice criticism is that tort law does not exist solely to make the plaintiff whole; rather, there are many instances in which a plaintiff may recover more than her economic losses.[48]

Some have questioned the collateral source rule following healthcare reform.[49] The Patient Protection and Affordable Care Act (PPACA),[50] specifically the individual mandate,[51] altered the rationale behind the collateral source rule.[52] The individual mandate introduced a new class of plaintiffs—the willfully uninsured.[53] These plaintiffs who elect to incur a tax penalty rather than procure health insurance will benefit from the collateral source rule.[54] The rule makes the plaintiff's status as insured or uninsured irrelevant to the calculation of damages, placing the willfully uninsured claimant on the same footing as the insured claimant—despite her decision to shirk her obligation under the PPACA to maintain health insurance.[55] In this way, the individual mandate undermines the rule's function as an incentive to purchase health insurance.[56] Some have argued that the PPACA would undermine the collateral source rule if it were to realize the goal of universal healthcare coverage because it

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48. *See* Todd, *supra* note 6, at 972 (indicating that because "tort law is particularly inconsistent on this point," the corrective justice argument against the collateral source rule is unpersuasive).

49. *See* Todd, *supra* note 6, at 982 ("The new federal healthcare legislation and similar state healthcare initiatives potentially undermine the collateral source rule . . . .").

50. Pub L. No. 111–148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

51. *See* 26 U.S.C. § 5000A (2012) (creating a tax penalty for individuals who fail to obtain minimum healthcare insurance coverage).

52. *See* Levenson, *supra* note 11, at 936–48 ("In light of the [PPACA], arguments for upholding the common law collateral source rule are no longer as persuasive as they were before.").

53. *See id.* at 934–36 (discussing the effect of the introduction of the willfully uninsured claimant on the scope of the collateral source rule).

54. *See id.* at 934 ("[T]he rule would now benefit uninsured individuals who shirk their obligations to obtain insurance under the [PPACA].").

55. *See id.* at 936 ("[T]he collateral source rule allows willfully uninsured claimants to hide their lack of health coverage during trial and during calculation of damages.").

56. *See* Todd, *supra* note 6, at 982 ("Some judges aver that the plaintiff-insured's 'foresight' in purchasing insurance should be rewarded.").

would then be nearly impossible for a juror to disregard a plaintiff's insurance coverage when calculating damages for past medical expenses.[57] But the reality is that the PPACA does not achieve universal healthcare coverage; rather, the patchwork of the insurance market ultimately makes this argument against the continued applicability of the collateral source rule following healthcare reform unpersuasive.[58]

Proponents of tort reform have also criticized the collateral source rule.[59] Tort reform movements—largely driven by corporate and insurance industry advocates and lobbyists—have sought, among other goals, to reduce the number of lawsuits and impose caps on noneconomic and punitive damages.[60] Advocates for tort reform have sought to eliminate the incentive the collateral source rule creates for plaintiffs to file lawsuits.[61] These movements have led some states to completely abandon the rule.[62] While modification or abrogation of the collateral source rule as a component of tort reform sought to introduce more certainty and coherence to tort systems, the result often has been fragmentation and inconsistency in the rule's application.[63]

The collateral source rule has also drawn criticism due to its effect on the ability of a trier-of-fact to calculate the accurate reasonable cost of past medical expenses when healthcare

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57. *See id.* at 985 ("If the [PPACA] achieves near-universal coverage, a juror would have a difficult time disregarding insurance coverage for a plaintiff's tortious injuries since a juror will expect the plaintiff to have insurance.").

58. *See id.* at 968 ("The absence of universal coverage undermines the arguments supporting the predicted demise of the collateral source rule.").

59. *See id.* at 977 ("In the past twenty years, the collateral source rule came under the greatest scrutiny by tort reform advocates.").

60. *See id.* at 977–78 (describing tort reform efforts across the United States).

61. *See id.* at 978 ("Because the collateral source rule apparently 'overcompensates' plaintiffs and provides a financial incentive for plaintiffs to bring an action, tort reform advocates who sought to limit the number and size of awards favored abolition of the rule."); Wershbale, *supra* note 2, at 357 ("Abrogation of the collateral source rule, in concert with other tort reforms, provides an avenue to reduce the cost of the American tort system by eliminating many marginal cases.").

62. *See infra* Part III.D (noting states that have abandoned the rule entirely).

63. *See* Todd, *supra* note 6, at 980 ("Incoherency and fragmentation in the law increase the cost of both the tort system and health insurance.").

providers write off portions of plaintiffs' medical bills.[64] Medical providers often enter into negotiated discount agreements with insurance providers, and the rule typically bars evidence of these discounts.[65] When a medical provider accepts less than the billed amount for medical expenses, the collateral source rule creates a discrepancy between the amount a plaintiff recovers and the amount anyone actually paid.[66] This issue is the main focus of this Note because resolving it can address other criticisms of the collateral source rule while retaining the rule's protections.[67]

Despite its criticisms, the collateral source rule remains a vital part of personal injury litigation. As one scholar put it, "[R]eports of the impending death of the collateral source rule are greatly exaggerated."[68] While many of the rule's criticisms are legitimate, it would be improper to completely abandon the important protections the rule guarantees because the rationales supporting the rule endure.[69] Resolving the write-off issue introduced above can balance the strengths and weaknesses of the rule and serve as a practical compromise between retaining the strict common law rule and completely abandoning the rule.[70]

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64. *See* Lyle, *supra* note 26, at 853–54 (introducing the difficulty courts face in calculating damages when hospitals' hyperinflated list prices for medical services are later written off).

65. *See* Levenson, *supra* note 11, at 933 ("States allow claimants to collect write-offs under the collateral source rule because disclosure of the reduced payment often suggests that a collateral source paid for these expenses, undermining the purpose of keeping this information from the jury.").

66. *See id.* at 932 ("Collateral sources often do not pay for medical services at full price, allowing an insured claimant to receive medical care at a reduced rate.").

67. *See infra* Parts III–IV (presenting the write-off issue, the approaches courts have taken to address it, and an argument in favor of a middle-ground solution).

68. Todd, *supra* note 6, at 965 (referencing a quote attributed to Mark Twain that "the reports of my death have been greatly exaggerated").

69. *See id.* at 987 ("Many of the rationales in favor of maintaining the collateral source rule remain in effect . . . ."); Krauss & Kidd, *supra* note 2, at 5 (arguing that victims do not receive justice where the collateral source rule has been abandoned).

70. *See supra* notes 65–67 and accompanying text (introducing the complications the collateral source rule creates when confronted with write-offs or negotiated discount agreements between insurers and healthcare providers).

III. The Write-Off Issue and How Courts Have Addressed It

Vast discrepancies often exist between the amounts initially billed for medical treatment and the amounts healthcare providers ultimately accept as payment for their services.[71] These discrepancies, characterized by some as write-offs and by others as negotiated discounts, often occur pursuant to agreements between healthcare providers and insurance carriers that are in place before the plaintiff receives medical treatment.[72] The issue arises when the plaintiff presents medical bills as evidence of the reasonable cost of her past medical expenses, while in reality the total sum paid by the plaintiff and her health insurance carrier is substantially less.[73] The collateral source rule could—and in many jurisdictions does—prevent a defendant from introducing evidence of the negotiated discount.[74] While courts take numerous approaches to this issue, the three most common approaches are the traditional application of the collateral source rule, application of a modified version of the collateral source rule, and abandonment of the collateral source rule.[75]

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71. *See, e.g.*, *Healthcare Costs Hearing*, *supra* note 12, at 106 ("I have actually seen contracts where the discount from list price was over 900 percent and in this case the hospital was still earning a profit from the insurer because the negotiated rate was above the hospital's actual costs.").

72. *See, e.g.*, Kenney v. Liston, 760 S.E.2d 434, 450 (W. Va. 2014) (Loughry, J., dissenting) ("[A]t the time the charges were incurred, the medical provider and the insurer had already agreed on a different price for the services rendered.").

73. *See, e.g.*, Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130 (Cal. 2011) ("The [hospital] declaration stated that of the $122,841 billed for plaintiff's surgeries, [the insurance carrier] paid $24,380, plaintiff paid $3,566, and the remaining $94,894 was written off or waived by [the hospital] pursuant to the agreement between [the hospital] and the patient's private healthcare insurer . . . ." (internal quotation marks omitted)).

74. *See* Levenson, *supra* note 11, at 932–33 ("Under the collateral source rule, claimants are able to collect the write-off—the difference between the actual cost and the reasonable cost of the care paid by the collateral source.").

75. *See* Lori A. Roberts, *Rhetoric, Reality, and the Wrongful Abrogation of the Collateral Source Rule in Personal Injury Cases*, 31 REV. LITIG. 99, 102 (2012) (describing the wide array of approaches state courts and legislatures have taken to resolving the write-off issue).

A. Traditional Application of the Common Law Collateral Source Rule

The majority approach applies the traditional common law collateral source rule and bars any evidence of the written-off portion of the medical bill.[76] The Supreme Court of Appeals of

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76. *See, e.g.*, McConnell v. Wal-Mart Stores, Inc., 995 F. Supp. 2d 1164, 1169 (D. Nev. 2014) (finding that, under Nevada law, write-offs of medical bills are payments within the meaning of the collateral source rule); Aumand v. Dartmouth Hitchcock Med. Ctr., 611 F. Supp. 2d 78, 91–92 (D.N.H. 2009) ("[T]he significant risk of unfair prejudice to [the plaintiff] from proof of what her insurers actually paid to settle her medical bills—that is, that the jury may improperly reduce any award to the estate—substantially outweighs any probative value of that proof to the value of the care . . . ."); Pipkins v. TA Operating Corp., 466 F. Supp. 2d 1255, 1261–62 (D.N.M. 2006) ("New Mexico case law, along with the policy rationale underlying New Mexico's adoption of the collateral source rule, indicates that Medicare write offs would be treated the same as any other benefit a plaintiff may receive from a collateral source."); Calva-Cerqueira v. United States, 281 F. Supp. 2d 279, 295–96 (D.D.C. 2003) ("The collateral source rule applies in this case because the source of the benefit, the plaintiff's medical care providers' alleged writing-off of costs, is independent of the tortfeasor."); Lopez v. Safeway Stores, Inc., 129 P.3d 487, 496 (Ariz. Ct. App. 2006) ("[W]e hold that [the plaintiff] was entitled to claim and recover the full amount of her reasonable medical expenses for which she was charged, without any reduction for the amounts apparently written off by her healthcare providers pursuant to contractually agreed-upon rates with her medical insurance carriers."); Montgomery Ward & Co., Inc. v. Anderson, 976 S.W.2d 382, 385 (Ark. 1998) ("We choose to adopt the rule that gratuitous or discounted medical services are a collateral source not to be considered in assessing the damages due a personal-injury plaintiff."); Tucker v. Volunteers of Am. Colo. Branch, 211 P.3d 708, 712–13 (Colo. App. 2008) ("[W]e conclude that the contract between plaintiff's insurer and the health care providers which decreased the amount actually paid for plaintiff's medical care inured to plaintiff's benefit and falls within the [collateral source rule]."); Mitchell v. Haldar, 883 A.2d 32, 40 (Del. 2005) ("We hold that the trial judge erred by excluding the full amount of the medical bills as evidence of the total amount of [the plaintiff's] reasonable medical expenses."); Olariu v. Marrero, 549 S.E.2d 121, 123 (Ga. 2001) ("[The defendant] is not entitled to use a third party's write-off of medical expenses as a set-off against [the plaintiff's] recovery of past medical expenses."); Bynum v. Magno, 101 P.3d 1149, 1156–57 (Haw. 2004) ("[T]he difference between the standard rate and the Medicare/Medicaid payment may be viewed as a part of the 'benefits conferred on the injured party' within the scope of the collateral source rule."); Wills v. Foster, 892 N.E.2d 1018, 1032–33 (Ill. 2008) ("Defendants may not, however, introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the collateral source rule."); Baptist Healthcare Sys., Inc. v. Miller, 177 S.W.3d 676, 683–84 (Ky. 2005) ("It is absurd to suggest that the tortfeasor should receive a benefit from a contractual arrangement between Medicare and the health care provider."); White v. Jubitz Corp., 219 P.3d 566, 583 (Or. 2009)

West Virginia illustrated the dominant reasoning that courts use to justify a strict application of the collateral source rule to the write-off issue in *Kenney v. Liston*.[77] In that case, the defendant rear-ended the plaintiff and caused "serious, permanent, painful injuries to [the plaintiff's] spine."[78] The plaintiff's medical bills were over $70,000.[79] The healthcare provider accepted a lower amount pursuant to a negotiated discount agreement with the plaintiff's insurance carrier.[80] The defendant filed a motion in limine arguing that the plaintiff's recovery should be limited to the portions of the medical bills that had been paid by either the plaintiff or his health insurance carrier.[81] The Monongalia County Circuit Court denied the motion, finding that the write-offs were a collateral source and the collateral source rule barred the evidence.[82]

The Supreme Court of Appeals of West Virginia affirmed, holding that the collateral source rule does not differentiate between the types of benefits the plaintiff can receive, as long as

("[E]xclusion of 'write-offs' from the amount . . . a plaintiff may claim creates the anomaly that a defendant will be liable for the full reasonable charges that a medical provider makes to an uninsured person . . . , but may have more limited liability if the injured person is insured . . . ."); Covington v. George, 597 S.E.2d 142,144–45 (S.C. 2004) ("We hold that the collateral source rule is directly implicated in this case, and the actual payment amount was properly excluded."); Papke v. Harbert, 738 N.W.2d 510, 535–36 (S.D. 2007) ("[T]he collateral source rule applies and defendants are precluded from entering into evidence the amounts 'written off' by medical care providers because of contractual agreements with sources independent of defendants."); Acuar v. Letourneau, 531 S.E.2d 316, 322 (Va. 2000) ("The portions of medical expenses that health care providers write off constitute compensation or indemnity received by a tort victim from a source collateral to the tortfeasor." (internal quotation marks omitted)); Leitinger v. DBart, Inc., 736 N.W.2d 1, 18 (Wis. 2007) ("The admission in evidence of the amount actually paid in the present case, even if marginally relevant, might bring complex, confusing side issues before the fact-finder that are not necessarily related to the value of the medical services rendered.").

77. 760 S.E.2d 434 (W. Va. 2014).

78. *Id.*

79. *Id.* at 438.

80. *Id.*

81. *See id.* ("The defendant contends that since the full bills were neither paid nor actually incurred by the plaintiff or the plaintiff's health insurance carrier, the plaintiff should not be allowed to introduce evidence of those written-off amounts at trial.").

82. *Id.*

the benefit does not come from the defendant.[83] The court embraced the reasonable value doctrine, finding that this interpretation of the collateral source rule allows the plaintiff to recover the reasonable value of his medical bills, "not the expenditures actually made or obligations incurred."[84] The defendant had distinguished between payments and other benefits, arguing that the collateral source rule only applies to payments.[85] The court "reject[ed] this tenuous distinction, because the law is clear that the collateral source rule applies to *any* benefit received by a plaintiff from *any* source in line the with plaintiff's interests."[86]

In a dissenting opinion, Justice Allen Loughry argued that the majority's decision permits damages for medical bills to be calculated "based on fictitious evidence that bears no relationship to the plaintiff's actual losses."[87] Justice Loughry found that "[i]t is simply absurd to conclude that the amount billed for a certain procedure reflects the 'reasonable value' of that medical service" because medical providers utilize tactics similar to retailers that involve exorbitant markups and subsequent discounts to ensure a profit.[88] The dissent specifically challenged the presumed reasonability of medical bills, arguing that no evidence the defendant could offer could overcome the presumption.[89] Justice Loughry asserted that this logic implied that healthcare

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83. *See id.* at 445–46 ("[T]he rule that collateral source benefits are not subtracted from a plaintiff's recovery applies to proceeds or benefits from sources such as insurance policies, . . . employment benefits; services or benefits rendered gratuitously (whether free, discounted, or later written off); and social legislation benefits.").

84. *Id.* at 444; *see also id.* at 445 ("The damage is sustained when the plaintiff incurs the liability, and the method by which that liability is later discharged has no effect on the measure of damages." (internal quotation marks omitted)).

85. *Id.* at 444.

86. *Id.*

87. *Id.* at 449 (Loughry, J., dissenting).

88. *Id.* at 451.

89. *See id.* at 452 ("What more probative evidence of the reasonable value of the services could there be than the negotiated and paid rate for the services? What more could a defendant offer to rebut the prima facie presumption established in West Virginia Code § 57-5-4j?").

providers "routinely and as a matter of freely-negotiated contracts accept *less* than the reasonable value of the services."[90]

While critical of the rule's application in this case, Justice Loughry's dissent did not advocate for the abandonment of the collateral source rule.[91] Rather, he found that although the ultimate amount recoverable would be reduced, limiting recovery to the amount actually paid would still retain the protections of the rule.[92] Justice Loughry relied heavily on California's approach to the collateral source rule in his dissent.[93] States like California that have modified the collateral source rule to allow defendants to introduce evidence of write-offs have demonstrated that the approach favored by Justice Loughry's dissent is an effective solution to the write-off issue.

B. Application of a Modified Version of the Collateral Source Rule

Some courts have approached the write-off issue by modifying the strict common law collateral source rule to create an exception that permits the defendant to introduce evidence of write-offs.[94] States that have adopted modified approaches preserve the plaintiff's interests protected by the collateral source rule while acknowledging the compelling argument that the presumption of reasonability given to medical bills is flawed in

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90. *Id*.

91. *See id.* at 450 ("Precluding recovery for the 'write-offs' or discounts does not contravene the collateral source rule.").

92. *See id.* at 452 ("Limiting the amounts which can be recovered as damages for medical expenses to those amounts actually paid, as opposed to fictitious amounts generated by medical providers to ensure they can still make a profit after giving a substantial discount, does not thwart the rationale behind the collateral source rule.").

93. *See id.* at 451 ("[T]he court found that the gratuitous services exception to the rule limiting recovery to a plaintiff's economic loss 'has no application to commercially-negotiated price agreements like those between medical providers and health insurers,' . . . ." (quoting Howell v. Hamilton Meats & Provisions, 257 P.3d 1130, 1139 (Cal. 2011)).

94. *See Howell*, 257 P.3d at 1145 (allowing the defendant to introduce evidence that the healthcare provider accepted a discounted payment); Robinson v. Bates, 857 N.E.2d 1195, 1200–01 (Ohio 2007) (allowing a trier-of-fact to hear evidence of both the billed amount and discounted amount to determine the reasonable value of past medical expenses).

light of the fact that nearly no one actually pays these amounts.[95] Courts in California and Ohio have addressed the write-off issue through differing modified approaches that are both worth discussion.

1. California Approach

The California approach appears in *Howell v. Hamilton Meats & Provisions, Inc.*[96] Here, the Supreme Court of California addressed the issue of whether a plaintiff whose medical provider has accepted an amount less than what is stated on the bill as full payment should be permitted to recover the undiscounted billed amount.[97] The case arose from a car accident for which the defendant conceded liability.[98] The plaintiff's total medical bills were roughly $190,000—$130,000 of which was discounted pursuant to an agreement between the hospital and insurance carrier.[99]

The defendant filed a motion in limine to exclude evidence of bills that were not paid by either the plaintiff or her health insurance carrier.[100] The trial court denied the motion, ruling that the defendant should make a post-trial motion to reduce medical damages.[101] The defendant did so, and the trial court granted the post-trial motion.[102] The California Court of Appeals reversed, holding that the reduction violated the collateral source rule.[103]

The Supreme Court of California held that the plaintiff could not recover the undiscounted billed amount for her medical expenses.[104] The court reasoned that recoverable damages for

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95. *See Healthcare Service Costs Hearing*, *supra* note 12, at 105 ("There is not a requirement that anyone ever pays that posted price and in fact the posted price is seldom paid.").

96. 257 P.3d 1130 (Cal. 2011).

97. *Id.* at 1133.

98. *Id.*

99. *Id.*

100. *Id.* at 1134.

101. *Id.*

102. *Id.*

103. *Id.*

104. *See id.* at 1145 ("[A]n injured plaintiff whose medical expenses are paid

medical expenses "must be both incurred *and* reasonable."[105] The court also found that because the agreement between the plaintiff's insurance carrier and the hospital was in place before the plaintiff's treatment, she was never actually liable for the full amount billed.[106] The court was not persuaded that the negotiated discount was a benefit for the plaintiff; rather, the court found that the parties to the agreement negotiated it primarily for the benefit of the insurance carrier.[107] While the court recognized that there could be cases in which a plaintiff would be liable for the full amount billed, it ultimately found that it "should not order one defendant to pay damages for an economic loss the plaintiff has not suffered merely because a different defendant may have to compensate a different plaintiff who *has* suffered such a loss."[108] Not only did the court find that evidence of the discount was relevant and admissible, the court went a step further and found that "[w]here the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses."[109] The court left open the question of whether the billed amount could be admissible for some other purpose.[110]

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through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial.").

105. *Id.* at 1137; *see also id.* at 1138 ("Thus, the general rule under the restatement, as well as California law, is that a personal injury plaintiff may recover *the lesser* of (a) the amount paid or incurred for medical services, and (b) the reasonable value of the services.").

106. *See id.* at 1139 ("[H]er prospective liability was limited to the amounts [her insurance carrier] had agreed to pay the providers for the services they were to render. Plaintiff cannot meaningfully be said ever to have incurred the full charges.").

107. *See id.* at 1144 ("Insurers and medical providers negotiate rates in pursuit of their own business interests, and the benefits of the bargains made accrue directly to the negotiating parties. The primary benefit of discounted rates for medical care goes to the payer of those rates—that is, in largest part, the insurer.").

108. *Id.* at 1145 (citation omitted).

109. *Id.* at 1146.

110. *See id.* (suggesting that the billed amount could be relevant for determining non-economic damages or damages for future medical expenses); *infra* notes 122125 and accompanying text (proposing purposes for which the billed amount could be admissible).

2. Ohio Approach

The Ohio approach appears in *Robinson v. Bates*.[111] *Robinson* arose from the plaintiff's injuries following a fall at her residence due to her landlord's repair work.[112] The plaintiff introduced evidence that her medical bills were $1,919 but stipulated that the healthcare provider accepted $1,350.43 in full satisfaction of the bill pursuant to a negotiated discount with her insurance carrier.[113] The trial court refused to admit the original medical bills, and the Ohio Court of Appeals reversed.[114]

The Supreme Court of Ohio held that "both the original medical bill rendered and the amount accepted as full payment for medical services should have been admitted."[115] The court found that, in addition to the amount accepted as payment, the court should also admit the amount originally billed.[116] Once the plaintiff introduces the original amount, the court found that the defendant should be permitted to introduce evidence that the amount was unreasonable.[117] The court found that allowing the defendant to introduce evidence of a write-off does not contravene the collateral source rule.[118] Recognizing the disparities that can arise from case to case, the court noted that a bright-line rule presuming the reasonability of either the billed amount or the discounted amount would not be appropriate.[119] Rather, the calculation of the reasonable value must be performed by the trier-of-fact with all the relevant evidence in each specific case.[120]

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111. 857 N.E.2d 1195 (Ohio 2006).

112. *Id.* at 1196–97.

113. *Id.* at 1197.

114. *Id.*

115. *Id.*

116. *See id.* ("[O]riginal bills are certainly evidence of the value that the medical providers themselves place upon their services.").

117. *See id.* at 1198 ("Once medical bills are admitted, a defendant may present evidence to challenge their reasonableness.").

118. *See id.* at 1200 ("[B]ecause no one pays the negotiated reduction, admitting evidence of write-offs does not violate the purpose of the collateral source rule.").

119. *See id.* ("[I]n any given case, that determination is not necessarily the amount of the original bill or the amount paid.").

120. *See id.* ("[T]he reasonable value of medical services is a matter for the jury to determine from all relevant evidence.").

The court ultimately left the responsibility of calculating the reasonable value of medical expenses to the jury, leaving them free to award "the amount originally billed, the amount the medical provider accepted as payment, or some amount in between."[121]

Justice Lundberg Stratton's opinion concurring in part and dissenting in part argued that, while both the amount billed and the amount paid should be admissible, the plaintiff should only be able to recover the amount actually paid for treatment.[122] While she would not permit a plaintiff to recover the billed amount, she believed that amount could be relevant "in evaluating pain and suffering and the extent of the injuries, past and future."[123] Justice Lundberg Stratton recognized that, without admitting the billed amount as evidence, the seriousness and extent of the plaintiff's injuries could be distorted.[124] Although the California court in *Howell* offered no opinion as to whether the billed amount could be relevant for some purpose other than calculating damages for past medical expense, Justice Lundberg Stratton's opinion in *Robinson* demonstrates other purposes for which the billed amount could be relevant.[125] The Ohio legislature responded to the *Robinson* decision by codifying its holding.[126]

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121. *Id.*

122. *See id.* at 1202 (Lundberg Stratton, J., concurring in part and dissenting in part) ("I would limit *recovery* for medical expenses to the amount actually paid for treatment.").

123. *Id.* at 1202–03.

124. *See id.* at 1202 ("For example, a plaintiff incurs a medical bill for $10,000. . . . The $10,000 bill is settled for $2,000. However, claiming the plaintiff incurred only $2,000 in treatment distorts the degree of medical care and physical damages actually incurred by the plaintiff . . . .").

125. *See* Howell v. Hamilton Meat Provisions, Inc., 257 P.3d 1130, 1146 (Cal. 2011) (noting that because the defendant conceded that the billed amount was relevant in this case, the court would not offer an opinion on whether the billed amount should be admissible to prove non-economic damages or damages for future medical expenses).

126. *See* OHIO REV. CODE ANN. § 2315.20 (West 2015) (codifying the rule promulgated in *Robinson v. Bates*).

C. Complete or Partial Abandonment of the Collateral Source Rule

Some states have completely abandoned the collateral source rule, effectively eliminating the write-off issue.[127] In these states, the insurer generally retains the right to subrogate against the tortfeasor directly.[128] Similarly, certain states allow for, or require, a post-trial damages reduction of collateral payments, which would also eliminate the issue.[129] These statutory modifications to the collateral source rule have generally emerged from broader tort reform efforts.[130]

In a series of decisions in the late 1990s, the Alabama Supreme Court addressed the constitutionality of the legislative attempts to abrogate the collateral source rule.[131] It ultimately decided in *Marsh v. Green*[132] that it was not the place of the

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127. *See, e.g.*, ALA. CODE § 12-21-45 (2015) (abrogating the collateral source rule as a rule of evidence at trial); N.Y. C.P.L.R. 4545 (McKinney 2015) ("[E]vidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source . . . .").

128. *See* Todd, *supra* note 6, at 993 ("In Alabama, the plaintiff's insurer, however, would be able to exercise its subrogation rights against the defendant . . . .").

129. *See, e.g.*, ALASKA STAT. ANN. § 09.17.070 (West 2015) ("After the fact finder has rendered an award to a claimant, . . . defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract."); FLA. STAT. ANN. § 768.76(1) (West 2015) ("[T]he court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources . . . .").

130. *See* Todd, *supra* note 6, at 977–80 (describing the status of the collateral source rule in states that have adopted tort reform). Todd argues that the efforts to improve tort systems by abrogating the collateral source rule have instead "created greater fragmentation and inconsistency." *Id.* at 979.

131. *See* Marsh v. Green, 782 So. 2d 223 (Ala. 2000) (finding the statutory abrogation of the collateral source rule to be constitutional); Am. Legion Post No. 57 v. Leahy, 681 So. 2d 1337, 1338 (Ala. 1996), *overruled by* Marsh v. Green, 782 So. 2d 223 (Ala. 2000) (finding the statutory abrogation of the collateral source rule to be unconstitutional); s*ee also* Benjamin B. Coulter, *No Longer as Good as Dead: The Continued Revival of Alabama's Medical and Hospital Expenses Exception to the Collateral Source Rule a Decade After* Marsh, 42 CUMB. L. REV. 299, 301–11 (2012) (recounting the history of the collateral source rule in Alabama).

132. 782 So. 2d 223 (Ala. 2000).

courts to assess the wisdom of otherwise constitutional action by the legislature.[133] While the court allowed the abandonment of the rule to stand in the end, its initial reluctance to do so signals that the rule remains a critical part of the tort system in the eyes of the courts.[134]

IV. Argument in Favor of the California Approach

The traditional common law collateral source rule has drawn legitimate criticism as to its relevance in modern tort law.[135] Abandoning the rule altogether, however, has had equally troublesome results.[136] A compromise that limits the scope of the rule without completely abandoning it is the most workable solution. A modified approach to the collateral source rule that allows defendants to introduce evidence of written-off medical bills can serve as an effective method of preserving the protections of the rule while limiting inflated damage awards.[137] While California and Ohio have both solved the write-off issue without abandoning the collateral source rule, the California

133. *See id.* at 231 ("These concerns deal with the wisdom of legislative policy rather than constitutional issues. Matters of policy are for the Legislature and, whether wise or unwise, legislative policies are of no concern to the courts."). High courts in other states that have attempted to abandon the collateral source rule statutorily have struck down the legislation as unconstitutional. *See, e.g.*, Farley v. Engelken, 740 P.2d 1058, 1068 (Kan. 1987) (finding that the abrogation of the collateral source rule violated equal protection); Carson v. Maurer, 424 A.2d 825, 838 (N.H. 1980) (same); Armeson v. Olson, 270 N.W.2d 125, 137 (N.D. 1978) (finding that abrogating the collateral source rule violated substantive due process).

134. *See Marsh*, 782 So. 2d at 231 ("[A] court cannot hold a statute invalid because of its view that there are elements therein which are violative of natural justice or in conflict with the court's notions of natural, social, or political rights of the citizen." (internal quotation marks omitted)).

135. *See supra* Part II.B (presenting the arguments in favor of abandoning the collateral source rule).

136. *See* Todd, *supra* note 6, at 979 (arguing that tort reform has "created greater fragmentation and inconsistency" in tort law).

137. *See infra* Parts IV.A–IV.B (evaluating the effect of the California approach on each of the rationales and criticisms of the collateral source rule).

approach is most practical.[138] Although it is not perfect, it can be altered to compensate for many of the concerns it creates.[139]

A. A Modified Approach Preserves the Protections of the Collateral Source Rule

The collateral source rule is supported by many rationales, such as its deterrent effect,[140] its litigation finance role,[141] its interplay with the reasonable value doctrine,[142] the fact that plaintiffs pay for the benefit of health insurance,[143] and the rule's integration into the subrogation process.[144] Because abandoning the rule would undermine these still relevant purposes, a modified approach is the best method of reforming the collateral source rule. Although a modified approach does not entirely preserve each of these rationales,[145] it is nonetheless the most practical way to balance the purposes of the rule with the reality of modern healthcare billing practices.

A modified approach best preserves the collateral source rule's desirable deterrent effect because the defendant pays the entire amount incurred for medical expenses, not just the amount the plaintiff herself paid.[146] In jurisdictions where the collateral

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138. *See infra* Part IV.C (arguing that the California approach is more practical than the Ohio approach).

139. *See infra* Part IV.D (proposing alterations to the California approach).

140. *See supra* notes 23–25 and accompanying text (describing the deterrent effect of the collateral source rule).

141. *See supra* notes 30–32 and accompanying text (describing the litigation finance role of the collateral source rule).

142. *See supra* notes 27–29 and accompanying text (describing the interaction between the collateral source rule and the reasonable value rule).

143. *See supra* notes 33–36 and accompanying text (describing the argument that the collateral source rule does not create a windfall because plaintiff has paid for the benefit of health insurance).

144. *See supra* notes 37–42 and accompanying text (describing the relationship between the collateral source rule and subrogation).

145. *See infra* Part IV.D (describing the effect of a modified approach on the litigation finance role of the collateral source rule).

146. *Compare* Howell v. Hamilton Meat Provisions, Inc., 257 P.3d 1130, 1145 (Cal. 2011) (permitting a plaintiff to recover only the amount the medical provider accepted as payment for medical services), *and* Robinson v. Bates, 857 N.E.2d 1195, 1200–01 (Ohio 2007) (permitting the trier-of-fact to determine the reasonable value of medical services after both the amount billed and amount

source rule has been abandoned, the plaintiff's health insurance carrier must initiate separate proceedings against the defendant to recover the portion of the plaintiff's medical bills it paid.[147] This method of subrogation imposes a larger cost on insurance carriers than the typical method in which the carrier subrogates against the plaintiff directly.[148] This higher cost could cause the carrier to forgo subrogation against the defendant.[149] In those cases, the defendant's liability is ultimately much less than the reasonable value of the plaintiff's medical expenses—arguably substantially reducing the defendant's deterrence.

A modified approach works best with the reasonable value doctrine because almost no one can reasonably be expected to pay the billed amount.[150] Discounts are far reaching: healthcare providers negotiate these discounts not only with health insurance carriers, but also with Medicare, Medicaid, and similar state-run programs.[151] Even uninsured patients could receive discounts in some cases.[152] Given the widespread nature of these discounts, the presumption of reasonability favoring the billed amount is flawed and should be re-evaluated. That is not to say that the billed amount is inherently unreasonable; rather, the circumstances in which that amount is reasonable are so rare

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accepted as payment have been introduced to evidence), *with* ALA. CODE § 12-21-45 (2015) (limiting a plaintiff's recovery to the amount she actually paid by abrogating the collateral source rule).

147. *See, e.g.*, Todd, *supra* note 6, at 993 (indicating that in jurisdictions in which the collateral source rule has been abandoned, the insurance carrier may pursue subrogation rights against a defendant directly).

148. *See* Wershbale, *supra* note 2, at 349–50 (describing the high administrative costs associated with subrogation).

149. *See* Todd, *supra* note 6, at 995 (noting that "insurers typically do not bring direct actions" against defendants); Wershbale, *supra* note 2, at 349 ("[I]nsurers often do not exercise the right to subrogation.").

150. *See Healthcare Service Costs Hearing*, *supra* note 12, at 105 ("Under the current system hospitals and physicians have the ability to post any price they choose. There is not a requirement that anyone ever pays that posted price and in fact the posted price is seldom paid.").

151. *See Howell*, 257 P.3d at 1142 ("Because so many patients, insured, uninsured, and recipients under government healthcare programs, pay discounted rates, hospital bills have been called insincere, in the sense that they would yield truly enormous profits if those prices were actually paid." (internal quotation marks omitted)).

152. *See id.* ("In California, medical providers are expressly authorized to offer the uninsured discounts . . . .").

that a presumption of reasonability is misplaced.[153] Thus, in reality, the traditional collateral source rule serves to undermine the reasonable value doctrine rather than support it. A modified approach permits the trier-of-fact to arrive at the reasonable value for medical expenses more effectively than under the common law collateral source rule.

Advocates for the collateral source rule argue that the defendant should not benefit from the plaintiff's decision to maintain health insurance coverage, and because the plaintiff paid for that benefit through monthly insurance premiums, she should be able to recover the full amount of her medical bills.[154] A modified approach preserves this function of the collateral source rule because, while the plaintiff is not permitted to recover the write-off, she is still permitted to recover the full amount that she and her insurance carrier actually paid.[155] The defendant does not benefit from the plaintiff's choice to maintain insurance coverage because she must still pay the full cost of her wrongdoing, as measured by the amount the healthcare provider accepted as payment for its services.[156] In addition, because discounts may be available even to uninsured patients in certain cases, the amount the defendant pays may be the same regardless of whether the plaintiff was insured.[157]

A modified approach does not change the way the plaintiff's insurance carrier exercises its subrogation rights. The plaintiff's insurance carrier is only entitled to the portion of the plaintiff's recovery that it actually paid, making the fact that the plaintiff does not recover the write-off irrelevant to the subrogation

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153. *See Healthcare Service Costs Hearing*, *supra* note 12, at 105 (indicating that charged amounts are seldom actually paid).

154. *See* DOBBS, *supra* note 3, § 8.6(3) ("[I]t is said that the collateral source rule encourages the plaintiff to protect himself by the purchase of insurance by making sure he reaps its value.").

155. *See Howell*, 257 P.3d at 1145 (holding that the plaintiff may recover "the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial").

156. *See supra* notes 150–153 and accompanying text (arguing that the amount the healthcare provider accepts as payment should be the presumed reasonable value of the services).

157. *See Howell*, 257 P.3d at 1142 (indicating that hospitals in California are permitted to offer discounts to uninsured patients).

issue.[158] In states where the collateral source rule has been abandoned, the health insurance carrier must subrogate against the defendant.[159] This method is less desirable for both the plaintiff's health insurance carrier and the defendant's liability insurance carrier.[160] It is easier and more cost-effective for the plaintiff's carrier to subrogate against the plaintiff directly.[161] In states where the health insurance carrier must pursue subrogation against the defendant, the defendant's liability insurance carrier is left uncertain as to the possibility of separate subrogation proceedings after trial. By contrast, a modified approach preserves the traditional relationship between the collateral source rule and subrogation, allowing courts to adopt the approach without concern that the subrogation procedure will be undermined.[162]

B. A Modified Approach Also Addresses Some of the Rule's Criticisms

The collateral source rule has been challenged on the grounds that it allows the plaintiff to receive a double-recovery,[163] on the grounds that it allows plaintiffs to recover artificially inflated retail mark-ups on medical expenses that are ultimately

158. *See* Roberts, *supra* note 75, at 137–38 ("A right of subrogation extends only to amounts paid by the insurer and therefore the right to subrogation does not allow a health care insurer to recover the amount of the contractual write-off.").

159. *See* Todd, *supra* note 6, at 993 (describing subrogation in states that have abandoned the collateral source rule).

160. *See id.* at 995 (indicating that health insurance carriers prefer not to bring actions directly against defendants).

161. *See id.* at 996 (noting that most states prefer post-trial reduction of a plaintiff's damages award rather than separate proceedings between the plaintiff's insurance carrier and the defendant).

162. *See Howell*, 257 P.3d at 1135 ("Since insurance policies frequently allow the insurer to reclaim the benefits paid out of a tort recovery by refund or subrogation, the rule, without providing the plaintiff a double recovery, ensures the tortfeasor cannot avoid payment of full compensation for the injury inflicted." (internal quotation marks omitted)).

163. *See supra* notes 44–48 and accompanying text (presenting the argument that the collateral source rule is contrary to the notion of corrective justice).

written off,[164] and on the grounds that healthcare and tort reform have eroded the role of the rule in modern litigation.[165] In addition to solving the write-off issue, a modified approach also ameliorates many of the rule's other criticisms.

Critics of the collateral source rule argue that it permits the plaintiff to recover an unfair windfall.[166] Proponents of the rule argue that this double-recovery is necessary to ensure that the defendant pays the full cost of her wrongdoing.[167] A modified approach strikes a balance between these two viewpoints by reducing the amount the plaintiff can recover while still ensuring that the defendant pays the reasonable cost of her wrongdoing.[168] This approach best satisfies both understandings of corrective justice: the wronged plaintiff is made whole, and the defendant pays the full cost of her wrongdoing.[169]

On its face, abandoning the rule could arguably be the best solution in light of healthcare reform. If the PPACA's individual mandate were taken to mean universal access to health insurance, then the collateral source rule would be unnecessary in the context of damages for medical expenses.[170] This is not,

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164. *See supra* notes 65–66 and accompanying text (introducing the write-off problem).

165. *See supra* notes 49–63 and accompanying text (describing the arguments that the collateral source rule should be abandoned due to healthcare reform and tort reform).

166. *See* Todd, *supra* note 6, at 972 ("This double recovery scenario creates a situation where the plaintiff is put in a better position than before the tort occurred, thereby conflicting with the compensatory function of tort law.").

167. *See* Krause & Kidd, *supra* note 2, at 22 (asserting that the tortfeasor has a duty to compensate the victim that should not be "extinguished by favors bestowed on the victim by a third party").

168. *See supra* notes 150–153 and accompanying text (arguing that the discounted amount represents the reasonable value of medical services).

169. *See* Krause & Kidd, *supra* note 2, at 26–28 (describing the relationship between the collateral source rule and the two competing understandings of corrective justice: making victims whole and righting wrongs). Krause and Kidd argue that the collateral source rule is best understood in the context of a corrective justice system based on righting wrongs rather than making victims whole. *See id.* at 28 ("When the collateral source rule is displayed side by side with a system of corrective justice based on correlativity and personality, wherein tort law is not concerned with making the victim whole but rather with righting wrongs, the two emerge harmoniously.").

170. *See* Todd, *supra* note 6, at 967 ("[T]he collateral source rule, when applied to medical expenses covered by health insurers, has less utility when there is universal healthcare coverage, as aspired to under the [PPACA].").

however, a realistic characterization of the individual mandate—there is not universal access to health insurance.[171] Even if there were, there are vast differences between health insurance policies.[172] The California approach recognizes the increased access to negotiated discounts following the individual mandate, yet preserves the still necessary protections of the collateral source rule.[173]

A modified approach also addresses some of the goals of tort reform without destroying the protections of the collateral source rule. A primary aim of tort reform is to reduce excessive damage awards.[174] By eliminating the write-off from the plaintiff's recovery, a modified approach reduces the artificial inflation of medical expenses but avoids the erratic effects of abandoning the collateral source rule.[175] Thus, a modified approach serves as an effective compromise that achieves a measure of meaningful reform without undermining the purposes of the collateral source rule.

C. The California Approach Is Most Practical

While both California and Ohio courts allow a defendant to introduce evidence of a write-off, the two approaches have notable differences.[176] The Ohio approach permits parties to introduce

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171. *See id.* at 968 ("The absence of universal coverage undermines the arguments supporting the predicted demise of the collateral source rule.").

172. *See, e.g.*, *Healthcare Service Costs Hearing*, *supra* note 12, at 106 (discussing the widely varying nature of the discounts for healthcare services).

173. *See* Paige Winfield Cunningham, *New England Journal of Medicine Report: 10 Million Newly Insured,* POLITICO (Jul. 23, 2014), http://www.politico.com/story/2014/07/new-england-journal-of-medicine-report-obamacare-109304.html (last visited June 5, 2015) (reporting that one study found that 10 million Americans were newly insured because of the PPACA) (on file with the Washington and Lee Law Review).

174. *See* Wershbale, *supra* note 2, at 349 ("The concern is that where the fact-finder remains uninformed, or there is no collateral source setoff, a successful plaintiff acquires a windfall, being awarded monetary damages in excess of necessary and reasonable medical costs.").

175. *See* Todd, *supra* note 6, at 979 (describing the inconsistent and fragmented practical results of abandoning the collateral source rule).

176. *Compare* Howell v. Hamilton Meat Provisions, Inc., 257 P.3d 1130, 1146 (Cal. 2011) (limiting a plaintiff's recovery to the amount actually paid by the plaintiff and her health insurance carrier), *with* Robinson v. Bates, 857

evidence of both the amount initially billed and the amount ultimately collected to the trier-of-fact, who then ultimately bears the burden of deciding the reasonable value of the medical services.[177] By contrast, the California approach only permits a plaintiff to recover the amount accepted as payment, and goes as far as to say that the amount initially billed is inadmissible because it is irrelevant to the calculations of economic damages for past medical expenses.[178]

On its face, the Ohio approach better enables a trier-of-fact to perform its duty to ascertain the reasonable value of medical expenses because this approach permits parties to introduce the maximum amount of information into evidence.[179] In theory, the trier-of-fact can parse through the complex records, bills, and discounts to arrive at the reasonable value.[180] Parties could hire expert witnesses to assist the judge or jury in understanding the complicated and largely arbitrary systems medical providers use to value their services.[181] However, the resources required to effectively educate judges and juries on hospital billing practices in even the most routine personal injury cases would be enormous.[182] These costs can be avoided by employing the

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N.E.2d 1195, 1197 (Ohio 2006) (allowing a jury to determine the reasonable value of medical expenses after considering all the relevant evidence, including both the amount billed and the amount accepted as payment).

177. *See Robinson*, 857 N.E.2d at 1197 ("[B]oth the original bill rendered and the amount accepted as full payment for medical services should have been admitted . . . .").

178. *See Howell*, 257 P.3d at 1146 ("Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses.").

179. *See Robinson*, 857 N.E.2d at 1200 ("Due to the realities of today's insurance and reimbursement system, in any given case, that determination is not necessarily the amount of the original bill or the amount paid. Instead, the reasonable value of medical services is a matter for the jury to determine from all relevant evidence.").

180. *See id.* ("To avoid the creation of separate categories of plaintiffs based on individual insurance coverage, we decline to adopt a categorical rule. Because different insurance arrangements exist, the fairest approach is to make the defendant liable for the reasonable value of plaintiff's medical treatment.").

181. *See, e.g.*, *Healthcare Service Costs Hearing*, *supra* note 12, at 106 ("The hospitals often do not know how they set each charge on the charge master file. There is not a formula that hospitals use to set charges. . . . [T]he charges are not set by market forces or using a systematic methodology.").

182. *Cf. Howell*, 257 P.3d at 1142 ("The dissent's proposal that the insured

California approach, which assumes that the amount the healthcare provider accepted as payment was the commercially reasonable value of the medical services.[183]

The California approach allows a measure of predictability in litigation that the Ohio approach does not. Allowing a trier-of-fact to determine which is most reasonable between the amounts a medical provider initially bills and the amount it ultimately collects introduces yet another wildcard into already unpredictable civil litigation.[184] Given the large percentage of personal injury cases that are settled before trial, the California approach permits parties to negotiate a settlement with an accurate standard that reflects the likely calculation of medical expenses at trial.[185]

D. Altering the California Approach

The California approach is the most practical solution to the write-off issue. The approach is not, however, without its

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plaintiff recover the 'reasonable value' of his or her care, to be proven in each case by expert testimony is also troubling because it would routinely involve violations of the evidentiary aspect of the collateral source rule.").

183. *Cf.* Kenney v. Liston, 460 S.E.2d 434, 452 (W. Va. 2014) (Loughry, J., dissenting) ("Are we to blindly accept the fiction that hospitals and other medical providers routinely and as a matter of freely-negotiated contracts accept *less* than the reasonable value of their services?"). It is worth noting that while this Note argues that the amount accepted as payment should be presumed to be the reasonable value of medical services, the California court did not engage in a reasonableness analysis. Rather, the court seemed to suggest that the plaintiff can only recover the amount that was actually paid, even if that amount was unreasonably low. *See Howell*, 257 P.3d at 1138 ("Thus the general rule under the Restatement, as well as California law, is that a personal injury plaintiff may recover *the lesser* of (a) the amount paid or incurred for medical services, and (b) the reasonable value of the services."). The solution this Note proposes alters this approach to ensure that the plaintiff recovers the reasonable value of her medical expenses, even in cases where the provider accepted an unreasonably low amount as payment. *See infra* Part IV.D (proposing alterations to the California approach that would address the main concerns, such as reasonability).

184. *See generally* Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375 (2011) (evaluating the predictability of jury trials).

185. *See* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1951–56 (2009) (discussing the dominant role of settlement in civil litigation).

shortcomings. The bright-line rule that a plaintiff can only recover the amount she and her insurance carrier actually paid constrains the role of the jury in calculating damages. In addition, the approach may eliminate the collateral source rule's function as a method for plaintiffs to finance litigation. Finally, the California approach could theoretically incentivize individuals not to procure insurance coverage as mandated by the PPACA. Although some of these concerns cannot be easily rectified, most can be addressed by altering the approach.

By setting the amount actually paid as the maximum amount the plaintiff can receive, the California approach heavily constrains the role of the jury in determining appropriate damages for past medical expenses.[186] This weakness could be overcome by altering the approach so that the amount paid is presumed reasonable, but the plaintiff may rebut the presumption by introducing evidence that the amount accepted as payment was unreasonable. This would account for the scenario in which a healthcare provider does accept an unreasonably low amount as payment for medical care. This would also preserve the role of the jury in determining whether the amount was reasonable by essentially reversing the common presumption that medical bills are prima facie evidence of reasonable medical expenses.[187]

Limiting the common law collateral source rule erodes the litigation finance role of the collateral source rule. The amount a plaintiff receives in excess of what she and her insurance carrier paid has allowed the plaintiff to be made whole even after paying her attorney.[188] By eliminating this amount from the plaintiff's recovery, the plaintiff must pay her attorneys' fees out of her own

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186. *See Howell*, 257 P.3d at 1146 ("Where a trial jury has heard evidence of the amount accepted as full payment by the medical provider but has awarded a greater sum as damages for past medical expenses, the defendant may move for a new trial on grounds of excessive damages.").

187. *See supra* note 10 (presenting the statutory provisions in Virginia and West Virginia giving medical bills a prima facie presumption of reasonability).

188. *See* Jeremy Kidd, *To Fund or Not to Fund: The Need for Second Best Solutions to the Litigation Finance Dilemma*, 8 J. L. ECON & POL'Y 613, 638 (2012) ("While not traditionally thought of as a form of litigation finance, the common law doctrine known as the 'collateral source rule' provides some relief to poor and middle-class tort victims as they recuperate and attempt to recover from a tortfeasor.").

pocket in cases in which punitive damages or pain and suffering damages are not sufficient to finance these costs. This approach could prevent plaintiffs from bringing otherwise legitimate lawsuits or prevent plaintiffs' attorneys from being paid.[189] As a result, this could lead to conflict between the plaintiff's insurance carrier and her attorney about which party gets paid and which party does not should the carrier choose to subrogate. While this is a legitimate concern, the collateral source rule does not create this problem. Rather, the rule has enabled a work-around that allows a plaintiff to pay both her insurance carrier and her attorney.[190] The heart of this problem lies with the contingency fee arrangements plaintiffs' attorneys employ to finance litigation. The solution to this problem may come through reforming litigation financing practices, or possibly through instituting a loser-pays civil litigation system, but it ultimately rests outside the scope of any reasonably practical modification to the collateral source rule.[191]

A modified approach may also encourage patients to shirk their obligations to procure health insurance under the PPACA. Because the approach limits the plaintiff's recovery to the amount actually paid, a potential claimant would receive a higher recovery if her hospital bills were not discounted at all. In general, the only patients that pay undiscounted rates are the uninsured.[192] This creates a theoretical reason not to procure insurance coverage, although in reality few people factor future tort recovery into their decision about whether to procure health insurance.[193]

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189. *See* DOBBS, *supra* note 3, at 494–95 (asserting that the collateral source rule allows a plaintiff to pad her damage award so that she can pay her attorneys' fees and still be made whole).

190. *See supra* notes 30–32 and accompanying text (explaining how the collateral source rule has permitted plaintiffs to finance litigation by allowing the payment of attorneys' fees out of the damages for expenses already paid by a collateral source).

191. *See* Kidd, *supra* note 188, at 617 (asserting that the best solution to the litigation finance problem is to expand access to traditional modes of finance and market credit to encompass litigation).

192. *See Healthcare Service Costs Hearing*, *supra* note 12, at 99 ("The only patients asked to pay these full charges are the uninsured, some people with high deductible health savings accounts, and the international visitors.").

193. *Cf.* DOBBS, *supra* note 3, § 8.6(3) ("[I]t may be said that if the plaintiff has paid for the insurance benefits, he probably did not do so in hope of a double

Altering the California approach to create a rebuttable presumption rather than a bright-line rule creates the most workable and fair solution to bring the collateral source rule in line with the reality of modern healthcare billing practices. This would ensure that plaintiffs receive reasonable compensation for medical expenses without introducing the added cost and uncertainty to litigation that the Ohio approach would create.[194] While this alteration to the California approach does not solve every potential issue, it does preserve the essential protections of the collateral source rule while also accomplishing meaningful and practical reform that reduces artificially inflated damage awards based upon unreasonably high valuations of medical expenses.[195]

V. Conclusion

While often the subject of debate, the collateral source rule remains an important and relevant part of the American tort system.[196] The rule nonetheless creates a dilemma when confronted with the reality that plaintiffs rarely pay billed amounts for medical expenses.[197] This raises questions as to whether the presumption that medical bills are prima facie evidence of the reasonable value of medical services is appropriate.[198] Of the approaches courts have taken to this issue, the Supreme Court of California's modified approach most effectively resolves the issue.[199] The approach serves as a middle

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recovery.").

194. *See supra* notes 179–185 and accompanying text (arguing that the Ohio approach introduces unnecessary expense and uncertainty into litigation).

195. *See Healthcare Service Costs Hearing*, *supra* note 12, at 106 (describing scenarios in which there is a negotiated discount of as high as 900 percent yet the hospital still receives a profit).

196. *See supra* notes 14–18 and accompanying text (describing the rise of the collateral source rule as a fundamental pillar of the tort system).

197. *See supra* notes 71–75 and accompanying text (introducing the write-off problem).

198. *See supra* notes 27–29 and accompanying text (arguing that statutory presumptions of medical bills' reasonability undermine the trier-of-fact's ability to accurately determine the reasonable value of past medical expenses).

199. *See supra* notes 176–185 and accompanying text (arguing that the

ground between the traditional application of the collateral source rule and abandonment of the rule. The plaintiff retains the benefit of the collateral source rule by recovering the total amount both she and her insurance carrier paid, yet defendants do not pay artificially inflated damages. While the approach is not perfect, courts can alter it to address most concerns.[200] By implementing this altered version of the California approach to the write-off issue, courts can achieve meaningful and practical reform to the tort system without abandoning the protections of the collateral source rule.

California approach is the most practical way to reduce inflated awards for medical expenses).

200. *See supra* notes 186–195 and accompanying text (proposing alterations to the California approach to address its potential shortcomings).