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THE IMPACT OF THE AFFORDABLE CARE ACT ON THE COLORADO COLLATERAL SOURCE RULE

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INTRODUCTION

The collateral source rule is a long-standing tenet of tort law, though it has been scrutinized by some for more than half a century.[1] Recently, critics have claimed that with the advent of The Patient Protection and Affordable Care Act (ACA) the policy justifications behind the rule have lastly gone extinct.[2] This short essay responds specifically to that new wave of criticism. The policy justifications remain firmly intact. In fact, the ACA, which is likely to be repealed in any event,[3] does very little to contribute to the collateral source rule debate. The same arguments have been made in the past, yet they have not resulted in abrogation of the collateral source rule in Colorado.

I. THE COLLATERAL SOURCE RULE

In 1854, a steamboat was found liable for colliding into a schooner on Lake Huron, causing the schooner to immediately sink and suffer the loss of her cargo.[4] As part of his defense, the owner of the steamboat argued that the schooner was insured, and had therefore already been fully compensated for the loss of the vessel.[5] The court, however, was unmoved. It refused to reduce the amount of damages accordingly, ruling that the insurance agreement was "a wager between third parties, with

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1. The collateral source rule, though still good law in most states, has been under scrutiny since at least the 1960's. *See, e.g., Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 741 (1964); Paul W. Pretzel, *Do We Need the Collateral Source Rule*, 529 INS. L. J. 69, 69 (1967); Charles W. Peckinpaugh, Jr., *An Analysis of the Collateral Source Rule*, 524 INS. L.J. 545, 545 (1966); Charles W. Peckinpaugh, Jr., *Is Collateral Source Outmoded?*, 1965 A.B.A. SEC. INS. NEGL. & COMP. L. PROC. 304, 304 (1965); John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

2. LaMar F. Jost, Marissa S. Ronk, *The Affordable Care Act and Colorado's Collateral Source Rule*, 93 DENV. L. REV. ONLINE 1, 1 (2016); Ann S. Levin, *The Fate of the Collateral Source Rule After Healthcare Reform*, 60 UCLA L. REV. 736, 736 (2013).

3. Donald Trump's recent selection for secretary of health and human services, Tom Price, has been an open critic of the ACA for several years. Robert Pear, *Tom Price, Obamacare Critic, Is Trump's Choice for Health Secretary*, N.Y. TIMES (Nov. 30, 2016), http://www.nytimes.com/2016/11/28/us/politics/tom-price-secretary-health-and-human-services.html?_r=0.

4. The Monticello, 58 U.S. 152, 155 (1854).

5. *Id.*

which the trespasser has no concern."[6] This marked what has been recognized as the establishment of the common law collateral source doctrine,[7] which is still recognized to a degree by the vast majority of states, including Colorado.[8]

The common law collateral source rule stands for the general proposition that any compensation received by an injured party from a collateral source, one that is independent of the wrongdoer, will not diminish the damages that the injured party is entitled to recover against the wrongdoer.[9] Colorado's collateral source rule contains a pre-verdict evidentiary component as well as a post-verdict setoff component, both of which the general assembly has codified.[10] As an evidentiary matter, collateral sources are inadmissible at trial.[11] Any evidence of collateral payments that may have been made to the plaintiff, regardless of the intended purposes, is completely barred.[12] The post-verdict setoff portion, on the other hand, commits the court to reducing the plaintiff's verdict by the amount the plaintiff has been compensated by another source.[13] The setoff rule is limited, however, by a contract exception, which prevents the reduction of damages if the benefits received were the result of a contract for which the plaintiff entered into and paid.[14] With this exception, the codified version of the rule closely resembles what it was at common law.[15]

II. RATIONALES AND CRITICISMS OF THE COLLATERAL SOURCE RULE

In *The Monticello*, the rule's rationale was simple, and somewhat intuitive. The insurer was not the wrongdoer, so the payments the insurer

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6. *Id.*

7. It was the Supreme Court of Vermont that first used the term "collateral" to describe third-party payments, thus extending a name to the doctrine. Harding v. Town of Townshend, 43 Vt. 536, 536 (1870). It should be noted, however, that at least one writer has claimed that the *Monticello* court did not invent a new doctrine, but applied an old one, and consequently the assertion that the collateral source rule began with this opinion is incorrect. Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 527 (1991).

8. For a list of how states apply the collateral source rule, *see* Andrew F. Popper, *The Affordable Care Act Is Not Tort Reform*, 65 CATH. U. L. REV. 1, 12–15, n.89–139 (2015); Field, et. al., *The Collateral Source Rule and the Affordable Care Act: Implications for Life Care Planning and Economic Damages*, JOURNAL OF LIFE CARE PLANNING, Vol. 13, No. 3, Appendix A (2015); Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 MCGEORGE L. REV. 965, 978–80 (2012).

9. *See*, *e.g.*, Colo. Permanente Med. Grp., P.C. v. Evans, 926 P.2d 1218, 1230 (Colo. 1996) (quoting Kistler v. Halsey, 481 P.2d 722, 724 (Colo. 1971)).

10. COLO. REV. STAT. § 13-21-111.6; COLO. REV. STAT. § 10-1-135(10)(a).

11. *See* Wal-Mart Stores, Inc. v. Cossgrove, 276 P.3d 562, 565 & n.3; COLO. REV. STAT. § 10-1-135(10)(a).

12. The Colorado Supreme Court has ruled that the prejudicial impact collateral sources could have on the fact finder far outweighs the alternative probative value they might provide. *Cossgrove*, 276 P.3d at 567.

13. COLO. REV. STAT. § 13-21-111.6.

14. *Id.*

15. *See Cossgrove*, 276 P.3d at 566.

made did not release the steamboat from liability.[16] In other words, the collateral payments were irrelevant—irrelevant to liability and irrelevant to the calculation of damages. Over the past century, the rationales behind the collateral source doctrine have developed and become more sophisticated.

One classic justification for the collateral source rule is that it incentivizes citizens to purchase insurance.[17] Or, to put it in more realistic terms, it does not punish citizens for doing so. If having insurance reduces the award an injured party may recover against a wrongdoer, then there may be good reason not to have it. Of course, it is very unlikely that the average citizen considers the collateral source rule when determining whether to obtain insurance.[18] However, by ensuring that having insurance will not negatively impact a future tort claim, the collateral source rule definitively rewards its purchase. So, at least as an ideal, the incentive rationale continues to stand on firm ground.

Another justification for the collateral source rule is to prevent the unjust enrichment a wrongdoer would receive from an injured party's insurance.[19] Should a wrongdoer be so lucky to injure someone who has good insurance coverage, the wrongdoer will only be accountable for the payment of damages not already satisfied by insurance. This result would naturally be unfair, and the collateral source rule works to correct it.

A final rationale—though this is not intended to be an exhaustive list[20]—is deterrence.[21] If a wrongdoer is forced to fully compensate an injured party, regardless of insurance, it will in turn help prevent tortious behavior. This argument works better in the reverse. If a wrongdoer is not forced to pay for the injuries he causes, he would have little reason to exercise caution. This resonates on a corporate level, one driven by economic efficiency.[22] If victims receive full or substantial compensation

16. The court ruled, "The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others." The Monticello, 58 U.S. 152, 155 (1854).

17. *See* Todd, *supra* note 8, at 974–75.

18. This rationale has been criticized precisely for that reason. *See* Jacobsen, *supra* note 7 at n.46.

19. Joseph P. Poehlmann, *Enduring Doctrine: The Collateral Source Rule in Wisconsin Injury Law*, 99 MARQ. L. REV. 209, 221–22 (2015).

20. The collateral source rule has been justified on numerous other grounds including retribution, instrumentalism, economic efficiency, evidentiary purposes, and contract theory, to name a few. *See* Todd, *supra* note 8, at 970–77 (discussing various rationales). Another modern justification—though from this author's perspective a very weak one—is the realist argument that there will not be a double-recovery after the plaintiff's attorney has collected a contingency fee for services. *See* Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 68 (Cal. 1970).

21. *See* Poehlmann, *supra* note 19 at 209; L. Timothy Perrin, Comment, *The Collateral Source Rule in Texas: Its Impending Demise and a Proposed Modification*, 18 TEX. TECH L. REV. 961, 989 (1987) (demonstrating there is evidence that tort judgments do deter bad conduct); RESTATEMENT (SECOND) OF TORTS § 901(c) (1979) (including "deter wrongful conduct" as one of the purposes of tort law).

22. *See* Stephen F. Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV. L. REV. 932, 932 (1993).

from their insurance, in effect releasing all others from liability, there is little reason for a corporation to spend the time and money to ensure products and services are safe.[23]

There has also been an equal amount of criticisms. Some critics have articulated normative arguments as to why the rule is a misfit. They focus on the principle of corrective justice in tort law, that is, "individuals who are responsible for the wrongful losses of others have a duty to repair the losses."[24] This notion of corrective justice is often shorthanded as the duty to make the plaintiff whole. If collateral benefits are removed from the equation, the plaintiff receives a double-recovery, payments from both the wrongdoer and from an insurance agreement. If the wrongdoer is required to compensate the victim for losses even when she has already received compensation, it would not make the victim whole.[25] It would give her a windfall, and serve as a punitive measure against the wrongdoer, which is not the intent of tort law.[26]

This argument has two shortcomings. As a matter of first impression, the windfall argument is lopsided and undermined both by public policy and practicality. If one concedes that the collateral source rule could potentially allow a plaintiff to receive a windfall, one must recognize that without the rule the wrongdoer would instead receive a windfall.[27] There is little doubt that public policy should favor the plaintiff over the wrongdoer. In *McLaughlin*, the court affirmed, "Public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an independent source."[28] As a more practical matter, many times the plaintiff will not be overcompensated. This is because prior to receiving insurance benefits, the plaintiff entered into an insurance contract and paid expensive premiums to maintain it. These premiums are not reimbursed when an injury is the result of wrongdoing. Moreover, most insurance contracts include a subrogation clause, which, in the event of litigation, gives the insurer a right to receive reimbursement from the plaintiff's award.[29]

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23. *See id.*

24. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 15 (2001).

25. Michael K. Beard, *The Impact of Changes in Health Care Provider Reimbursement Systems on the Recovery of Damages for Medical Expenses in Personal Injury Suits*, 21 AM. J. TRIAL ADVOC. 453, 459–60 (1998).

26. *Id.*; *see also* Rebecca Levenson, *Allocating the Costs of Harm to Whom They Are Due: Modifying the Collateral Source Rule After Health Care Reform*, 160 U. PA. L. REV. 921, 931–33 (2012).

27. *See* Todd, *supra* note 8, at 965 (explaining that without the collateral source rule, insurance would in effect subsidize the tortfeasor's wrongful behavior).

28. McLaughlin v. BNSF Ry. Co., 300 P.3d 925, 940 (Colo. App. 2012) (quoting Green v. Denver & Rio Grande W. R.R. Co., 59 F.3d 1029, 1032 (10th Cir. 1995)).

29. *See* Todd, *supra* note 8, at 987.

Second, as a normative critique, the windfall argument is incomplete.[30] Compensation is a vehicle of corrective justice, not its synonym.[31] Repairing the losses caused by wrongful conduct is often translated into strictly monetary values, but as a principle of tort law, corrective justice is far more comprehensive.[32] The types of recovery afforded to a plaintiff best illumine this point. A plaintiff may recover not only economic damages, but noneconomic damages, such as pain and suffering, grief, and loss of joy and quality of life. In some cases, a plaintiff is also entitled to punitive damages. All in all, making a plaintiff whole, repairing her losses, is multidimensional and is only crudely reduced to costs because a better system of values is lacking.[33]

Corrective justice, in any case, is not the only theory upon which tort jurisprudence is based. The principle of deterrence provides another school of thought.[34] As articulated above, the collateral source rule helps deter tortious conduct, and would thus fit squarely within that purpose.[35] Rather than an unwarranted punitive device, the collateral source rule accomplishes the goals of deterrence. There are additional theories of tort law as well, including civil recourse and distributive justice, which have been theorized to encompass more than mere compensation.[36] Considering all this, to conclude that the collateral source rule is a misfit for the purposes of tort law is to ignore both the comprehensive nature of corrective justice and certainly the comprehensive nature of tort law jurisprudence.

Critics have also introduced pragmatic reasons to abrogate the collateral source rule. Over the past twenty years, tort reform advocates have placed the rule under heavy fire.[37] They argue that the goals of tort reform could be partly accomplished by eliminating the collateral source rule.[38] Abrogating the rule, which they claim is antiquated and misrepre-

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30. In this particular context, the term windfall is actually improperly used. Lori A. Roberts, *Rhetoric, Reality, and the Wrongful Abrogation of the Collateral Source Rule in Personal Injury Cases*, 31 REV. LITIG. 99, 109–10 (2012). Professor Lori Roberts defines windfall as "a receipt of financial gain that was not expected and not the result of something the recipient did." In other words, within the context of a tort claim, characterizing the financial gain a plaintiff may receive from a negotiated insurance contract as a windfall is inaccurate. Such gain would not be a windfall as the term is properly used because insurance coverage is both expected and contracted for by the plaintiff.

31. *See* Brian L. Church, *Balancing Corrective Justice and Deterrence: Injury Requirements and the Negligent Infliction of Emotional Distress*, 60 ALA. L. REV. 697, 702 (2009).

32. *See id.*

33. *See* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 710–13 (2003).

34. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997).

35. *See* Perrin, *supra* note 21.

36. *See* Zipursky, *supra* note 33 at 965; *see also* Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449 (1992).

37. Daena A. Goldsmith, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799, 827–29 (1988).

38. *Id.*

sented anyway, would improve outcomes for everyone, by discouraging the filing of frivolous lawsuits and by advancing insurance coverage while simultaneously lowering its costs.[39]

These arguments are propounded predominantly by tort reform activists,[40] and they garner very little empirical support.[41] A number of studies have demonstrated that tort reform has failed to accomplish much of what it set out to do, such as lower insurance costs, reduce litigation, and improve healthcare.[42] Of the few states that have abrogated the collateral source rule, there is little to suggest doing so has had a positive impact.[43]

For one rationale or another, the collateral source rule has evolved as an important aspect of tort law. While many states have modified the common law version of the collateral source rule, and a select few have abrogated it altogether, it has been remarkably resilient despite its criticisms.[44]

III. THE COLLATERAL SOURCE RULE IN LIGHT OF THE AFFORDABLE CARE ACT

The brief discussion above represents only a fraction of the collateral source rule debate. It is by no means the intent of this essay to fully assess the merits of the rule or respond to all its criticisms, nor is there adequate space to do so. The argument here is much more precise. To state it plainly, the advent of the ACA does very little to contribute to the overall debate. The policy justifications of the rule have not suddenly been lost, nor have the criticisms been given firmer shape. Colorado's collateral source rule has remained steadfast despite tort reform and other challenges. Therefore, it looks to remain steadfast in light of the ACA. The arguments are the same; they have only taken on a new disguise.

The ACA was enacted in March of 2010, and took effect on January 1, 2014.[45] Since its inception, it has withstood several constitutional challenges.[46] However, President-elect Donald Trump has stated repealing

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39. *Id.*; Jamie L. Wershbale, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 346 (2008).

40. *See* Todd, *supra* note 8, at 978–80.

41. *See* Popper, *supra* note 8, at 23–25 (surveying how tort reform has failed to achieve many of its goals, and arguing that there is very little evidence that abrogating the collateral source rule "will advance anything other than the bottom line for insurers").

42. *Id.*; *see* Roberts, *supra* note 30, at 99 (suggesting the crisis which inspired tort reform was a matter of mere rhetoric).

43. Roberts, *supra* note 30, at 134–35 (revealing that in California, where the collateral source rule has been abrogated, insurance premiums have not decreased).

44. *See supra* note 8 and accompanying text.

45. *Timeline: Affordable Care Act*, http://affordablehealthca.com/timeline-obamacare/ (last visited Nov. 30, 2016).

46. NCC Staff, *How Obamacare has faced five years of constitutional challenges*, http://blog.constitutioncenter.org/2015/03/how-obamacare-survived-five-years-of-constitutional-challenges/ (last visited Nov. 30, 2016).

the ACA will be part of his first-item agenda.[47] That the ACA will remain good law has never been less clear. On that basis alone, any changes to the collateral source rule in Colorado, or elsewhere, because of the ACA would be premature. Even if the ACA is not repealed or changed dramatically, however, the collateral source rule should remain unaffected.

The ACA is not a health insurance program but a framework intended to expand healthcare to all Americans.[48] While the ACA has nothing to do with tort reform,[49] critics claim the "sea change" in healthcare it stimulated has radical implications for tort reform and the collateral source rule in particular.[50] The arguments, however, are almost exclusively tied to the single issue of the individual mandate, though they may come in many forms.[51] This essay responds to three. First, that the individual mandate eliminates the need to encourage the purchase of insurance; next, that because of the individual mandate the windfall to the plaintiff is no longer justified; finally, that the individual mandate destabilizes the architecture of unjust enrichment to the wrongdoer.[52]

First, the incentive rationale is not suddenly eliminated as a result of the individual mandate. Notably, attacks on the merits of this justification are not new.[53] From the very beginning, there have been arguments attempting to undermine it. Prior to the ACA, arguments stockpiled on the fact that the insurance market had changed dramatically since the time the rule came into effect.[54] They argued that whereas insurance was once rare, it had now become commonplace.[55] Consequently, an incentive to purchase insurance is no longer necessary for citizens to obtain it, and so the rationale has become antiquated and lost its functional value.[56] As discussed above, however, the incentive justification has equal bearing when viewed differently. When viewed as the refusal to punish a citizen for having insurance, it serves as a reward for its purchase. Therefore, by contrast, without the collateral source rule, there would be an incentive to refrain from obtaining insurance. In this light, the collateral source rule continues to play an important role in encouraging the purchase of insurance.

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47. Amita Kelly, *Here Is What Donald Trump Wants To Do In His First 100 Days*, NPR, http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days (last visited Nov. 30, 2016).

48. Cameron Keng, *Obamacare (Affordable Care Act) Is Not an Insurance Or Healthcare Problem*, FORBES, http://www.forbes.com/sites/cameronkeng/2013/10/02/obamacare-affordable-care-act-is-not-an-insurance-or-healthcare-problem/#1644c1a34794 (last visited Nov. 30, 2016).

49. *See* Popper, *supra* note 8, at 23–25.

50. *See* Jost, *supra* note 2.

51. *See* Levin, *supra* note 2, at 763–70 (discussing some of the other arguments, which are not addressed in this essay, that involve the way the ACA impacts the collateral source rule).

52. *See id.*

53. *See* Jacobsen, *supra* note 18.

54. *See* Fleming, *supra* note 1, at 1478–80.

55. *Id.*

56. *See* Levin, *supra* note 2, at 740.

Contrary to the new wave of arguments, the ACA has not reinvented the wheel. The incentive rationale remains valid. Critics argue that because the ACA now mandates the purchase of insurance, the rationale no longer exists. The ACA's individual mandate, however, does not force citizens to purchase insurance, nor can it ensure every citizen will do so. It gives individuals the option of either obtaining health insurance through an ACA approved program or paying a tax penalty.[57] If, in fact, the ACA truly delivered universal healthcare, this criticism might warrant a second look. The ACA, however, falls well short of universal coverage, and therefore it cannot be said to eliminate this classic rationale of the collateral source rule. In actuality, the individual mandate has very little impact. Because individuals have the choice to either purchase insurance or pay a tax, the collateral source rule continues to have incentivizing value. For example, if an individual purchases insurance under the ACA, he will recover substantially less from the tortfeasor than he might if he chooses to pay the tax. A post-ACA insured person would therefore still be punished for purchasing insurance, in the form of a reduced recovery against the tortfeasor. This creates an incentive to forego obtaining health insurance, which is contrary to good public policy and part of the reason the rationale was initially conceived. The heart of the rationale coincides with the ACA.

Next, there is an argument that the individual mandate makes a windfall to the plaintiff unjustifiable.[58] Several have argued that because insurance is mandated by law, allowing a plaintiff to receive double-recovery on the basis that she should benefit from her good insight to purchase insurance no longer exists.[59] Her insurance is no longer the product of good insight but the duty of a lawful citizen. This argument fails for the same reasons outlined above. The individual can choose between insurance coverage or a tax penalty. Consequently, the collateral source rule continues to reward a plaintiff for her good insight, which is a valid justification—regardless of whether it's a likeable one—so long as a choice remains. Moreover, the rather distasteful alternative is a windfall to the wrongdoer, and therefore punishment to the plaintiff for holding insurance.[60]

Finally, arguments attempting to reframe the unjust enrichment of the wrongdoer have also been introduced. These claim the outcome of the individual mandate will result in defendants and plaintiffs alike partaking in a form of project risk sharing.[61] In other words, if both the

57. Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2597 (2012). The ACA mandate allows individuals to choose between obtaining health insurance coverage or paying a fine. When Justice Roberts wrote his opinion upholding the ACA mandate, he made it clear, "If someone chooses to pay rather than obtain health insurance, they have fully complied with the law."

58. *See* Levin, *supra* note 2, at 740; Jost, *supra* note 2.

59. *See* Levin, *supra* note 2, at 740; Jost, *supra* note 2, at 5.

60. *See* Roberts, *supra* note 30.

61. *See* Levin, *supra* note 2, at 766.

plaintiff and the defendant are insured, they could potentially be contributing to a group cost sharing pool, where any insurance benefits would be the result of a jointly paid-for system.[62] Therefore, the defendant is not unjustly enriched because the discount in damages he receives is the result of his own contribution to the insurance pool.[63] This, of course, rests in the rather optimistic, and perhaps unrealistic, notion that universal healthcare will eventually be achieved through the ACA. Even so, the ACA is not a single-payer system, which means the plaintiff pays her own premiums without the aid of the defendant. While greater cost sharing is possible, if the ACA remains in effect, the sort of single-payer system contemplated here is likely not. As a result, the defendant could still be unjustly enriched, even if less so than he was before, if the collateral source rule was abrogated. Considering all this, one cannot conclude that preventing the unjust enrichment of the defendant is no longer a valid concern. In any event, the same argument has already been rejected in Colorado. The Colorado Court of Appeals ruled that even if the defendant contributes to or helps purchase benefits for the plaintiff, it does not affect the protections of the collateral source rule.[64] It naturally follows from this ruling that the risk-sharing aspect of the ACA will not eliminate the unjust enrichment rationale in Colorado. Thus, the collateral source rule carries on.

CONCLUSION

To borrow a line from Professor Adam G. Todd, "Recent reports of the impending death of the collateral source rule are greatly exaggerated."[65] Similarly, the impact of the ACA on the rule is exaggerated greatly still. The collateral source rule debate is ongoing, and it will not be quickly resolved even if the ACA remains good law. While the ACA, and more specifically the individual mandate, may dramatically change healthcare, it does not displace the valid rationales behind the rule.

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62. *Id.*

63. *Id.*

64. McLaughlin v. BNSF Ry. Co., 300 P.3d 925, 925 (Colo. App. 2012). The court rejected the defendant's argument that contributions made by the defendant to the disability benefits the plaintiff received under the Railroad Retirement Act somehow made them noncollateral.

65. *See* Todd, *supra* note 8, at 965.