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Close, but no Cigar: Issues with Louisiana Revised Statutes § 9:2800.27 and the Collateral Source Rule

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Close, but No Cigar: Issues with Louisiana Revised Statutes § 9:2800.27 and the Collateral Source Rule

Andrew G. Jarreau*

TABLE OF CONTENTS

Introduction	356
I. Louisiana Tort Recovery & the Collateral Source Rule.....	361
A. Tort Recovery in Louisiana and Its Connection with the Collateral Source Rule	361
B. The Collateral Source Rule in the United States	363
1. General Development of the Collateral Source Rule	363
2. Other States' Applications of the Collateral Source Rule	364
C. The Collateral Source Rule in Louisiana	366
II. <i>Bozeman v. State</i> : The Beginning of a Restrictive Era.....	368
A. The Accident That Brought Change	369
B. The <i>Bozeman</i> Court's Multi-Jurisdictional Analysis of the Collateral Source Rule.....	371
1. Reasonable Value of Services	371
2. Actual Amounts Paid	373
3. Benefit of the Bargain	374
C. The Result from <i>Bozeman</i> : A Two-Pronged Inquiry.....	375
D. You Get What You Pay For.....	376
1. Attorney-Negotiated Write-offs: Not a Mode of Excessive Recovery	376
2. The Advantage of the Collateral Source Rule and Workers' Compensation	377
E. Louisiana Revised Statutes § 9:2800.27: A Step in the Right Direction	379
III. One Step Forward and a Half Step Back.....	382
A. An Unpleasant Statute for Both Parties	382

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B. Phantom Charges, Real Money	384
IV. A Few Changes to Make Everyone Happy	385
A. Fixing a Bad Compromise	386
B. A Change to Deflate Jury Verdicts	388
C. Application of the Proposed Statute	389
1. Private Insurance Benefits.....	389
2. Attorney-Negotiated Write-Offs	391
3. Self-Negotiated Write-Offs	392
Conclusion.....	393

INTRODUCTION

On October 11, 2007, Dr. Maureen Jones arrived at the Paris Parker Salon to receive a Swedish massage.¹ Rather than leaving refreshed, Dr. Jones left Paris Parker Salon with pain and discomfort in her lower back.² By the following day, Dr. Jones's pain had increased so significantly that she sought immediate medical treatment.³ An MRI revealed that Dr. Jones had suffered a ruptured disc in her lower back.⁴ After a failed attempt at conservative treatment, she underwent surgery.⁵ Dr. Jones subsequently filed suit against the salon, the masseuse, and the salon's insurance provider.⁶ At a bench trial, the court ruled in favor of Dr. Jones, finding that the masseuse breached the applicable standard of care and awarding Dr. Jones damages in excess of \$800,000.⁷

Despite the considerable award of damages, Dr. Jones never received a bill for what the health care provider charged.⁸ Dr. Jones testified that the Baton Rouge Clinic did not charge her for the services she received there as a professional courtesy.⁹ The Louisiana First Circuit Court of Appeal ruled, however, that Louisiana's collateral source rule applied to

1. Johnson v. Neill Corp., No. 2015 CA 0430, 2015 WL 9464625, at *1 (La. Ct. App. 1st Cir. Dec. 23, 2015).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at *2.

9. *Id.* at *10.

Dr. Jones's "written-off"¹⁰ expenses, as well as actual paid expenses, and that, therefore, she could recover the healthcare provider's total amount billed.¹¹ Thus, Dr. Jones received \$107,811 for medical expenses she never incurred.¹² However, if Dr. Jones had brought this cause of action after January 1, 2020 and had received the write-off benefit through her insurance carrier, then she would still recover \$43,124.40 for medical expenses she never incurred.¹³

The collateral source rule prevents third-party payments to or benefits conferred on the victim from reducing the tortfeasor's liability.¹⁴ The jurisprudential test for the collateral source rule, prior to 2020, required that (1) the application of the rule furthers the policy goal of tort deterrence and that (2) the plaintiff must have experienced a diminution of patrimony¹⁵ in obtaining the benefit.¹⁶ Following the Louisiana Supreme Court's decision in *Bozeman v. State*, Louisiana courts inconsistently applied the collateral source rule.¹⁷ This inconsistency effectively allowed certain plaintiffs to unjustly profit from litigation—plaintiffs like Dr.

10. A "write-off," as referred to in this Comment, is the difference between the amount billed by the health care provider and the amount paid by the health insurer or other third party. Gary M. Langlois, Jr., *Louisiana's Collateral Source Rule: Eliminating the "Windfall" Arising from Medical Expense Write-Offs*, 63 LOY. L. REV. 291, 301 (2017). For example, the health care provider might bill the patient \$5,000 for services provided; however, the workers' compensation fee schedule only obliges the workers' compensation insurer to pay \$3,000. The \$2,000 difference between the amount billed and the actual amount paid by the insurer is the written-off amount. The healthcare provider eats the written-off amount is eaten because it legally cannot recover it from the patient.

11. The Louisiana First Circuit Court of Appeal held that even though the plaintiff did not suffer a diminution in patrimony to obtain the benefit, allowing the recovery of the written-off amount would not be "unconscionable." *Johnson*, 2015 WL 9464625, at *11.

12. *Id.*

13. See LA. REV. STAT. § 9:2800.27(B) (2020).

14. *Bozeman v. State*, 879 So. 2d 692, 697 (La. 2004).

15. Patrimony is defined as all of a person's assets and liabilities that are capable of having a pecuniary value. *Patrimony*, BLACK'S LAW DICTIONARY (11th ed. 2019).

16. See *Bozeman*, 879 So. 2d 692.

17. See generally *Lockett v. UV Ins. Risk Retention Grp.*, 180 So. 3d 557 (La. Ct. App. 5th Cir. 2015); *Royer v. State Dep't of Transp. & Dev.*, 210 So. 3d 910 (La. Ct. App. 3d Cir. 2017).

Jones, who had not incurred any monetary burdens from their injuries yet received a profit.¹⁸

In the 2020 First Extraordinary Session, the Louisiana Legislature enacted Louisiana Revised Statutes § 9:2800.27, which governs the collateral source rule's application to medical expenses and provides much needed clarity to the rule.¹⁹ The statute limits a plaintiff's recovery to the actual amounts paid, with an exception.²⁰ The exception allows a court to award 40% of the written-off amount when a person obtains a write-off through an issuer of health insurance or Medicare.²¹ Although Louisiana Revised Statutes § 9:2800.27 takes a step in the right direction, the statute does not provide an equitable and just solution in all cases. An award for written-off medical expenses is excess recovery and makes the plaintiff "more than whole," thereby contradicting the public policy behind compensatory damages and tort recovery.²² On the other hand, denying plaintiffs recovery in addition to the actual amounts paid, except for when the write-off is obtained via health insurance or Medicare, can result in some plaintiffs being made less than whole.²³ For example, the new statute fails to consider the diminution to patrimony suffered by plaintiffs that procure the write-off benefit through either their attorney or self-negotiations.²⁴ An additional issue is that the statute mandates that the

18. See generally *Lockett*, 180 So. 3d 557 (allowing plaintiff to recover written-off medical expenses that were never incurred); *Royer*, 210 So. 3d at 922 (allowing plaintiff to recover written-off amounts even though he suffered no diminution in patrimony to obtain benefit because the "overriding policy of tort deterrence outweighed the concern of double recovery").

19. See LA. REV. STAT. § 9:2800.27 (2020).

20. See *id.* § 9:2800.27.

21. The statute provides:

The court shall award to the claimant forty percent of the difference between the amount bill and the amount actually paid to the contracted medical provider by a health insurance issuer or Medicare in consideration of the claimant's cost of procurement, provided that this amount shall be reduced if the defendant proves that the recovery of the cost of procurement would make the award unreasonable.

Id. § 9:2800.27(B).

22. Langlois, *supra* note 10, at 315.

23. See *id.* § 9:2800.27(D).

24. See generally *Johnson v. Neill Corp.*, No. 2015 CA 0430, 2015 WL 9464625, at *1 (La. Ct. App. 1st Cir. Dec. 23, 2015) (acknowledging that the plaintiff received medical services for free as a professional courtesy); *Hoffman v. 21st Century N. Am. Ins.*, 209 So. 3d 702 (La. 2015) (acknowledging that the plaintiff received a discounted rate on medical services because of an agreement

court allow the jury to see only evidence of the amount billed by a medical provider and not the amount actually paid, which could potentially lead to inflated awards of general damages.²⁵

The Louisiana Legislature should amend Louisiana Revised Statutes § 9:2800.27 to provide that recovery, in addition to amounts actually paid, must be tied to the costs paid or incurred by the plaintiff in procuring the write-off benefit.²⁶ An amendment limiting recovery to actual amounts paid, with an exception for cost of procurement,²⁷ would provide an equitable result to both plaintiffs and defendants.²⁸ This proposed exception would allow recovery in addition to the amounts actually paid in cases where expenses diminish the victim's patrimony in exchange for obtaining the benefit of the write-off amount.²⁹ Such an amendment would permit recovery in amounts that make victims whole, and thus tortfeasors would still satisfy their obligation under Louisiana Civil Code article 2315.³⁰ The legislature should also amend the statute to ensure that with respect to damages, litigants cannot present the jury with evidence other

between the healthcare provider and attorney); *Lockett v. UV Risk Retention Grp., Inc.*, 180 So. 3d 557 (La. Ct. App. 5th Cir. 2015) (allowing plaintiff to recover written-off medical expenses obtained through self-negotiations).

25. *See id.* § 9:2800.27(F).

26. *See generally Lockett*, 180 So. 3d 557 (allowing plaintiff to recover written-off medical expenses that were never incurred); *Johnson*, 2015 WL 9464625, at *1 (allowing plaintiff to recover expenses for medical services rendered to the victim as a professional courtesy); *Royer v. State Dep't of Transp. & Dev.*, 210 So. 3d 910 (La. Ct. App. 3d Cir. 2017) (allowing plaintiff to recover written-off amounts even though he suffered no diminution in patrimony to obtain benefit because the "overriding policy of tort deterrence outweighs the concern of double recovery").

27. This exception would utilize the definition of "cost of procurement" provided in the current statute. "Cost of procurement" is defined as the cost paid by or on behalf of the claimant to procure the benefit paid by a health insurance issuer or Medicare and the cost of procurement of the award of medical expenses, including but not limited to contracted attorney fees and health insurance premiums paid. *Id.* § 9:2800.27(A)(5).

28. *See generally* TEX. CIV. PRAC. & REM. CODE § 41.0105 (2019).

29. *See Hoffman*, 209 So. 3d 702 (noting that victim paid contingency fee to attorney to obtain attorney-negotiated write-offs); *see also O'Connor v. Litchfield*, 864 So. 2d 234 (La. Ct. App. 1st Cir. 2001) (noting that victim paid monthly insurance premiums to obtain private insurer's discounted rates for medical services).

30. The Louisiana Supreme Court in *Bellard v. American Century Insurance* held that Louisiana Civil Code article 2315 places an affirmative duty on the tortfeasor to pay compensatory damages in the amount that makes the victim whole. *Bellard v. Am. Century Ins.*, 980 So. 2d 654, 668 (La. 2008).

than the actual amounts paid to a medical provider for services. This amendment would allow juries to have a more accurate valuation of the damages at issue.

Part I of this Comment will discuss the history and development of the collateral source rule in the United States.³¹ Additionally, this section will outline Louisiana's adoption and application of the collateral source rule prior to the Louisiana Supreme Court's decision in *Bozeman v. State*.³² Part II will begin with a discussion of the holding in *Bozeman v. State* and its effect on the collateral source rule's application.³³ Further, this section will consider how after *Bozeman* the Louisiana Supreme Court continued to restrict the application of the collateral source rule, leading to the enactment of Louisiana Revised Statutes § 9:2800.27.³⁴ Part III will explain how this new statute runs contrary to the policy behind tort recovery in general.³⁵ Specifically, the section will show how the statute allows courts in certain cases to award what are effectively punitive damages, thereby exceeding the plain language of Louisiana Civil Code article 2315.³⁶ Additionally, the section will show how the law prevents plaintiffs from being made whole in other cases.³⁷ Part IV will conclude by proposing that the Louisiana Legislature should amend Louisiana Revised Statutes § 9.2800.27. The recommended amendment rids the statute of the arbitrary provision allowing recovery of 40% of write-offs in certain cases, and it ties additional recovery to a plaintiff's cost of procuring the write-off benefit.³⁸ Further, this section will explain why tying available damages, in addition to the actual amounts paid, to the plaintiff's cost of procurement will provide a more just and equitable recovery scheme.

31. *Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152 (1854).

32. *Bozeman v. State*, 879 So. 2d 692 (La. 2004).

33. *See id.*

34. *See Hoffman*, 209 So. 3d 702; *Simmons v. Cornerstone Invs.*, 282 So. 3d 199 (La. 2019).

35. *See* LA. REV. STAT. § 9:2800.27 (2020).

36. *Id.*

37. *Id.*

38. *See id.* § 9:2800.27(B).

I. LOUISIANA TORT RECOVERY & THE COLLATERAL SOURCE RULE

The collateral source rule plays a vital role in tort litigation because it preserves the obligation of tortfeasors to repair the damages they cause.³⁹ States' application of the rule and the effects that the application has on damages awards have diverged significantly since the U.S. Supreme Court's adoption of the rule in 1854.⁴⁰ Some states have adopted statutes governing the rule's application, such as Louisiana, whereas others apply the collateral source rule pursuant to jurisprudential tests.⁴¹

A. Tort Recovery in Louisiana and Its Connection with the Collateral Source Rule

Louisiana Civil Code article 2315 provides the starting point for all tort litigation within the state.⁴² The article states, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."⁴³ The obligation that article 2315 creates places an affirmative duty on the tortfeasor to pay compensatory damages that "make the victim whole."⁴⁴ The purpose of compensatory damages is to compensate a victim for actual damages suffered, and when calculated, compensatory damages should total the actual loss sustained.⁴⁵ In rare cases, a court may award punitive damages in addition to actual damages suffered.⁴⁶ The aim of punitive damages is to punish the wrongdoer.⁴⁷ Although compensatory damages are available in all tort actions, a court may only award punitive

39. See, e.g., LA. CIV. CODE art. 2315 (2019) ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.").

40. See *Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152 (1854).

41. See generally *Bellard v. Am. Cent. Ins.*, 980 So. 2d 654 (La. 2008) (holding the *Bozeman* two-pronged test determines whether the collateral source rule applies to received benefits).

42. LA. CIV. CODE art. 2315.

43. *Id.*

44. *Bellard*, 980 So. 2d at 668.

45. *Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019). Compensatory damages represent the monetary value of harm that the victim suffers as a result of the tortfeasor's actions—for example, the amount of medical expenses incurred by the victim or the pecuniary damages to the victim's automobile in a car accident. *Id.* These damages are in contrast to punitive damages, which are awarded solely to punish the tortfeasor and not to make the victim whole. *Id.*

46. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 7.03 (perm. ed., rev. vol. 2013).

47. *Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019).

damages in “extremely specific and egregious situations” that are identified by statute.⁴⁸ Indeed, because of their nature, punitive damages are available in only six situations according to the Louisiana Civil Code, including driving while intoxicated, criminal sexual activity, and hazing.⁴⁹

The Louisiana Supreme Court divides compensatory damages into two categories: special damages and general damages.⁵⁰ Special damages must be specially pled or alleged and are those damages that courts can determine with relative certainty.⁵¹ Examples of special damages include lost wages, lost future earnings, and medical expenses.⁵² By contrast, general damages are inherently speculative, and courts cannot determine them with mathematical certainty.⁵³ Examples of general damages include pain and suffering, mental anguish, and loss of enjoyment of life.⁵⁴ The collateral source rule, however, applies only to special compensatory damages.⁵⁵

The collateral source rule prevents third-party payments to or benefits conferred on the victim from reducing the tortfeasor’s liability.⁵⁶ In other words, courts will not deduct from the victim’s compensatory damages payments received from a source other than the tortfeasor.⁵⁷ The collateral source rule can only apply to special damages because it requires that the victim incur the expenses at some point, meaning the expenses are directly quantifiable.⁵⁸ The collateral source doctrine is both an evidentiary rule and a principle of damages awards, working in both capacities to ensure a just recovery for victims.⁵⁹

48. Langlois, *supra* note 10, at 316.

49. See LA. CIV. CODE art. 2315.3 (2019) (permitting punitive damages in child pornography cases); *id.* art. 2315.4 (permitting punitive damages when the injury was caused by an intoxicated driver); *id.* art. 2315.7 (permitting punitive damages when the injury was caused by criminal sexual activity with a juvenile); *id.* art. 2315.8 (permitting punitive damages in domestic abuse cases); *id.* art. 2315.9 (permitting punitive damages in terrorism cases); *id.* art. 2315.10 (permitting punitive damages when death is caused by hazing).

50. *McGee v. A C & S, Inc.*, 933 So. 2d 770, 774 (La. 2006).

51. MARAIST & GALLIGAN, *supra* note 46, § 7.02.

52. Langlois, *supra* note 10, at 296–97.

53. MARAIST & GALLIGAN, *supra* note 46.

54. *Id.*

55. *Id.*

56. *Bozeman v. State*, 879 So. 2d 692, 697 (La. 2004).

57. *Id.* at 698.

58. 2 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 13.4 (3d ed. 2016), Westlaw STEIN TREATISE.

59. *Bozeman*, 879 So. 2d at 697.

B. The Collateral Source Rule in the United States

The collateral source rule finds its application in the laws of every state.⁶⁰ The United States Supreme Court adopted the general collateral source doctrine in 1854, and state courts have since applied the collateral source rule in various forms.⁶¹ Congress has enacted legislation governing the application of the collateral source rule in narrow circumstances, leaving much discretion to the states to determine their boundaries.⁶² Given this broad discretion, application of the collateral source rule varies significantly among states.⁶³

1. General Development of the Collateral Source Rule

The U.S. Supreme Court first introduced the collateral source rule in its 1854 decision *The Propeller Monticello v. Mollison*.⁶⁴ The case arose when the plaintiff, Gilbert Mollison, filed a lawsuit for damages after his ship sunk as a result of a collision with the defendant's ship, the *Monticello*.⁶⁵ Although the Court found the pilot of the *Monticello* at fault for causing the collision, the ship's owner claimed that he was not liable for payment of damages because Mollison had already received payment from his own insurer.⁶⁶ The Court rejected the defendant's argument, stating that an insurer does not act as a joint tortfeasor to release the at-fault party from liability.⁶⁷ Further, the Court reasoned that the contract between Mollison and its insurer was a "wager between third parties" and would have no effect on the tortfeasor's liability.⁶⁸ As a matter of principle, the Court held that "[the tortfeasor] is bound to make satisfaction for injury

60. See generally Harmonie Group/Next Generation, *50 State Collateral Source Rule Overview*, LITIG. TOOLS, <https://www.harmonie.org/file/Litigation%20Best%20Practices/Collateral%20Source%20Rule%202016.pdf> [<https://perma.cc/HMR5-M7KU>] (last visited Sept. 25, 2019).

61. See *Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152 (1854).

62. See Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210 (2009). See, e.g., 6 U.S.C. § 442(c) (2018) (providing any recovery by a plaintiff under this anti-terrorism federal cause of action shall be reduced by the amount of collateral source compensation received).

63. See generally Harmonie Group/Next Generation, *supra* note 60.

64. See *Propeller Monticello*, 58 U.S. (17 How.) 152.

65. *Id.* at 153.

66. *Id.* at 155.

67. *Id.*

68. *Id.*

done.”⁶⁹ The Court’s holding became known as “the collateral source rule.”⁷⁰

Although there is jurisprudence from the Supreme Court regarding the collateral source rule, Congress defers to the state legislatures for a formal enactment of the rule.⁷¹ This lack of federal guidance has led to divergent approaches among lower courts since the *Propeller Monticello* decision in 1854.⁷² The *Restatement (Second) of Torts* provides that “[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.”⁷³

2. Other States’ Applications of the Collateral Source Rule

Many states have derogated from the *Restatement*’s broad approach, however, by enacting statutes that restrict the application of the collateral source rule.⁷⁴ These statutes range from abrogating the collateral source rule entirely to leaving the rule untouched in its original form.⁷⁵ The current trend has been for state legislatures to enact statutory reform retreating from the rule’s all-encompassing original form.⁷⁶

Perhaps the most plaintiff-friendly application of the collateral source rule is found in Hawaii.⁷⁷ Hawaiian courts apply the collateral source rule in its original form;⁷⁸ courts refuse under all circumstances to subtract from a plaintiff’s award benefits from a collateral source.⁷⁹ Further, Hawaiian courts state that it is better for the victim to receive a double recovery than to allow the tortfeasor to benefit as a result of a reduction to an award of damages.⁸⁰ Additionally, the Hawaii Supreme Court has held that the collateral source rule applies to both Medicare and Medicaid,

69. *Id.*

70. *See id.* at 152.

71. *See* Benjet, *supra* note 62. Congress has, however, enacted statutes governing the application of the collateral source rule in narrow and specific instances. *See, e.g.*, 6 U.S.C. § 442(c) (2018) (providing any recovery by a plaintiff under this anti-terrorism federal cause of action shall be reduced by the amount of collateral source compensation received).

72. *See generally* Harmonie Group/Next Generation, *supra* note 60.

73. RESTATEMENT (SECOND) TORTS § 920(A) (AM. L. INST. 1979).

74. Benjet, *supra* note 62, at 211.

75. *See generally* Harmonie Group/Next Generation, *supra* note 60.

76. Langlois, *supra* note 10, at 313.

77. Harmonie Group/Next Generation, *supra* note 60.

78. *Id.*

79. *Id.*

80. *Id.* (citing *Bynum v. Magno*, 101 P.3d 1149 (Haw. 2004)).

prohibiting the reduction of a damages award to the discounted amount.⁸¹ Hawaii is one of only a handful of states that have yet to enact a statute limiting the collateral source rule's application.⁸²

One example of state statutory guidance on the collateral source rule is Texas Civil Practice and Remedies Code § 41.0105.⁸³ Although the collateral source rule in Texas began as a jurisprudential doctrine that precludes any reduction in a tortfeasor's liability because of benefits from an independent source, the Texas Legislature has codified application of the rule with respect to damages awards.⁸⁴ The statute provides that "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."⁸⁵ The Texas Supreme Court interpreted the relevant statute in *Haygood v. DeEscabedo*, holding that to impose liability for medical expenses that are not charged does not prevent a windfall to a tortfeasor, but rather creates one for a claimant.⁸⁶ The Texas Supreme Court further explained that the statute allows recovery of expenses that have been or will be paid and bars recovery of amounts and charges that the service provider bills but then writes off.⁸⁷ Although this statute substantially limits the collateral source rule's application compared to states like Hawaii, the statute still allows for victims under certain circumstances to recover benefits that they have received from a collateral source.

Unlike Texas, Idaho has abrogated the collateral source rule entirely.⁸⁸ In 1990 the Idaho Legislature enacted Idaho Code § 6-1606, which requires the deduction of collateral source payments from damages awards, thereby allowing the recovery of only the victim's out-of-pocket expenses.⁸⁹ The statute limits the tortfeasor's liability to damages

81. See *Bynum v. Magno*, 101 P.3d 1149 (Haw. 2004). This means the plaintiff will be able to recover the full amount of medical expenses regardless of what is actually paid.

82. See generally *Harmonie Group/Next Generation*, *supra* note 60. The states that have not enacted a statute governing the collateral source rule are Arizona, Arkansas, California, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maine, Massachusetts, New Mexico, South Carolina, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See *Harmonie Group/Next Generation*, *supra* note 60.

83. See TEX. CIV. PRAC. & REM. CODE § 41.0105 (2019).

84. *Harmonie Group/Next Generation*, *supra* note 60 (citing *Haygood v. DeEscabedo*, 356 S.W.3d 390 (Tex. 2011)).

85. TEX. CIV. PRAC. & REM. CODE § 41.0105.

86. *Haygood v. DeEscabedo*, 356 S.W.3d 390, 395 (Tex. 2011).

87. *Id.* at 396–97.

88. *Harmonie Group/Next Generation*, *supra* note 60.

89. IDAHO CODE § 6-1606 (2019).

remaining after all forms of collateral source payments are taken into account.⁹⁰ The purpose of the statute is to prevent victims from receiving more than what is owed for their injuries.⁹¹ The court applies the relevant reductions under the statute post-trial.⁹² Further, Idaho courts have ruled that allowing the introduction of evidence of written-off expenses is problematic because it allows the plaintiff to artificially inflate the damages suffered and promotes a fiction as to the damages actually incurred.⁹³

Idaho is one of only two states to abrogate the rule in its entirety.⁹⁴ The current state of Louisiana's collateral source rule is a statute enacted by the Louisiana Legislature that falls somewhere between Hawaii's all-encompassing application and the Texas statute limiting recovery to the actual amounts paid.⁹⁵

C. *The Collateral Source Rule in Louisiana*

It was not until the Louisiana Supreme Court's 1962 decision in *Gunter v. Lord* that Louisiana courts adopted the collateral source rule.⁹⁶ In *Gunter*, the court held that a tort victim could not recover twice from the same insurer for the same medical expenses.⁹⁷ The court established that in cases where a source besides the wrongdoer wholly or partly indemnifies the plaintiff, "the wrongdoer . . . would [not] benefit therefrom by a reduction of his damages in a suit by the injured party."⁹⁸ Therefore, courts will not reduce a defendant's liability because of benefits that the plaintiff receives from the plaintiff's own insurer.⁹⁹ For 27 years following *Gunter*, the Louisiana Legislature allowed courts to develop and further entrench the collateral source rule's applicability to the calculation of awards of damages in tort actions.¹⁰⁰

90. Harmonie Group/Next Generation, *supra* note 60.

91. *Id.*

92. *Id.*

93. *See* Verska v. Saint Alphonsus Reg'l Med. Ctr., 265 P.3d 502 (Idaho 2011).

94. *See* Harmonie Group/Next Generation, *supra* note 60 (listing New Jersey as the only other state to abrogate the collateral source rule in its entirety).

95. *See* LA. REV. STAT. § 9:2800.27 (2020).

96. *Gunter v. Lord*, 140 So. 2d 11 (La. 1962).

97. *Id.* at 16.

98. *Id.*

99. *Id.*

100. *See generally* Norris v. State Farm Fire & Cas. Co., 416 So. 2d 321 (La. Ct. App. 5th Cir. 1982); Surgi v. Otis Elevator Co., 541 So. 2d 297 (La. Ct. App. 5th Cir. 1989).

In 1989, however, the Louisiana Legislature enacted Louisiana Code of Evidence article 409.¹⁰¹ This article, known as the “collateral source rule of evidence,” prevents tortfeasors from attempting to reduce their liability by introducing evidence of third-party payments made to victims.¹⁰² Until 2020, the Louisiana Legislature had not yet codified a similar rule with respect to the calculation of awards of damages.¹⁰³ The passing of the Civil Justice Reform Act of 2020,¹⁰⁴ however, aligned Louisiana with the majority of states that have enacted statutes restricting the extent of the collateral source rule’s application to awards of damages.¹⁰⁵ The difference between the evidentiary context and the context of damages awards is that the former governs what is introduced as evidence in litigation, whereas the latter governs the amount of special damages available to the victim.¹⁰⁶ Currently, Louisiana Revised Statutes § 9:2800.27 dictates courts’ application of the rule to special damages in Louisiana.¹⁰⁷

After the Louisiana Supreme Court’s decision in *Gunter*, the court remained silent regarding the application of the collateral source rule to calculations of damages awards until its decision in *Louisiana Department of Transportation & Development v. Kansas City Southern Railway* in 2003.¹⁰⁸ In *Kansas City*, the court found the defendant, Kansas City Southern Railway (KCS), liable to the plaintiff, Louisiana Department of Transportation and Development (DOTD), for pollution clean-up costs under the Louisiana Environmental Quality Act.¹⁰⁹ The court held that the

101. “In a civil case, evidence of furnishing or offering or promising to pay expenses or losses occasioned by an injury to person or damage to property is not admissible to prove liability for the injury or damage nor is it admissible to mitigate, reduce, or avoid liability therefor. This Article does not require the exclusion of such evidence when it is offered solely for another purpose, such as to enforce a contract for payment.” LA. CODE EVID. art. 409 (2019).

102. Langlois, *supra* note 10, at 303. Defendants frequently would introduce evidence of payments from third parties received by the victims in an attempt to persuade the jury to award a lower damages award.

103. See LA. REV. STAT. § 9:2800.27 (2020).

104. See H.B. 57, 2020 Leg., 1st Extraordinary Sess. (La. 2020).

105. Langlois, *supra* note 10, at 303.

106. See LA. CODE EVID. art. 409; see also Langlois, *supra* note 10, at 305–09. The focus of this Comment is on the collateral source rule’s application to damages awards, and for that purpose, the following discussion will pertain to that application alone.

107. See generally LA. REV. STAT. § 9:2800.27.

108. La. Dep’t of Transp. & Dev. v. Kansas City S. Ry. Co., 846 So. 2d 734 (La. 2003).

109. *Id.* at 736.

collateral source rule applied to allow recovery of funds that the DOTD received from a third party, and thus the amount DOTD had already received did not reduce KCS's liability.¹¹⁰

In *Kansas City*, DOTD sued KCS to recover clean-up costs, alleging that KCS polluted a construction site for Interstate 49 in Shreveport, Louisiana.¹¹¹ Prior to the suit, the United States government reimbursed DOTD for 90% of the cleanup costs.¹¹² KCS argued, and the lower courts held, that the reimbursement from the federal government limited KCS's liability to the remaining 10% of costs.¹¹³ The state supreme court reversed, however, and applied the collateral source rule to prohibit the reduction of the plaintiff's award.¹¹⁴ The court reasoned that the possibility of the plaintiff receiving a profit—an amount exceeding the actual damages sustained—was preferable to allowing the defendant to reduce its liability by 90%.¹¹⁵

The Louisiana Supreme Court's opinion in *Kansas City* marked the end of the court's silence on the applicability of the collateral source rule.¹¹⁶ Since its ruling in *Kansas City*, the court has issued multiple opinions limiting the rule's application, specifically in cases where write-offs reduced the victim's medical expenses.¹¹⁷ This recent jurisprudence, however, has failed to create a bright-line rule for lower courts to follow when determining whether the collateral source rule should apply in a given situation.

II. *BOZEMAN V. STATE*: THE BEGINNING OF A RESTRICTIVE ERA

The Louisiana Supreme Court began a trend of restricting application of the collateral source rule in 2004.¹¹⁸ In *Bozeman v. State*, the state

110. *Id.* at 745.

111. *Id.* at 736.

112. *Id.*

113. *Id.*

114. *Id.* at 743.

115. *Id.*

116. *See Bozeman v. State*, 879 So. 2d 692 (La. 2004); *Hoffman v. 21st Century N. Am. Ins.*, 209 So. 3d 702 (La. 2015); *Simmons v. Cornerstone Invs.*, 282 So. 3d 199 (La. 2019).

117. *See Bozeman*, 879 So. 2d 692 (holding the collateral source rule does not apply to write-offs obtained through Medicaid); *Hoffman*, 209 So. 3d 702 (holding the collateral source rule did not apply to attorney-negotiated write-offs for medical expenses); *Simmons*, 282 So. 3d 199 (holding the collateral source rule did not apply to medical write-offs obtained through the workers' compensation fee schedule).

118. *See Bozeman*, 879 So. 2d 692.

supreme court held that the rule does not apply to written-off medical expenses obtained through Medicaid.¹¹⁹ The court has since found the rule inapplicable to written-off medical expenses obtained through attorney negotiations¹²⁰ and workers' compensation.¹²¹ Ultimately, the Louisiana Supreme Court's restrictive trend led to the Louisiana Legislature enacting a statute that governs the collateral source rule's application.¹²²

A. The Accident That Brought Change

In *Bozeman v. State*, the Louisiana Supreme Court held that the collateral source rule does not apply to Medicaid write-off amounts and thus limited awards of special damages to the actual amounts paid.¹²³ The court reasoned that because the plaintiff obtained the write-off benefit without paying consideration, the collateral source rule should not apply to allow the plaintiff to recover damages in excess of what was actually paid.¹²⁴ *Bozeman* marked the court's first consideration of whether the rule applies to medical expenses that health care providers write off or contractually adjust under the federal Medicaid program.¹²⁵ When a plaintiff is a Medicaid recipient, the law requires that the health care provider accept as full payment an amount set by the Medicaid fee schedule.¹²⁶ This amount will always be lower than the amount charged by the health care provider, thereby creating a write-off like the one under dispute in *Bozeman*.¹²⁷

On May 12, 1993, Terry Bozeman suffered brain damage and other severe injuries as a result of a one-car accident.¹²⁸ Immediately following the accident, a helicopter transported Mr. Bozeman to the LSU Medical Center in Shreveport, where he stayed for about a month until moving to a long-term care facility to receive around-the-clock care.¹²⁹ Mr. Bozeman remained at the long-term care facility in a semi-conscious state until his death on August 29, 1996.¹³⁰ Prior to his death, Mr. Bozeman accrued

119. *See id.*

120. *Hoffman*, 209 So. 3d 702.

121. *Simmons*, 282 So. 3d 199.

122. *See* LA. REV. STAT. § 9:2800.27 (2020).

123. *Bozeman*, 879 So. 2d 692.

124. *Id.* at 695.

125. *Id.* at 693.

126. *Id.*

127. *Id.*

128. *Id.* at 694.

129. *Id.*

130. *Id.*

\$613,626.64 in medical expenses, of which Medicaid covered \$291,863.56.¹³¹ Following the accident but before his death, Mr. Bozeman, with his wife Linda Bozeman as his signing representative, applied for and received Medicaid benefits.¹³² Some 10 days following the grant of Medicaid benefits, Mrs. Bozeman filed an action for personal injuries against DOTD, alleging that her husband's injuries were the result of the unreasonably dangerous condition of Highway 173.¹³³ At trial, both parties introduced documents detailing the medical services provided to Mr. Bozeman, along with the amounts that Medicaid paid for Mr. Bozeman's care.¹³⁴ The State, arguing on behalf of DOTD, requested that DOTD receive a credit for the amounts that Medicaid paid.¹³⁵ The trial court, however, denied this request and awarded the plaintiff damages, including the full amount of medical expenses that Medicaid paid to Mr. Bozeman's health care providers.¹³⁶

On appeal, the State argued that the trial court erred in its liability determinations and damages awards.¹³⁷ The State reasoned that the trial court failed to deduct the amount that Medicaid paid from the total amount awarded for medical expenses.¹³⁸ The Second Circuit Court of Appeal affirmed the lower court's judgment in part but remanded the case for the trial court to "fix the amount of special damages."¹³⁹ On remand, the trial court substantially reduced the award of medical damages, holding that the plaintiff cannot recover the written-off medical expenses.¹⁴⁰ On a second appeal, the Second Circuit affirmed the trial court's ruling for the following reasons: (1) that there is no obligation to pay the write-off amount; (2) that no windfall should accrue to either party when the plaintiff cannot recover the write-off amount; and (3) that federal and state Medicaid statutes require health care providers to accept the payment set by the Medicaid fee schedule as payment in full.¹⁴¹ The court further reasoned that the goal of tort recovery is to make the plaintiff whole, and in the current case the plaintiff was made whole by recovering the amounts

131. *Id.* at 695.

132. *Id.* at 694.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 695.

139. *Id.* (citing *Terrell v. Nanda*, 759 So. 2d 1026 (La. Ct. App. 2d Cir. 2000)).

140. *Id.*

141. *Id.*

that Medicaid actually paid.¹⁴² Following the Second Circuit's decision, the Louisiana Supreme Court granted a writ of certiorari to address whether the collateral source rule applies to written-off medical expenses.¹⁴³ The supreme court looked extensively into the collateral source rule's application throughout history and closely examined the approaches taken by other states.¹⁴⁴

B. The Bozeman Court's Multi-Jurisdictional Analysis of the Collateral Source Rule

In its *Bozeman* opinion, the Louisiana Supreme Court first noted the inconsistent jurisprudence regarding the collateral source rule's application to Medicaid write-offs in both Louisiana and elsewhere.¹⁴⁵ The court recognized that there are three approaches that other states have taken in determining whether the collateral source rule applies to written-off medical expenses.¹⁴⁶ The three approaches taken are as follows: (1) Reasonable Value of Services, (2) Actual Amounts Paid, and (3) Benefit of the Bargain.¹⁴⁷ The court provided a multi-jurisdictional analysis of each approach, citing to decisions from other state supreme courts to determine whether the collateral source rule should apply to the write-offs that Mr. Bozeman obtained through Medicaid.¹⁴⁸

1. Reasonable Value of Services

The first approach to the collateral source rule that the court acknowledged was the approach known as "Reasonable Value of Services."¹⁴⁹ This approach provides that the amount of a collateral-source benefit received by the victim will not reduce the wrongdoer's liability.¹⁵⁰ Further, the court explained that under this approach, even if the benefit conferred upon the plaintiff is a gift, the plaintiff should not receive a

142. *Id.*

143. *Id.* at 697.

144. *Id.* at 697–706.

145. *Id.* at 701.

146. *Id.* at 701–05.

147. *Id.* at 701.

148. *Id.* at 697–706.

149. *Id.*

150. *Id.* at 702 (quoting *La. Dep't of Transp. & Dev. v. Kansas City S. Ry. Co.*, 846 So. 2d 734, 743 (La. 2003)).

reduction in the award of special damages for the medical expenses billed.¹⁵¹

The *Bozeman* court cited to the South Carolina Supreme Court's opinion in *Haselden v. Davis* to further explain the Reasonable Value of Services approach.¹⁵² In *Haselden*, the court held that the plaintiff could recover the full amount of billed medical expenses; it refused to limit his award to what Medicaid actually paid.¹⁵³ The parties debated whether they could introduce into evidence either the total amount of medical expenses or the amount that Medicaid paid.¹⁵⁴ The trial court held in favor of the plaintiff and allowed introduction of the full amount of medical expenses.¹⁵⁵ The appellate court affirmed the ruling.¹⁵⁶

The South Carolina Supreme Court granted writs to determine whether the collateral source rule should apply to write-offs obtained through Medicaid.¹⁵⁷ The court held that the collateral source rule does apply and that the plaintiff's recovery should not be limited to the amounts that Medicaid paid.¹⁵⁸ The court stated that the plaintiff in a personal injury action can recover the reasonable value of the medical services, not limiting recovery to the amount actually paid.¹⁵⁹ Furthermore, the court held that the Medicaid provider,¹⁶⁰ which bills the total amount and then agrees to accept a lower payment, may not claim that the reasonable value of the services equals the lesser amount paid.¹⁶¹ The plaintiff in *Bozeman* argued that the focus of the case should be on the reasonable value of the medical services, not what was actually paid or incurred.¹⁶² The Louisiana Supreme Court, however, rejected this approach, holding that it would be unconscionable to allow the victim to receive free medical care and then to "pocket the windfall" by recovering medical expenses that were never incurred.¹⁶³

151. *Id.* at 701–02.

152. *Id.* at 701; *Haselden v. Davis*, 579 S.E.2d 293 (S.C. 2003).

153. *Haselden*, 579 S.E.2d at 295.

154. *Id.* at 294.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 295.

160. A Medicaid provider is a physician who agrees to accept as compensation for medical services those amounts set forth in the Medicaid agreement. *Id.*

161. *Id.*

162. *Bozeman v. State*, 879 So. 2d 692, 702 (La. 2004).

163. *Id.* at 705.

2. Actual Amounts Paid

In *Bozeman* the Louisiana Supreme Court also discussed the approach known as “Actual Amounts Paid,” which denies the plaintiff the ability to recover the write-off amounts because the plaintiff does not incur those amounts.¹⁶⁴ This approach is the most restrictive application of the collateral source rule short of complete abrogation.¹⁶⁵ The defendant in *Bozeman* urged the court to apply this approach and argued that the written-off amounts are “illusory charges” and that allowing recovery of them would violate the policy behind compensatory damages.¹⁶⁶

The opinion *Howell v. Hamilton Meats & Provisions* provides a good example of the application of the Actual Amounts Paid approach to a plaintiff’s damages award, but the *Bozeman* court did not cite to *Howell*.¹⁶⁷ Not long after *Bozeman*, however, the Louisiana Supreme Court cited to *Howell* in *Hoffman v. 21st Century North America Insurance* to explain the Actual Amounts Paid approach.¹⁶⁸ The *Howell* opinion provides a clear demonstration of the Actual Amounts Paid approach as applied to a plaintiff’s award of damages.¹⁶⁹ In *Howell*, the court limited recovery to the amount that plaintiffs and their insurers have actually paid or still owe for past medical expenses.¹⁷⁰ The case arose out of an automobile accident in which the defendant conceded fault.¹⁷¹ The only contested issues at trial were the amount of the plaintiff’s economic and noneconomic damages and whether the collateral source rule should apply to the written-off medical expenses that the plaintiff sought to recover.¹⁷² If the court were to apply the rule, then the plaintiff would have recovered the total amount billed by the medical provider, whereas not applying the rule would limit the plaintiff’s recovery to amounts actually paid by the plaintiff or her insurer.¹⁷³

The *Howell* court reasoned that the collateral source rule did not apply to the written-off amounts because they were “not a benefit provided to

164. *Id.*

165. *Id.*

166. *Id.* at 703.

167. *See Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal. 2011).

168. *Hoffman v. 21st Century N. Am. Ins.*, 209 So. 3d 702, 707 (La. 2015).

169. *See Howell*, 257 P.3d 1130.

170. *Id.* at 1145.

171. *Id.* at 1133.

172. *Id.* at 1134.

173. *Id.* at 1144.

the plaintiff in compensation for his or her injuries.”¹⁷⁴ Further, the court acknowledged that limiting the plaintiff’s recovery to paid charges provides certainty without violating the policy underlying the collateral source rule.¹⁷⁵ According to the court, this approach did not lessen tort deterrence and instead allowed the plaintiff to still receive full compensation.¹⁷⁶ The court reasoned, however, that it would be unfair to allow a decrease to the tortfeasor’s liability because of the foresight of the victim in some cases but to not decrease liability in other cases.¹⁷⁷

3. *Benefit of the Bargain*

The approach known as “Benefit of the Bargain” awards the plaintiff the full value of the medical expenses, including the write-off amount, when the plaintiff has paid some consideration for the benefit of the write-off amounts.¹⁷⁸ Under this approach, because of the plaintiff’s continuous diminution in patrimony through the payment of insurance premiums, courts do not consider write-offs a windfall.¹⁷⁹ On the other hand, when a plaintiff has obtained the benefit without a diminution to his patrimony, the approach prevents the recovery of written-off amounts.¹⁸⁰

In *Bozeman* the Louisiana Supreme Court used the Virginia Supreme Court’s ruling in *Acuar v. Letourneau* as an example of the Benefit of the Bargain approach.¹⁸¹ In *Acuar*, the court held that the collateral source rule applied to written-off medical expenses obtained through a contractual arrangement with a health insurance carrier.¹⁸² The plaintiff sought damages resulting from an automobile accident and received a favorable jury verdict at trial.¹⁸³ The jury, however, reduced the award by the amount of the written-off medical expenses.¹⁸⁴ On appeal, the plaintiff argued that the trial court erred by allowing the submission of evidence of the write-offs to the jury.¹⁸⁵

174. *Id.* at 1145.

175. *Id.*

176. *Id.*

177. *Bozeman v. State*, 879 So. 2d 692, 703 (La. 2004).

178. *Id.*

179. *Id.* (citing *Griffin v. La. Sheriff’s Auto Risk Assoc.*, 802 So. 2d 691, 714 (La. Ct. App. 1st Cir. 2001)).

180. *Id.* at 705.

181. *Id.* at 704.

182. *Acuar v. Letourneau*, 531 S.E.2d 316, 322 (Va. 2000).

183. *Id.* at 317.

184. *Id.*

185. *Id.*

The Virginia Supreme Court determined that the rule applied to the write-offs obtained through the plaintiff's insurance carrier because the wrongdoer should not receive a benefit from a contract for which he never paid compensation.¹⁸⁶ Furthermore, the court held that to the extent that such a result provides a windfall to the injured party, the victim rather than the wrongdoer should receive that benefit.¹⁸⁷ The Louisiana Supreme Court ultimately adopted this approach.¹⁸⁸

C. The Result from Bozeman: A Two-Pronged Inquiry

The *Bozeman* court held that the Benefit of the Bargain approach was the proper application of the collateral source rule and that where there is a diminution of patrimony in obtaining the write-off benefit, recovery of that benefit is proper.¹⁸⁹ Thus, under this approach, Medicaid recipients cannot recover as damages the amounts written off under the fee schedule.¹⁹⁰ In denying application of the collateral source rule, the court determined that the plaintiff could only recover the amounts that Medicaid actually paid.¹⁹¹

Louisiana courts interpret the *Bozeman* decision as creating a two-pronged inquiry for the application of the collateral source rule.¹⁹² The two-pronged test inquires into: (1) whether application of the rule will further the policy goal of tort deterrence, and (2) whether the victim, in obtaining the available collateral source, either paid for such benefit or suffered some diminution of patrimony because of the availability of the benefit such that no double recovery would result from the rule's application.¹⁹³ The Benefit of the Bargain approach allows more recovery than the Actual Amounts Paid approach under certain facts and less recovery than the Reasonable Value of Services approach.¹⁹⁴ The Louisiana Supreme Court failed, however, to specify whether the two-

186. *Id.* at 323.

187. *Id.*

188. *Bozeman v. State*, 879 So. 2d 692, 704 (La. 2004).

189. *Id.* at 705.

190. *Id.*

191. *Id.*

192. See *Bellard v. Am. Cent. Ins.*, 980 So. 2d 654, 669–70 (La. 2008) (citing *Bozeman*, 879 So. 2d 692); *Lockett v. UV Ins. Risk Retention Grp.*, 180 So. 3d 557 (La. Ct. App. 5th Cir. 2015); *Royer v. State Dep't of Transp. & Dev.*, 210 So. 3d 910 (La. Ct. App. 3d Cir. 2017).

193. *Bellard*, 980 So. 2d at 669.

194. *Bozeman*, 879 So. 2d at 701–05.

pronged test requires the facts to satisfy both prongs or one, and thus left ample room for interpretation of its application.¹⁹⁵

D. You Get What You Pay For

The Louisiana Supreme Court has continued to restrict the application of the collateral source rule since its 2004 decision in *Bozeman*.¹⁹⁶ The court, as recently as May 2019, held that when obtaining a collateral source does not diminish a plaintiff's patrimony, the collateral source rule does not apply.¹⁹⁷ These subsequent decisions increased discussion and debate surrounding the collateral source rule, which ultimately resulted in the Louisiana Legislature's enactment of Louisiana Revised Statutes § 9:2800.27 during the 2020 First Extraordinary Session.¹⁹⁸

1. Attorney-Negotiated Write-offs: Not a Mode of Excessive Recovery

The restriction of the collateral source rule's application came to the forefront of the Louisiana legal field when the Louisiana Supreme Court addressed attorney-negotiated write-offs in *Hoffman v. 21st Century North American Insurance*.¹⁹⁹ The *Hoffman* case arose out of a vehicular accident in which the defendant, Carolyn Elzy, rear-ended the plaintiff, Eddie Hoffman.²⁰⁰ At a bench trial, the judge found the defendant completely at fault and awarded Hoffman special damages.²⁰¹ When calculating the amount for special damages, the court reduced the award based on a medical statement indicating that an attorney-negotiated write-off reduced the charges and that the plaintiff's attorney had an arrangement with the plaintiff's medical provider.²⁰² Hoffman argued that under the collateral source rule, he should recover the total billed amount, including

195. *See id.* at 705.

196. *See Bellard*, 980 So. 2d 654 (holding the collateral source rule does not apply to funds received from a workers' compensation insurer); *Hoffman v. 21st Cent. N. Am. Ins.*, 209 So. 3d 702 (La. 2015) (holding the collateral source rule does not apply to write-offs obtained through attorney-negotiations); *Simmons v. Cornerstone Invs.*, 282 So. 3d 199 (La. 2019) (holding the collateral source rule does not apply to write-offs obtained through workers' compensation insurance).

197. *See Simmons*, 282 So. 3d 199.

198. *See* LA. REV. STAT. § 9:2800.27 (2020).

199. *Hoffman*, 209 So. 3d 702.

200. *Id.* at 703.

201. *Id.*

202. *Id.* at 704.

the write-offs.²⁰³ The Louisiana First Circuit Court of Appeal affirmed the trial court's decision to deny recovery of the write-offs.²⁰⁴

The Louisiana Supreme Court, applying the *Bozeman* two-pronged inquiry, held that the collateral source rule does not apply to attorney-negotiated write-offs.²⁰⁵ The particular write-off at issue failed the second prong of the inquiry because the court held that the payment of attorney fees by the plaintiff to obtain the write-off was not a sufficient diminution of patrimony.²⁰⁶ The court found that allowing the plaintiff to recover any amount in excess of the actual amount paid would result in a profit for the plaintiff.²⁰⁷ In addressing the purpose of tort recovery, the court stated that allowing the plaintiff to recover expenses he had not actually incurred "is contrary to Louisiana Civil Code art. 2315."²⁰⁸ Post-*Hoffman*, the supreme court continued to limit the applicability of the collateral source rule, as seen most recently in *Simmons v. Cornerstone Investments*, with respect to write-offs obtained through workers' compensation benefits.²⁰⁹

2. *The Advantage of the Collateral Source Rule and Workers' Compensation*

The Louisiana Supreme Court held in *Simmons v. Cornerstone Investments* that the collateral source rule does not apply to medical write-offs obtained through the workers' compensation fee schedule.²¹⁰ The *Simmons* case arose when the plaintiff, Kerry Simmons, suffered a workplace injury in the course and scope of his employment with Cintas Corporation.²¹¹ The plaintiff received workers' compensation benefits through his employer, totaling \$18,435 in coverage for medical bills, which had been reduced from \$24,435 pursuant to the Louisiana Workers' Compensation Act Medical Reimbursement Schedule.²¹² Kerry Simmons filed suit against both Cornerstone Investments, LLC, the owner of the building where she was injured, and its insurer.²¹³

203. *Id.*

204. *Id.*

205. *Id.* at 706.

206. *Id.*

207. *Id.* at 707.

208. *Id.* at 708.

209. *See Simmons v. Cornerstone Invs.*, 282 So. 3d 199 (La. 2019).

210. *Id.*

211. *Id.* at 200.

212. *Id.*

213. *Id.* at 201.

The plaintiff settled with his employer, leaving Cornerstone and its insurer as the sole defendants in the suit.²¹⁴ The defendants moved to exclude evidence of the amount of written-off expenses and to include only the amount actually paid by the workers' compensation insurer.²¹⁵ The trial court granted the defendants' motion, thereby preventing the introduction of evidence showing any amount in excess of what workers' compensation actually paid.²¹⁶ The Louisiana Third Circuit Court of Appeal denied the plaintiff's writ application; however, the Louisiana Supreme Court granted writ to determine the applicability of the collateral source rule to workers' compensation payments.²¹⁷

The state supreme court found that the written-off amount is a "phantom charge" that the plaintiff had not paid nor would ever have to pay.²¹⁸ The workers' compensation payment schedule provides the maximum monetary amounts that will be paid by workers' compensation insurers.²¹⁹ Payments by employees in excess of the workers' compensation payment schedule are forbidden by law.²²⁰ The court held that the collateral source rule does not apply to write-offs obtained through the workers' compensation payment schedule.²²¹ In making its determination, the court applied the *Bozeman* two-pronged test to find the collateral source rule inapplicable.²²² The court held that awarding medical expenses that were never incurred based on the public policy of tort deterrence is insufficient to justify application of the rule.²²³ Furthermore, the court held that the loss of the employee's right to file a tort suit against the employer was an indirect diminution of patrimony, insufficient to satisfy the second prong of the *Bozeman* test.²²⁴ The court stated that any recovery in excess of the reduced amount of medical bills "would be a windfall to [the] [p]laintiff" and would thereby contradict the rationale behind the collateral source rule.²²⁵ The Louisiana Supreme Court's

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 204.

219. *Id.*

220. *Id.*

221. *Id.* at 206.

222. *Id.* at 204–05.

223. *Id.* at 205.

224. *Id.*

225. *Id.*

decision in *Simmons*, however, is not the most recent development of the collateral source rule in the state.²²⁶

E. Louisiana Revised Statutes § 9:2800.27: A Step in the Right Direction

The combination of overwhelming Republican success in the 2019 state legislature elections and the second highest insurance rates in the country made 2020 a prime year for long-sought tort reform in Louisiana.²²⁷ After dozens of tort reform bills failed to gain bipartisan support, the Civil Justice Reform Act of 2020 passed in both chambers during the final days of the 2020 First Extraordinary Session.²²⁸ This tort reform bill, among other significant changes to the Louisiana civil justice system,²²⁹ enacted Louisiana Revised Statutes § 9:2800.27, which governs the application of the collateral source rule to medical expenses.²³⁰ The statute follows the Actual Amounts Paid approach from *Bozeman*, with one exception.²³¹

Louisiana Revised Statutes § 9:2800.27, titled “Recoverable past medical expenses; collateral sources; limitations; evidence,” begins by defining terms and phrases unique to the statute.²³² These terms and phrases include “health insurance issuer,”²³³ “medical provider,”²³⁴ “cost

226. See LA. REV. STAT. § 9:2800.27 (2020).

227. Telephone Interview with John M. Stefanski, State Representative District 42, Louisiana House of Representatives (July 10, 2020).

228. See H.B. 57, 2020 Leg., 1st Extraordinary Sess. (La. 2020).

229. The other significant changes made in the bill are: (1) lowering the jury trial threshold from \$50,000 to \$10,000; (2) amending Louisiana Code of Evidence article 411, which governs the admissibility of liability insurance; and (3) repealing the law preventing evidence of whether the plaintiff was wearing a seatbelt from being offered to the jury. *Id.* § 9:2800.27.

230. H.B. 57, § 4, 2020 Leg., 1st Extraordinary Sess. (La. 2020).

231. See *id.* § 9:2800.27.

232. *Id.* § 9:2800.27(A).

233. “‘Health insurance issuer’ means any health insurance coverage through a policy or certificate of insurance subject to regulation of insurance under state law, a health maintenance organization, an employer-sponsored health plan, the Office of Group Benefits, or an equivalent federal or state health plan.” *Id.* § 9:2800.27(A)(1).

234. “‘Medical provider’ means any healthcare provider, hospital, ambulance service, or their heirs or assignees.” *Id.* § 9:2800.27(A)(2).

sharing,”²³⁵ “contracted medical provider,”²³⁶ and “cost of procurement.”²³⁷ The statute applies prospectively beginning January 1, 2021, and will not apply to causes of action arising or actions pending prior to January 1, 2021.²³⁸

The Louisiana Legislature codified two major Louisiana Supreme Court decisions with Louisiana Revised Statutes § 9:2800.27.²³⁹ Subsection C, codifying *Bozeman*, limits a claimant’s recovery to the actual amounts paid when the medical expenses are covered by Medicaid.²⁴⁰ Additionally, subsection E, codifying *Simmons*, limits a claimant’s recovery of medical expenses to the amount paid under the medical payment fee schedule of the Louisiana workers’ compensation law when the expenses are paid pursuant to that law.²⁴¹ Subsection D of the statute provides a catch-all for the recovery of any past medical expenses not paid by an insurance provider, Medicare, Medicaid, or a workers’ compensation insurer.²⁴² The statute only allows recovery in addition to the actual amounts paid when a person obtains the write-off benefit via an insurance provider or Medicare.²⁴³

Louisiana Revised Statutes § 9:2800.27(B) requires a court to award to the claimant 40% of the written-off amount when a health insurance issuer or Medicare paid for the expenses.²⁴⁴ However, the subsection does provide that the court can reduce the 40% if the defendant proves that the additional recovery is unreasonable.²⁴⁵ The defendant has the opportunity

235. “‘Cost sharing’ means copayments, coinsurance, deductibles, and any other amounts which have been paid or are owed by the claimant to a medical provider.” *Id.* § 9:2800.27(A)(3).

236. “‘Contracted medical provider’ means any in-network medical provider that has entered into a contract or agreement directly with a health insurance issuer or with a health insurance issuer through a network of providers for the provision of covered healthcare services at a pre-negotiated rate or any medical provider that has billed and received payment for covered healthcare services from Medicare when the provider is a participating provider in those programs.” *Id.* § 9:2800.27(A)(4).

237. *See supra* note 27 defining “cost of procurement.”

238. H.B. 57 § 6, 2020 Leg., 1st Extraordinary Sess. (La. 2020).

239. *See* LA. REV. STAT. § 9:2800.27(C), (E).

240. *Id.* § 9:2800.27(C).

241. *Id.* § 9:2800.27(E).

242. *Id.* § 9:2800.27(D).

243. *Id.* § 9:2800.27(B).

244. *Id.*

245. *Id.*

to present evidence regarding the reasonableness of the additional damages after a jury renders a verdict.²⁴⁶

Lastly, subsection F provides the procedure for the courts' application of the statute.²⁴⁷ In all cases, the statute requires the court to inform the jury only of the amount billed by a medical provider and not the amount actually paid.²⁴⁸ Additionally, the statute forbids disclosing to the jury whether any person, health insurance issuer, or Medicare has paid or agreed to pay any of the claimant's medical expenses.²⁴⁹ After the jury renders a verdict, the court receives evidence related to the limitations of recoverable medical expenses provided in the statute.²⁵⁰ The court then reduces the jury award according to the evidence presented.²⁵¹

Post-*Bozeman*, the Louisiana Supreme Court continuously decreased the extent of the collateral source rule's application to written-off medical expenses.²⁵² The Louisiana Legislature finally brought much needed clarity to the rule's application in 2020 by enacting Louisiana Revised Statutes § 9:2800.27.²⁵³ The statute, however, does not provide an equitable and just solution in all cases. An award for written-off medical expenses is excess recovery and makes the plaintiff more than whole, thereby contradicting the policy behind compensatory damages and tort recovery.²⁵⁴ On the other hand, denying plaintiffs' recovery beyond the actual amounts paid, except for when the write-off comes from health insurance or Medicare, can result in awards that make plaintiffs less than whole.²⁵⁵

246. *Id.* § 9:2800.27(F).

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *See Bellard v. Am. Cent. Ins.*, 980 So. 2d 654 (La. 2008) (holding the collateral source rule does not apply to funds received from a workers' compensation insurer); *Hoffman v. 21st Century N. Am. Ins.*, 209 So. 3d 702 (La. 2015) (holding the collateral source rule does not apply to write-offs obtained through attorney-negotiations); *Simmons v. Cornerstone Invs.*, 282 So. 3d 199 (La. 2019) (holding the collateral source rule does not apply to write-offs obtained through workers' compensation insurance).

253. *See id.* § 9:2800.27.

254. Langlois, *supra* note 10, at 315.

255. *See id.* § 9:2800.27(D).

III. ONE STEP FORWARD AND A HALF STEP BACK

The application of Louisiana Revised Statutes § 9:2800.27 as it is written can provide inequitable results for both plaintiffs and defendants.²⁵⁶ Depending on the amount of damages at issue in a case, the application of the statute's 40% provision could either impose punitive damages on a defendant or fail to make the plaintiff whole.²⁵⁷ Additionally, the statute fails to consider the diminution of patrimony suffered by a plaintiff who obtains the write-off benefit through either an attorney or self-negotiations.²⁵⁸ Lastly, requiring the court to inform the jury only of the amount billed by a medical provider, and not the actual amount paid, potentially inflates the general damages awarded in jury trials where the collateral source rule applies.

A. An Unpleasant Statute for Both Parties

Louisiana Revised Statutes § 9:2800.27(B) allowing recovery of 40% of the written-off medical expenses is a result of compromise in the Louisiana Legislature.²⁵⁹ The 40% additional recovery that is available when either a health insurance provider or Medicare reduces medical expenses is meant to compensate for the plaintiff's cost of procuring the benefit of insurance.²⁶⁰ However, in certain cases, namely, those with higher special damages, recovering 40% of the written-off expenses will enable recovery that exceeds the plaintiff's cost of procurement, thereby contravening what the legislature intended with Louisiana Civil Code

256. *Id.* § 9:2800.27.

257. *See id.* § 9:2800.27(B).

258. *See generally* Johnson v. Neill Corp., No. 2015 CA 0430, 2015 WL 9464625, at *1 (La. Ct. App. 1st Cir. Dec. 23, 2015) (acknowledging that the plaintiff received medical services for free as a professional courtesy); Hoffman v. 21st Century N. Am. Ins., 209 So. 3d 702 (La. 2015) (acknowledging that the plaintiff received a discounted rate on medical services because of an agreement between the healthcare provider and attorney); Lockett v. UV Risk Retention Grp., Inc., 180 So. 3d 557 (La. Ct. App. 5th Cir. 2015) (allowing plaintiff to recover written-off medical expenses obtained through self-negotiations).

259. Telephone Interview with John M. Stefanski, State Representative District 42, Louisiana House of Representatives (July 10, 2020). Representative Stefanski, the author of the statute, explained that he originally had 30% in the bill, and the opposition to the statute wanted 50%. *Id.* After extensive negotiations on the content of the Civil Justice Reform Act of 2020, the Republicans and Democrats settled on 40%. *Id.*

260. *Id.*

article 2315: to make the victim whole.²⁶¹ On the other hand, in cases with lower special damages, the additional 40% recovery may be inadequate to compensate the plaintiff for their cost of procurement.²⁶²

Once damages reach the point at which the plaintiff is made whole, that is, when recovery equals the cost of procurement of insurance, any additional liability effectively operates as punitive damages.²⁶³ According to the Louisiana Civil Code, courts may award punitive damages only when a code article specifically allows them to do so.²⁶⁴ Currently, there are only six situations where punitive damages are available, including cases involving egregious acts such as terrorism, criminal sexual activity with a juvenile, and hazing that leads to death.²⁶⁵

The prerequisite to punitive damages that the defendant must exhibit “wanton or reckless disregard” is further proof that Louisiana law means to exclude the vast majority of negligence cases from implicating punitive damages.²⁶⁶ The recovery of written-off medical expenses in excess of the cost of procurement, in cases like *Lockett v. UV Insurance Risk Retention Group*, where the victim sued for damages sustained in an automobile accident, unjustifiably imposes punitive damages on defendants who collided with another vehicle.²⁶⁷ The new statute allowing this excessive recovery through the application of the collateral source rule effectively imposes the same additional damages on negligent drivers that are only statutorily permitted for egregious defendants such as terrorists and child rapists.²⁶⁸

Conversely, when the amount of written-off medical expenses is low, the additional 40% recovery provided by the statute may be inadequate to

261. Langlois, *supra* note 10, at 300.

262. *Id.*

263. MARAIST & GALLIGAN, *supra* note 46.

264. *Id.*

265. See LA. CIV. CODE art. 2315.3 (2019) (permitting punitive damages in child pornography cases); *id.* art. 2315.4 (permitting punitive damages when the injury was caused by an intoxicated driver); *id.* art. 2315.7 (permitting punitive damages when the injury was caused by criminal sexual activity with a juvenile); *id.* art. 2315.8 (permitting punitive damages in domestic abuse cases); *id.* art. 2315.9 (permitting punitive damages in terrorism cases); *id.* art. 2315.10 (permitting punitive damages when death is caused by hazing).

266. MARAIST & GALLIGAN, *supra* note 46, at § 7.03.

267. See generally *Lockett*, 180 So. 3d 557.

268. See, e.g., *Hoffman v. 21st Century N. Am. Ins.*, 209 So. 3d 702 (La. 2015) (bringing action for negligence arising out of an automobile accident). Cf. LA. CIV. CODE art. 2315.7 (permitting punitive damages when the injury was caused by criminal sexual activity with a juvenile); *id.* art. 2315.9 (permitting punitive damages in terrorism cases).

accomplish the goal of compensatory damages, namely, making the plaintiff whole.²⁶⁹ Consider a case where there are \$5,000 in written-off medical expenses, and the plaintiff pays \$6,000 per year for health insurance. Louisiana Revised Statutes § 9:2800.27(B) allows this plaintiff to recover \$2,000 in addition to the actual amounts paid “in consideration of the claimant’s cost of procurement.”²⁷⁰ The additional recovery in this hypothetical, however, only covers one-third of the plaintiff’s cost of procurement. Under these facts, the statute fails to make the plaintiff whole because the plaintiff takes either a \$3,000 loss on the write-off or a \$4,000 loss on the cost of procurement. Moreover, the issues with the additional recovery allowed in Louisiana Revised Statutes § 9:2800.27(B) are not the only problems with the statute.²⁷¹

B. Phantom Charges, Real Money

Louisiana Revised Statutes § 9:2800.27 provides that “[t]he jury shall be informed only of the amount *billed* by a medical provider for medical treatment.”²⁷² This requirement will cause issues with the award of general damages in cases where there are written-off medical expenses.²⁷³ There is no mechanical rule for determining general damages; the facts and circumstances of each case control.²⁷⁴ One of the considerations relevant to calculating general damages is the amount of special damages recoverable in the case.²⁷⁵ The difference between the amount of medical expenses actually paid and the amount billed in cases can be hundreds of

269. Langlois, *supra* note 10, at 300.

270. LA. REV. STAT. § 9:2800.27(B) (2020).

271. *Id.*

272. *Id.* § 9:2800.27(F) (emphasis added).

273. See, e.g., Johnson v. Neill Corp., No. 2015 CA 0430, 2015 WL 9464625, at *1 (La. Ct. App. 1st Cir. Dec. 23, 2015) (awarding \$700,000 in general damages in combination with \$135,361 in special damages); cf. Hoffman, 209 So. 3d at 703 (awarding \$4,500 in general damages in combination with \$2,478 in special damages).

274. Leblanc v. Allstate Ins. Co., 772 So. 2d 400, 405 (La. Ct. App. 5th Cir. 2000).

275. A popular method of calculating general damages awards is the “multiplier method.” The multiplier method calculates all the plaintiff’s monetary losses stemming from their injury, or special damages, and multiplies them by a certain rate to get a desired total for general damages. For example, if a plaintiff has \$1,000 in special damages, the method will multiply \$1,000 by multiplier to get a total for general damages. *How is Pain and Suffering Calculated in Lawsuits in Louisiana?*, SPENCER CALAHAN INJURY LAWS., <https://www.calahanlaw.com/personal-injury-lawyer-baton-rouge/how-is-pain-and-suffering-calculated-in-law-suits-in-louisiana/> [<https://perma.cc/P2YT-CV3A>] (last visited Aug. 31, 2020).

thousands of dollars.²⁷⁶ Therefore, presenting the jury with the amount billed and not the actual amount paid creates a false narrative regarding the amount of special damages recoverable in the case. This false narrative concocted by the presentation of evidence of the amount billed, and not the amount actually paid, is likely to cause juries to inflate general damages to match the high-dollar amount of the bill.

Consider this issue in the context of *Bozeman v. State*.²⁷⁷ In that case, subsection F would require the jury to learn of the \$613,626.64 in billed medical expenses.²⁷⁸ The amount actually paid in *Bozeman*, however, was \$291,863.56.²⁷⁹ Under the new statute, the jury would only see evidence of medical expenses that are more than double the actual amount paid. This could easily lead to a jury overvaluing the general damages in a case based on the false narrative created by billed medical expenses.

With a few exceptions for egregious cases, an alleged tortfeasor, if found at fault, should be liable to a plaintiff only for the damages resulting from the tortfeasor's actions.²⁸⁰ These damages should not include written-off medical expenses in excess of the cost of procurement of insurance, that the victim has no obligation to pay to the healthcare provider.²⁸¹ On the other hand, plaintiffs not at fault should always recover the amount of compensatory damages that makes them whole.²⁸² Additionally, the plaintiff should not be allowed to present the amount billed by the healthcare provider because it creates a false narrative that leads to inflated awards of general damages. The Louisiana Legislature should amend Louisiana Revised Statutes § 9:2800.27 to provide a more equitable application of the collateral source rule for both plaintiffs and defendants.

IV. A FEW CHANGES TO MAKE EVERYONE HAPPY

Although the Louisiana Legislature's enactment of Louisiana Revised Statutes § 9:2800.27 provides much needed clarity to the collateral source

276. See generally *Simmons v. Cornerstone Invs.*, 282 So. 3d 199 (La. 2019) (\$128,615 in written-off medical expenses); *Bozeman v. State*, 879 So. 2d 692 (La. 2004) (\$258,419.67 in written-off medical expenses); *Johnson*, 2015 WL 9464625, at *1 (\$107,811 in written-off medical expenses).

277. See *Bozeman*, 879 So. 2d 692.

278. *Id.* at 694.

279. *Id.*

280. See LA. CIV. CODE art. 2315 (2019).

281. *Simmons*, 282 So. 3d at 204.

282. See discussion *supra* Part I.A on the purpose of compensatory damages awards.

rule's application, it does not provide optimal results in many cases.²⁸³ The Louisiana Legislature should amend the statute governing how the collateral source rule applies to the calculation of awards for damages so as to provide equitable recovery in all cases. Amending three sections of the current statute will produce a fairer collateral source rule for both plaintiffs and defendants alike.²⁸⁴

The legislature should amend § 9:2800.27(B) by tying any additional recovery to the claimant's cost of procurement.²⁸⁵ Additionally, the legislature should remove subsection D from the statute and amend subsection B to encompass all third parties not otherwise provided for in the statute.²⁸⁶ Lastly, the legislature should amend § 9:2800.27(F) to require that the actual amount of medical expenses paid be disclosed to the jury.²⁸⁷ These amendments will collectively provide a collateral source rule that is more equitable for both plaintiffs and defendants.

A. Fixing a Bad Compromise

The legislature should make two amendments to the statute's exception in subsection B.²⁸⁸ First, the Louisiana Legislature should amend that subsection with respect to the potential recovery in addition to the actual amounts paid.²⁸⁹ Additionally, the legislature should amend the subsection to cover all third parties not otherwise provided for in the statute in tandem with the deletion of subsection D.

Currently, Louisiana Revised Statutes § 9:2800.27(B) reads, "The court shall award to the claimant *forty percent* of the difference between the amount billed and the amount actually paid to the contracted medical provider"²⁹⁰ The legislature should amend the subsection to state: "The court shall award to the claimant the lesser of the written-off amount or the cost of procurement."²⁹¹ This amendment would provide an equitable recovery in all cases where the collateral source rule applies.²⁹²

283. See LA. REV. STAT. § 9:2800.27 (2020).

284. See *id.*

285. See *id.* § 9:2800.27(B).

286. See *id.* § 9:2800.27(D).

287. See *id.* § 9:2800.27(F).

288. See *id.* § 9:2800.27(B).

289. See *id.*

290. *Id.* (emphasis added).

291. *Id.*

292. See discussion *supra* Part III.A regarding the equity issues with applying the current 40% rule.

The amendment allows for the recovery of either the plaintiff's cost of procurement or the written-off amount, whichever is lesser. The plaintiff would be required to provide evidence regarding the cost of procurement. This amendment places the statute somewhere between the Actual Amounts Paid and Benefit of the Bargain approaches discussed in *Bozeman*.²⁹³ The statute, with the proposed amendment, prevents the double recovery allowed in states like Hawaii²⁹⁴ without following Idaho's harsh abrogation of the collateral source rule.²⁹⁵ Thus, the proposed statute falls within the plain meaning and legislative intent behind Louisiana Civil Code article 2315, and ensures that the plaintiff recovers damages that make the plaintiff whole.²⁹⁶

Additionally, the legislature should amend subsection B to include all third parties not otherwise provided for in the statute in tandem with deleting subsection D from the statute.²⁹⁷ Currently, the exception to limiting recovery to actual amounts paid only includes Medicare and health insurance issuers.²⁹⁸ The legislature should change "health insurance issuer or Medicare" to "third party not otherwise provided for in this section."²⁹⁹ This amendment would allow the statute to capture both attorney-negotiated write-offs³⁰⁰ and self-negotiated write-offs,³⁰¹ in addition to those benefits obtained via health-insurance issuers and Medicare.³⁰² These amendments, however, do not solve all the issues with § 9:2800.27.

293. See *Bozeman v. State*, 879 So. 2d 692, 702–05 (La. 2004).

294. See *Bynum v. Magno*, 101 P.3d 1149 (Haw. 2004) (holding that it is better for the victim to receive double recovery than to allow the tortfeasor benefit from the collateral source).

295. See IDAHO CODE § 6-1606 (2019) (“[A] judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage . . .”).

296. See discussion *supra* Part I.A regarding tort recovery in general.

297. See LA. REV. STAT. § 9:2800.27(C), (E) (2020).

298. See *id.* § 9:2800.27(B).

299. *Id.*

300. See *Hoffman v. 21st Century N. Am. Ins.*, 209 So. 3d 702 (La 2015).

301. See *Lockett v. UV Ins. Risk Retention Grp.*, 180 So. 3d 557 (La. Ct. App. 5th Cir. 2015).

302. LA. REV. STAT. § 9:2800.27(B).

B. A Change to Deflate Jury Verdicts

Louisiana Revised Statutes § 9:2800.27(F) provides the procedure for courts applying the collateral source rule to an award of damages.³⁰³ Currently, the subsection provides:

In a jury trial, only after a jury verdict is rendered may the court receive evidence related to the limitations of recoverable past medical expenses provided by Subsection B or D of this section. The jury shall be informed only of the amount billed by a medical provider for medical treatment. Whether any person, health insurance issuer, or Medicare has paid or agreed to pay, in whole or in part, any of a claimant's medical expenses, shall not be disclosed to the jury. In trial to the court alone, the court may consider such evidence.³⁰⁴

The legislature should amend the statute by deleting the first sentence above and adding a sentence following the original second sentence to allow the court to add damages post-verdict. Additionally, the second sentence should be amended to require the court to present the jury with only evidence of the actual amount paid for medical treatment. In tandem, these amendments create a procedure for the court to add damages pursuant to subsection B, discussed above, post-verdict.³⁰⁵ Subsection F with the suggested amendments would read:

The jury shall be informed only of the amount paid by a third party for medical treatment. In a jury trial, only after a jury verdict is rendered may the court provide additional recovery to the jury award pursuant to Subsection B of this Section. Whether any person, health insurance issuer, or Medicare has paid or agreed to pay, in whole or in part, any of a claimant's medical expenses, shall not be disclosed to the jury. In trial to the court alone, the court may consider such evidence.³⁰⁶

303. *Id.* § 9:2800.27(F).

304. *Id.*

305. *See id.* § 9:2800.27(B).

306. *Id.* (emphasis added to show proposed amendments).

Louisiana Code of Civil Procedure article 1814 allows this post-verdict additur³⁰⁷ by the court.³⁰⁸ Additionally, these amendments to subsection F solve the issues discussed above with the potential for inflated damage awards. The jury receiving evidence only of the medical expenses paid provides a more accurate valuation of general damages and prevents excessive recovery from defendants based on past medical expenses that were never incurred.³⁰⁹ Lastly, the proposed amendments do not require an alteration of Louisiana Code of Evidence article 409 because evidence of third-party payments remains inadmissible.³¹⁰ The amendment to subsection F alters only the amount of medical expenses presented to the jury at trial and does not permit the evidence of who paid the expenses that is forbidden by article 409.

C. Application of the Proposed Statute

The proposed amendment to Louisiana Revised Statutes § 9.2800.27 provides a more equitable and just recovery than the current statute, as illustrated by three different hypotheticals. The application of the collateral source rule with respect to write-offs is dynamic, as write-offs arise from a variety of sources, including private insurance,³¹¹ attorney-negotiations,³¹² and self-negotiations.³¹³ The following hypotheticals further prove that although enacting Louisiana Revised Statutes § 9.2800.27 is a step in the right direction, the statute does not provide the most equitable application of the collateral source rule.

1. Private Insurance Benefits

The Louisiana First Circuit Court of Appeal in *Griffin v. Louisiana Sheriff's Auto Risk Ass'n* held that the collateral source rule applies to

307. "Additur" is defined as a trial court's order, issued usually with the defendant's consent, that increases the jury's award of damages to avoid a new trial on grounds of inadequate damages. The term may also refer to the increase itself, the procedure, or the court's power to make the order. *Additur*, BLACK'S LAW DICTIONARY (11th ed. 2019).

308. LA. CODE CIV. PROC. art. 1814 (2020).

309. *See supra* note 276.

310. LA. CODE EVID. art. 409 (2019).

311. *See generally* *Griffin v. La. Sheriff's Auto Risk Ass'n*, 802 So. 2d 691 (La. Ct. App. 1st Cir. 2001).

312. *See generally* *Hoffman, v. 21st Century N. Am. Ins.*, 209 So. 3d 702 (La. 2015).

313. *See generally* *Lockett v. UV Ins. Risk Retention Grp.*, 180 So. 3d 557 (La. Ct. App. 5th Cir. 2015).

write-offs obtained through a private insurer.³¹⁴ Griffin filed a personal-injury lawsuit against the Terrebone Parish Sheriff's Office after suffering injuries from an automobile collision with a sheriff's deputy.³¹⁵ The court held that Griffin's premium payments continually diminished her patrimony, and thus the collateral source rule applied to the reductions of her medical expenses obtained via her insurer.³¹⁶ The application of the collateral source rule in this case allowed Griffin to recover an additional \$47,739.28 for the written-off medical expenses.³¹⁷ Under the current statute, Griffin could recover 40% of that amount, or \$19,095.71.

Under the above proposed amendment, to determine the issue of the write-offs, the court would compare Griffin's additional recovery to the amount by which obtaining the insurance benefit diminished her patrimony.³¹⁸ The initial step requires Griffin to provide evidence of the cost of procuring the insurance benefit.³¹⁹ Here, this requirement is easily met by offering evidence of the payment of insurance premiums. The opinion is silent regarding the premiums that Griffin paid for her insurance; however, this hypothetical will assume she pays \$5,000 per year.³²⁰ Therefore, the statute would allow Ms. Griffin to recover the lesser of either the \$5,000 annual insurance premium or the written-off amount of \$47,739.28.

In this hypothetical, the statutory amendment would decrease the plaintiff's recovery from \$19,095.71 to \$5,000, but the decreased recovery would still make the plaintiff whole.³²¹ The victim would recover the money paid to obtain the write-off benefit without charging the defendant over \$14,000 more than the expenses actually incurred by the plaintiff.³²² This reduction provides an equitable recovery by not allowing the tortfeasor to benefit excessively from the collateral source rule and by allowing the plaintiff to recover the consideration paid to obtain the insurance benefit.³²³

314. See *Griffin*, 802 So. 2d 691.

315. *Id.* at 695.

316. *Id.* at 715.

317. *Id.*

318. See *supra* Part IV.A.

319. See *supra* Part IV.A.

320. See *generally Griffin*, 802 So. 2d 691.

321. See discussion *supra* Part I.A on policy behind compensatory damages.

322. See *Griffin*, 802 So. 2d at 713 (stating the medical expenses paid by the insurer equaled \$42,169.72, with \$47,739.28 written-off).

323. See discussion *supra* Part IV.A regarding the statute's compromise between abrogating and preserving collateral source rule.

2. Attorney-Negotiated Write-Offs

In *Hoffman*, the Louisiana Supreme Court held that the plaintiff could not recover the written-off amount of medical expenses that he obtained through attorney negotiations.³²⁴ The decision to not apply the collateral source rule to attorney-negotiated write-offs reduced the plaintiff's recovery by \$2,050.³²⁵ Louisiana Revised Statutes § 9:2800.27(D) codifies the *Hoffman* holding; therefore, the recovery would be the same under the new statute.³²⁶ The above proposed amendment would allow the additional recovery of \$2,050 if the plaintiff could provide evidence of the cost of procuring the write-off benefit.³²⁷ The plaintiff would likely be successful in providing the necessary evidence via the contract signed by the parties.³²⁸ Although the opinion is silent regarding the contingency fee charged by the plaintiff's attorney, this example will assume the fee was 33.3%.³²⁹

The proposed statutory amendment provides greater recovery in this case compared to what the Louisiana Supreme Court awarded in *Hoffman* and what Louisiana Revised Statutes § 9:2800.27 allows.³³⁰ The amendment would allow recovery of the written-off \$2,050 or the amount of the contingency fee paid by the plaintiff, whichever is lesser.³³¹ Here, the assumed contingency fee paid by the plaintiff would be \$2,263.73.³³² Thus, the amendment would allow the recovery of the written-off amount because it is the lesser of the two potentially recoverable amounts.³³³ This additional recovery makes the plaintiff whole because he is able to recover

324. See *supra* Part II.D.1.

325. *Hoffman v. 21st Century N. Am. Ins.*, 209 So. 3d 702, 704 (La. 2015) (finding plaintiff could only recover the \$950 actually charged for medical services and not the \$3,000 billed).

326. LA. REV. STAT. § 9:2800.27(D) (2020).

327. See *supra* Part IV.A.

328. See *supra* Part III.B.

329. "In routine personal injury cases, a typical contingency fee is 33.3 % of the recovery." *The Attorney's Fee: Contingency Fee*, COCHRAN FIRM METAIRIE, <http://www.medicalmalpracticelouisiana.com/do-i-have-a-case/attorneys-fee-contingency-fee> [<https://perma.cc/E7G5-8J2H>] (last visited Mar. 25, 2020).

330. See *supra* Part IV.A.

331. See *supra* Part IV.A.

332. The contingency fee is calculated by multiplying the assumed 33.3% contingency fee by the total damages award in the amount of \$6,798. *Hoffman v. 21st Century N. Am. Ins.*, 209 So. 3d 702, 703 (La. 2015).

333. See *supra* Part IV.A.

the full amount of write-offs that he obtained through a diminution of patrimony.³³⁴

3. *Self-Negotiated Write-Offs*

In *Lockett*, the Louisiana Fifth Circuit Court of Appeal held that the collateral source rule applies to self-negotiated write-offs of medical expenses.³³⁵ In that case the application of the collateral source rule to the written-off medical expenses increased the plaintiff's recovery by \$41,360.04.³³⁶ The plaintiff obtained the write-off by personally negotiating with Ochsner for a significant reduction in her medical bills in exchange for immediate payment.³³⁷ Under Louisiana Revised Statutes § 9:2800.27(D), however, the plaintiff cannot recover the written-off amount.³³⁸

Providing evidence of the cost of procurement under the proposed amendment would be a difficult task.³³⁹ The plaintiff could offer evidence of the time she spent negotiating with the health care provider and argue that the lost time was a diminution to her patrimony. If the court were to accept this evidence as sufficient proof of a diminution, then the question becomes how the court will calculate the monetary value of lost time. The legislature could decide on a set amount for self-negotiated deals, or the plaintiff could provide evidence of the value of her time. This example will use the value of her time as compared to the written-off amount. The plaintiff in *Lockett* worked as a nurse, and thus her hourly wage would determine the value of her time. Assuming that the plaintiff had an hourly wage of \$30 and that she spent 20 hours negotiating, the diminution to her patrimony would be \$600. Thus, the plaintiff would be allowed to recover \$600 in addition to the incurred medical expenses. This reduced recovery would still meet the goal of making the plaintiff whole because she could recover the incurred medical expenses as well as the diminution in patrimony sustained spending time negotiating with the health care provider.

The three scenarios above show the proposed amendment's effectiveness in satisfying the ultimate goal of tort recovery: to make the

334. *See supra* Part IV.A.

335. *See Lockett v. UV Ins. Risk Retention Grp.*, 180 So. 3d 557 (La. Ct. App. 5th Cir. 2015).

336. *Id.* at 568.

337. *Id.* at 569.

338. LA. REV. STAT. § 9:2800.27(D) (2020).

339. *See supra* Part IV.A.

plaintiff whole.³⁴⁰ The proposed amendment provides an effective solution that fits in between the original all-encompassing application of the collateral source rule³⁴¹ and the complete abrogation of the rule.³⁴² Furthermore, the proposed amendment provides a more equitable solution to both plaintiffs and defendants than does Louisiana Revised Statutes § 9:2800.27.³⁴³

CONCLUSION

The enactment of Louisiana Revised Statutes § 9:2800.27 provided much needed clarity to the collateral source rule's application.³⁴⁴ The statute, however, does not provide an optimal application of the collateral source rule.³⁴⁵ Specifically, the statute's exception to the Actual Amounts Paid approach imposes punitive damages on the defendant in some cases and fails to make the plaintiff whole in others.³⁴⁶ These punitive damages make the plaintiff more than whole and thereby contradict the public policy behind compensatory damages and tort recovery as a whole.³⁴⁷ Additionally, only presenting evidence of the amounts billed to the jury can potentially cause inflated awards of general damages. The Louisiana Legislature should amend the statute's exception to the Actual Amounts Paid approach, as well as the procedure for applying the rule to a jury verdict. The current state of the collateral source rule provides inequitable relief to both plaintiffs and defendants alike. An amendment to allow recovery, beyond the actual amounts paid, in the amount of either the write-off or the cost of procurement, would provide a more equitable result to all parties. Additionally, amending the procedure to present evidence of the actual amounts paid to the jury will provide more accurate monetary awards of general damages. In the end, the amendments will provide a fairer and more equitable collateral source rule to both sides.

340. See discussion *supra* Part I.A. on tort recovery in general.

341. See discussion *supra* Part I.B.2 on Hawaii's application of the collateral source rule.

342. See discussion *supra* Part I.B.2 regarding Idaho's application of the collateral source rule.

343. See LA. REV. STAT. § 9:2800.27.

344. *Id.*

345. See *supra* note 45.

346. See discussion *supra* Part III on recovery issues with statute's 40% rule.

347. Langlois, *supra* note 10, at 315.

