Note

Evidence of Health Insurance Payments at Trial in Personal Injury Claims: Colorado's Collateral Source Doctrine after *Crossgrove*

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The Colorado Supreme Court recently settled a hotly litigated doctrine: the Collateral Source Doctrine. Adopted in Colorado in 1916, the Collateral Source Doctrine stands for the simple proposition that "a tortfeasor should not benefit from the foresight of the person that they injured." "Foresight" generally refers to the purchase of insurance, and the Doctrine embodies a public policy in favor of possible "double recovery" by an insured over a policy that would allow a tortfeasor to "plead the foresight of their victim" as a defense to paying damages that were insured.

This article discusses first and third party insurance coverage in the context of personal injury claims, most commonly automotive accidents, including the effects of subrogation clauses in first party insurance contracts on recovery of damages. Also interwoven is the settling effect that the Colorado Supreme Court's recent holdings are likely to have on pretrial litigation of the admissibility of Collateral Source evidence.

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I. INTRODUCTION

September 30, 2006 was a warm, clear, autumn day.[1] Around noon, a driver drove eastbound on East Colfax Avenue in her 2001 Honda Accord.[2] She merged into the left turn lane, preparing to make a left turn onto North Helena Drive.[3] Rather than block the intersection, another driver in the oncoming, westbound lane, stopped short and courteously waved at her to make the left turn in front of them while they waited for westbound traffic to move again.[4] She accepted this invitation, and while making the left turn, smashed into the side of a motorcycle traveling westbound in the right lane of East Colfax Avenue.[5] The force of her Honda crashing into the side of the motorcycle threw the motorcyclist ten feet from his motorcycle, causing significant injuries.[6]

The motorcyclist had health insurance through Aetna, which helped pay for his medical care necessitated by the accident.[7] Nevertheless, the motorcyclist sought to hold the driver responsible for his injuries, injuries that he believed she had caused, and that she should accept responsibility for.[8] After all, most believe that the rules of the road are designed to

1. *History for Aurora, CO*, WUNDERGROUND.COM (Sept. 30, 2006), http://www.wunderground.com/history/airport/KBKF/2006/9/30/DailyHistory.html?req_city=NA&req_state=NA&req_statename=NA&MR=1 (last visited Mar. 7, 2013).

2. Civil Complaint and Jury Demand at ¶¶ 5-6, 8, Pollastrini v. Wells, No. 2008-CV-1273, 2008 WL 8235723 (Colo. Dist. Ct. June 19, 2008).

3. *Id.* at ¶ 9.

4. *Id.* at ¶ 10.

5. *Id.* at ¶ 11.

6. Plaintiff Sean Pollastrini's Motion for Summary Judgment Regarding Exclusion of Evidence of Collateral Source Benefits From Plaintiff's Health Insurer and Plaintiff's Motion in Limine Regarding Exclusion of Collateral Source Benefits From Plaintiff's Health Insurer at 2, Pollastrini v. Wells, No. 2008-CV-1273, 2008 WL 8235723 (Colo. Dist. Ct. Dec. 30, 2008) [hereinafter Plaintiff's Motion for Summary Judgment].

7. *Id.*

8. Civil Complaint and Jury Demand, *supra* note 3, at ¶¶ 13-16.

protect all drivers and that people should take responsibility for their actions. The motorcyclist sought the counsel of an attorney in an effort to collect damages resulting from the accident.[9]

Almost four years from the day he was injured, and after countless hours of labor by his advocates, the motorcyclist was vindicated by the narrowest margin allowed by law; the jury found him 49% responsible for his injuries.[10] Under the comparative negligence doctrine, the jury found the other driver only 51% responsible for the total damages.[11]

As a result, the jury awarded the motorcyclist compensation for 51% of the damages he sustained in the accident. After collecting, the motorcyclist likely used the funds to pay the various costs associated with litigation and repay his insurer (Aetna). The motorcyclist was not likely "made whole" by his efforts, but he did his best within Colorado law.

This article discusses the present state of a battle between liability insurance companies and policy holders, such as the motorcyclist in the example above, for the benefit of health insurance contracts and the discounts associated with them. The motorcyclist became an unwitting soldier in the war over these benefits, a war to decide which insurance company gets the benefit of discounts on medical care, obtained by health insurance companies. The motorcyclist joined the ranks of countless injured people whose names become the cases that are peppered throughout this article, cases that take on meanings unimaginable to their namesakes.

II. Insurance

A. First-party Insurance, a Collateral Source That Pays

First-party insurance. (1953) "A policy that applies to an insured or the insured's own property, such as life insurance, health insurance, disability insurance, and fire insurance. — Also termed indemnity insurance; self-insurance."[12]

1. First-party health insurance

The motorcyclist's health insurance policy with Aetna was first-party insurance.[13] When he was injured, he received medical care and Aetna paid a portion of the resulting medical bills on his behalf, per the terms of

9. *See* Civil Complaint and Jury Demand, *supra* note 3.

10. Colo. Rev. Stat. § 13-21-111(1) (2012); Special Verdict Form B, Pollastrini v. Wells, No. 2008-CV-1273, 2010 WL 5864008 (Colo. Dist. Ct. Aug. 25, 2010).

11. Special Verdict Form B, *supra* note 11, at 2.

12. Black's Law Dictionary 871 (9th ed. 2009) (defining "first-party insurance").

13. *See* Plaintiff's Motion for Summary Judgment, *supra* note 7, at 2.

the insurance contract.[14] If no one else contributed to the motorcyclist's losses, there would be nothing more to the story of first party insurance (at least relative to this article); the motorcyclist in that scenario would simply enjoy the benefit of a contract for which he paid premiums. However, that was not the case.

The other driver was found responsible for 51% of the motorcyclist's medical expenses, but Aetna had already paid those bills. The other driver would certainly benefit if she were able to claim that she need not pay again for motorcyclist's medical expenses that had already been paid by Aetna. Indeed, if the other driver were allowed to simply reimburse Aetna, rather than pay the motorcyclist for the value of medical care received, she would benefit handsomely by paying Aetna's negotiated discount rates for his medical care. In this case, Aetna was a source of benefits to the injured motorcyclist, entirely collateral to the other driver.

The essence of the other driver's claim to the motorcyclist's benefits was that, although she was not a party to his health insurance contract, she should nevertheless enjoy the benefit of Aetna's collateral source payments by limiting the motorcyclist's recovery to only the amounts actually paid on the motorcyclist's behalf, without regard for his payments to Aetna for that contract in the first place (premiums, limitation of care, etc.).[15] The Collateral Source Doctrine prevents this transfer of benefits from an injured person to their tortfeasor, or, as will be discussed, a tortfeasor's insurance company.[16]

2. *UM/UIM first-party insurance*

In the context of motor vehicle insurance, as opposed to health insurance, first-party insurance is known as "Un-Insured Motorist/Under-Insured Motorist" (UM/UIM) coverage. UM/UIM must be offered to motorists when they buy liability insurance.[17] Under UM/UIM coverage, a first-party policy holder is indemnified for any damages sustained in an automobile accident to the extent that the damages exceed the liability insurance limits of the tortfeasor who caused the damages (the other driver).[18]

For an illustration of UM/UIM coverage, consider the case of Mr.

14. *Id.*

15. Defendant's Response to Plaintiff Sean Pollastrini's Motion for Summary Judgment Regarding Exclusion of Evidence of Collateral Source Benefits From Plaintiff's Health Insurer and Plaintiff's Motion in Limine Regarding Exclusion of Collateral Source Benefits From Plaintiff's Health Insurer at 2, Pollastrini v. Wells, No. 2008-CV-1273, 2009 WL 7453864 (Colo. Dist. Ct. Jan. 21, 2009) [hereinafter Defendant's Response to Plaintiff's Motion for Summary Judgment].

16. *See* COLO. REV. STAT. § 13-21-111.6 (2012).

17. *See* COLO. REV. STAT. § 10-4-609(2) (2012).

18. *See* COLO. REV. STAT. § 10-4-609(1)(c) (2012); *see also* Sunahara v. State Farm Mutual Auto. Ins. Co., 280 P.3d 649, 655, 659 (Colo. 2012).

Sunahara and Mr. Mallard in *Sunahara v. State Farm Mutual Auto Insurance Company*. Mr. Sunahara owned a UM/UIM policy at the time he was run over in the parking lot of his workplace by Mr. Mallard on April 28, 2004.[19] The limit of Mr. Mallard's liability insurance policy was $100,000, which, due to the injuries sustained, was tendered to Mr. Sunahara upon Mr. Sunahara's demand.[20] However, Mr. Sunahara enjoyed playing tennis and $100,000 did not cover all of his medical expenses. After being run over by Mr. Mallard, Mr. Sunahara required shoulder surgery in order to regain a level of shoulder functionality necessary to continue his tennis hobby.[21] To fund the shoulder surgery, Mr. Sunahara made a claim against his own first-party UM/UIM insurer, State Farm Insurance, for the amount that his damages exceeded the $100,000 recovered from Mr. Mallard.[22]

State Farm investigated the basis of Mr. Sunahara's UM/UIM claim and decided to contest liability for the surgery.[23] State Farm made the choice to "step into the shoes" of Mr. Mallard (the tortfeasor) and become an adversary to Mr. Sunahara in his effort to recover damages.[24] Just like the other driver to the motorcyclist's health insurance, State Farm wanted the benefit of discounted rates that Mr. Sunahara's first-party health insurer would pay for his surgery. So, while the facts surrounding Mr. Sunahara's injuries appeared squarely within the scope of his UM/UIM first-party insurance coverage, he nevertheless joined the motorcyclist as a soldier in the war over collateral source benefits.[25]

B. Subrogation: The Insurance Company Giveth, and Taketh Away

Subrogation. "The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor. . . . Subrogation most commonly arises in relation to insurance policies."[26]

Many people do not realize that, when they receive medical care necessitated by the tortious actions of another and paid for by their own

19. Complaint and Jury Demand at ¶¶ 3-4, 7, Sunahara v. State Farm Mutual Auto. Ins. Co., No. 07-CV-9232, 2007 WL 6253300, (Colo. Dist. Ct. Sept. 24, 2007).

20. *See* Sunahara, *supra* note 20, at 652.

21. Oral Argument at 38:01, Sunahara v. State Farm Mutual Auto. Ins. Co., (Colo. Nov. 30, 2011) (No. 10SC409), *available at* http://www.courts.state.co.us/Courts/Supreme_Court/Oral_Arguments/Index.cfm?year=2011.

22. *See* Oral Argument, *supra* note 23, at 59:15.

23. *See* Sunahara, *supra* note 20, at 652.

24. *See* Oral Argument, *supra* note 23, at 47:32.

25. *See* Sunahara, *supra* note 20, at 658 (reversing the Court of Appeals and remanding for a new trial).

26. Black's Law Dictionary, *supra* note 14, at 1563-64 (defining "subrogation").

health insurer, their insurance company has the right to be reimbursed under a right of subrogation.[27] Being injured by someone else may be the first time a policy holder realizes that they are beholden to their insurer for more than the monthly premiums; while they may have received care, their insurer will be the first to be "made whole" by any legal action taken to recover damages from the responsible tortfeasor.[28]

For example, the subrogation provisions of the Blue Cross Blue Shield Federal Plan indicate the extent to which an insurer may go to secure repayment for benefits paid.[29] The following subrogation provisions come from the Blue Cross Blue Shield Service Benefit Plan ("BCBS") (all emphasis supplied):[30]

- ✓ "All recoveries you or your representatives obtain (whether by lawsuit, settlement, insurance or benefit program claims, or otherwise), no matter how described or designated, *must be used to reimburse us in full for benefits we paid.* Our share of any recovery extends only to the amount of benefits we have paid or will pay to you or your representatives. For purposes of this provision, 'you' includes. . .."[31]

This means that the insured policyholder will repay BCBS even if to do so requires them to remit funds representing an award or settlement of damages for lost wages, future medical expenses, or pain and suffering.

- ✓ "We are entitled under our right of recovery to be reimbursed for our benefit payments *even if you are not 'made whole'* for all of your damages in the recoveries that you receive. Our right of recovery is *not subject to reduction for attorney's fees* and costs under the "common fund" or any other doctrine."[32]

This means that BCBS specifically intends be repaid without regard to unrecovered damages and costs incurred by the injured in making a recovery against a tortfeasor.

- ✓ "We will *not reduce our share of any recovery unless*, in the exercise of our *discretion*, we agree in writing to a reduction (1) because you do not receive the full amount of damages that you claimed or (2) because you had to pay attorneys' fees. You must

27. *See* BLUE CROSS AND BLUE SHIELD, SERVICE BENEFIT PLAN 128-29 (2013), *available at* http://www.fepblue.org/downloads/2013-service-benefit-plan-brochure_100512.pdf (last visited Feb. 19, 2013) (containing a subrogation clause); ROCKY MOUNTAIN HEALTH PLANS, CHILDREN HEALTH PLAN PLUS BENEFITS BOOKLET 43-44 (2011), *available at* http://www.rmhp.org/docs/member/chp_benefits_booklet.pdf?sfvrsn=0 (last visited Feb. 20, 2013).

28. *See* BLUE CROSS AND BLUE SHIELD, *supra* note 29, at 128; *see also* ROCKY MOUNTAIN HEALTH PLANS, *supra* note 29, at 44.

29. *See* BLUE CROSS AND BLUE SHIELD, *supra* note 29, at 128-29.

30. BLUE CROSS AND BLUE SHIELD, *supra* note 29, at 128.

31. *Id.*

32. *Id.*

cooperate in doing what is reasonably necessary to assist us with our right of recovery. You must not take any action that may prejudice our right of recovery."[33]

This means that BCBS retains the right to choose whether to take from the injured insured. BCBS also demands that, if it chooses to exercise its right to "step into the shoes" of the insured to sue a tortfeasor, the insured assist in that action.

✓ "If you do not seek damages for your illness or injury, you must permit us to initiate recovery on your behalf (including the right to bring suit in your name). This is called subrogation."[34]

This means BCBS specifically has the right to "step into the shoes" of the insured and sue the person responsible for the cost of the treatment of the insured's injuries.

For a tortiously injured person who intended to buy protection with their health insurance premiums, learning about subrogation may be a wrenching experience. Recognizing the draconian effect of subrogation provisions on the injured, Colorado provided a measure of statutory relief in the form of §135, a "made whole" statute.[35] §135 modifies enforceability of subrogation rights based on whether the insured is "fully compensated" for their losses.[36] To effectuate the "made whole" public policy, §135 provides presumptions, either for or against a determination of "full compensation," based on the conditions under which a recovery is made.[37]

Under §135, if an injured plaintiff settles for less than the limits of the tortfeasor's policy, or secures a judgment for *any* amount (recall the effect of comparative negligence in the case of the motorcyclist), that amount is presumed to "fully compensate" them for their loss.[38] For example, the motorcyclist is considered "fully compensated" under this statute because a jury determined the he deserved compensation for 51% of his total losses. Assuming Aetna's subrogation rights against the motorcyclist are similar to those under the BCBS plan (discussed above), §135 would not limit Aetna's recovery against his award – Aetna would not be limited to taking back only 51% of the money that it paid on his behalf (the amount attributed to the other driver's negligence). Rather, Aetna would have a right to the entire amount.[39]

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33. *See* Blue Cross Blue Shield, *supra* note 29, at128.

34. *Id.*

35. COLO. REV. STAT. § 10-1-135 (2012).

36. § 10-1-135(b).

37. *See* § 10-1-135(3)(d)(I).

38. *See id.* § 10-1-135(3)(d)(II).

39. *Id.*; *See* Christopher P. Koupal, *CRS § 10-1-135 and the Changing Face of Subrogation Claims in Colorado,* 40 COLO. LAW. 41, 43 (2011).

Subrogation rights are generally negated in first party UM/UIM claims because UM/UIM policies contemplate exhaustion of the subrogable source before the first party benefit becomes available.[40] Nevertheless, there is nothing preventing a UM/UIM carrier from subrogating against the personal assets of an uninsured or underinsured motorist whom is responsible for a loss covered by a UM/UIM policy.[41] For the same reason that motorists are required to have third party liability insurance – a lack of adequate personal assets – subrogation claims subsequent to first party UM/UIM claims are unlikely.

Notably, in crafting §135, the Colorado legislature recognized and prevented juries from assuming that a plaintiff need not be compensated for bills already paid by an insurance company.[42] This thoughtful provision acknowledges that most people (and therefore most jurors) are unaware that insurance companies will take back, through subrogation, the "amount paid" on behalf of their insured upon a recovery, and that evidence of such payments could confuse a jury. While the "made whole" statute does provide some relief to subrogated plaintiffs who settle for policy limits, it essentially ensures that a plaintiff's award will not be unfairly reduced twice; first by a jury that confusedly reduces an award under the belief that a plaintiff's bills are already paid, and then again when those benefits are actually reclaimed by the first-party insurer through subrogation.[43]

1. The road less traveled: "stepping into your shoes"

Generally, it is cheaper and less complicated in personal injury suits for an insurance company to subrogate against an award procured by the injured, rather than exercise its right to actually step into the shoes of the injured to sue the tortfeasor.[44] However, when the litigation costs required to bring a subrogation claim are dwarfed by the insured loss, an insurer is more likely to exercise its right to subrogate.

By way of example, if an insured's $10,000,000 structure burns down due to the negligence of a contractor, a subrogation expense of several hundred thousand dollars is a relatively small risk for a first party insurer in recovering against the contractor (realistically, the contractor's liability

40. *See* COLO. REV. STAT. §10-4-609(1)(a), (4) (2012) (requiring insurance providers to offer UM/UIM coverage to purchasers of liability coverage, but not requiring purchase of UM/UIM coverage).

41. *See* J. Kent Miller, *Subrogation: Principles and Practice Pointers*, COLO. LAW., Jan. 1991, at 19 (discussing the priority of who has rights of recovery against a tortfeasor's non-insurance assets).

42. § 10-1-135(10)(a).

43. *See, e.g.*, Wal-Mart Stores, Inc., v. Crossgrove, 276 P.3d 562, 563 (Colo. 2012).

44. *See* Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 LOY. U. CHI. L.J. 49, 88 (2008).

insurer). An insurer may well hire its own plaintiff's council on a contingent basis in some subrogation circumstances.

In contrast, the cost of litigating a subrogation claim for medical expenses in a personal injury case may offset any possible recovery. For example, if the subrogable medical expenses are $10,000 and the recovery claim would cost $5,000 to litigate, and there is a 50/50 chance of a favorable verdict, pursuing such a subrogation claim would be a poor use of resources, because the insurer would have to spend one dollar for each dollar of potential recovery. Therefore, the narrower margins between litigation costs and subrogable interests in personal injury cases incentivize insurers to let an injured insured bear the cost of making a recovery, and then simply take back what it is owed under the insurer's right to subrogate by placing a lien on any recovery.[45]

C. Third-Party Insurance: Transferring a Loss, For a Fee

Liability insurance. "An agreement to cover a loss resulting from the insured's liability to a third party, such as a loss incurred by a driver who injures a pedestrian. • The insured's claim under the policy arises once the insured's liability to a third party has been asserted. — Also termed *third-party insurance*; *public-liability insurance*."[46]

When the motorcyclist brought action against the other driver seeking to recover the damages caused by the accident, the other driver's legal defense representation was a benefit of her own insurance contract.[47] The other driver owned a third party liability insurance contract with Government Employees Insurance Company (GEICO).[48] The other driver either asserted to the motorcyclist that he direct his claims to GEICO, or called GEICO herself to inform them of her potential liability; in either case, she made a "claim."[49] Upon filing her claim, she activated GEICO's duty to defend her from liability, and their duty to settle the motorcyclist's claims against her, if his claim was reasonable and within the limits of her policy. This transfer of liability, from a tortfeasor to their third-party insurer, makes the liability insurance company the beneficiary of every dollar not paid to the person injured by the tortfeasor.

In Colorado, motorists are required to own liability insurance, because most motorists do not have personal assets adequate to pay the

45. *See* Bluecross Blue Shield, *supra* note 29, at 128.

46. Black's Law Dictionary, *supra* note 14, at 873 (defining "insurance").

47. *See* Defendant's Response to Plaintiff's Motion for Summary Judgment, *supra* note 17, at 1.

48. *See Id.*

49. Black's Law Dictionary, *supra* note 14, at 281-82 (defining a claim as the "assertion of an existing right; any right to payment or to an equitable remedy. . .").

substantial damages that could easily be caused while driving a car.[50] The statutory minimum coverage amounts of $25,000 per person and $50,000 per accident should be a warning that liability insurance cannot be relied upon to "make whole" someone seriously injured by someone else's negligent driving.[51]

1. Duty to settle

A third party insurer has a duty to settle a claim if it is reasonable to do so and within the limits of the policy.[52] If a claim exceeds the limits of the policy, and the insurer does not contest liability, it may simply tender the policy limits to the injured.[53] Or, if the insurer believes that the claim will not be successful at trial, it may refuse to settle, but will be liable for the entire amount of a resulting judgment, without regard to policy limits. As a result, the insurer is prevented from "gambling" with the personal assets of the insured by exposing them to liability in excess of the policy limits.

On the other hand, if a third-party insurer has tendered policy limits, they are no longer bound to defend the tortfeasor.[54]

III. Litigating to be "Made Whole"

A. The Collateral Source Doctrine in Colorado

The collateral source rules stand for the proposition that a tortfeasor should not benefit from the foresight of the person that they injured.[55] The common law Collateral Source Doctrine (CLCS) was adopted in Colorado in 1916, in the case of *Rhinehart v. Denver & R.G.R. CO.*[56] Like the motorcyclist, Mr. Rhinehart suffered damages due to the actions of another, in this case, the Denver & Rio Grande Railroad Company.[57] Mr. Rhinehart received payments for his losses directly from his first-party insurer.[58] Citing a legion of state high court decisions from other jurisdictions, the Colorado Supreme Court in *Rhinehart* planted the seed of the CLCS in Colorado by holding that "[t]he railroad company was not

50. Colo. Rev. Stat. § 10-4-619(1) (2012) (requiring motorists to carry insurance).

51. Colo. Rev. Stat. § 10-4-620 (2012) (requiring minimum legal liability $25,000 per person, $50,000 per accident).

52. Colo. Rev. Stat. § 10-3-1104(h)(V), (VIII), (XIV) (2012).

53. *See* Steven Plitt and Jordan R. Plitt, Practical Tools for Handling Insurance Cases § 2:19 (2012).

54. *Id.*

55. BLACK'S LAW DICTIONARY, *supra* note 14, at 299 (defining "collateral-source rule").

56. Rhinehart v. Denver & Rio Grande R.R., 158 P. 149, 152, 157 (1916).

57. *Id.* at 150.

58. *Id.*

entitled to any deduction upon account of insurance."[59]

1. The CLCS from 1916-1986: necessarily, a rule of evidence

For many years after *Rhinehart*, Colorado grappled with how to implement the policy behind the CLCS; that "a tort-feasor may not plead his victim's prudence and foresight to relieve him from the consequences of his own wrong."[60] The Colorado Supreme Court opinion in the case of *Carr v. Boyd* so succinctly described the proper implementation of the CLCS rule that the same Court would cite *Carr* when re-defining the CLCS almost sixty years later.[61] The *Carr* Court held that in order to effectuate the CLCS policy, collateral source payments "cannot be taken advantage of by the defendant to mitigate the damage," evidence of such payments must be inadmissible at trial.[62]

The *Carr* Court reasoned that, if evidence of collateral source payments was admitted at trial, a jury might "conclude that the real controversy was brought on by the fact that the [collateral source] was making a claim for the proceeds of any verdict that might be awarded to plaintiff, and, of course, further conclude that plaintiff would lose nothing by reason of having been paid. . .."[63] The holding of *Carr* is as relevant to a trial for damages today as it was in 1951; presently, most Americans with health insurance are subject to subrogation rights similar to those described in *Carr*, and face a fight to recover from a tortfeasor.[64]

Unfortunately, the succinct rule against inadmissibility of collateral source payments, as set out in *Carr*, was undermined in *Kendall v. Hargrave*.[65] In *Kendall*, the same opinion that adopted "reasonable value" as the proper measure of a plaintiff's damages, the Colorado Supreme Court stated (while discussing admissibility of payments made by a plaintiff for medical care (not collateral source payments)) that "the amount paid for

59. *Id.* at 157.

60. *Id.*; Carr v. Boyd, 229 P.2d 659, 663 (Colo. 1951) (stating that "benefits paid by the [collateral source] to the plaintiff in the case at bar cannot be taken advantage of by the defendant to mitigate the damages or otherwise"); Riss & Co. v. Anderson, 114 P.2d 278, 281 (Colo. 1941) (stating that "a tort-feasor may not plead his victim's prudence and foresight to relieve him from the consequences of his wrong" in cases where an injured victim relied on first-party insurance, or similar benefit plans); King v. O.P. Baur Confectionary Co., 68 P.2d 909, 912 (Colo. 1937) (discussing whether payments by insurance carrier preclude action against employer responsible for damages).

61. Wal-Mart Stores, Inc., v. Crossgrove, 276 P.3d 562, 566 (Colo. 2012) (Eid, J., dissenting) (citing *Carr*, 229 P.2d 659).

62. *Carr*, 229 P.2d at 663.

63. *Id.* at 664.

64. *See supra*, notes 28-30 and accompanying text.

65. *See generally* Kendall v. Hargrave, 349 P.2d 993, 994 (Colo. 1960) (discussing what evidence a jury may consider regarding a plaintiff's medical bills).

services is some evidence of their reasonable value."[66] Thus, *Kendall* made admissible "amounts paid" to prove "reasonable value," in contrast with *Carr*, which excluded "amounts paid" under the CLCS.[67] It was left to creative lawyering, on a case by case basis, to convince a judge whether amounts paid would be admissible to show "reasonable value," or excluded by the CLCS.[68]

By way of modern example, the payments that Aetna made for the care that the motorcyclist received were collateral source payments, meaning they were made under a contract to which the other driver was not a party. The other driver would directly benefit from Aenta's collateral source payments if she were able to claim that she need not compensate the motorcyclist for expenses that Aenta had already paid.

2. *"Double recovery" is a questionable concern*

Assuming for a moment that Aetna could not subrogate from the motorcyclist for the amounts paid on his behalf, and further assuming that the other driver was forced to compensate him for 100% of the expenses already paid by Aetna, the CLCS would approve of the resultant "double recovery," or "windfall," on the following premise:

> "The purpose of the collateral source rule was to prevent the defendant from receiving credit for such compensation and thereby reduce the amount payable as damages to the injured party. *To the extent that either party received a windfall, it was considered more just that the benefit be realized by the plaintiff in the form of double recovery than by the tortfeasor in the form of reduced liability*."[69] (emphasis added)

In light of the reality that first party health insurers have subrogation rights, the CLCS's allowance of double recovery is largely without application.[70] The CLCS would appear to do nothing more that ensure that the plaintiff's insurer, instead of the defendant, will take back from the injured plaintiff the benefit of past payments. But there is more to the story about what forms a "benefit" from a collateral source may take, besides payments.

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66. *Id.* at 994.

67. *See Id.*

68. *See* Plaintiff's Motion for Summary, *supra* note 7, at 5 (arguing that collateral source payments are inadmissible); *see also* Defendant's Response to Plaintiff's Motion for Summary Judgment, *supra* note 17, at 2 (arguing that amounts paid on the plaintiff's behalf are a proper measure of damages).

69. Crossgrove v. Wal-Mart Stores, Inc., 280 P.3d 29, 31 (Colo. App. 2010).

70. *Id.*; *but see* COLO. REV. STAT. § 10-1-135(3)(d)(II) (2012); *see* Koupal, *supra*, note 42, at 43.

3. *Why is the CLCS so important? ". . .the correct measure of [a plaintiff's] damages is the necessary and reasonable value of the services rendered*, rather than the amount which may have been paid for such service"[71]

In October 2002, Larry Crossgrove was delivering cookies to a Wal-Mart location in Trinidad, Colorado.[72] As he pushed his cookie delivery cart into the store, the delivery door fell on his head, causing injuries.[73] The medical provider that treated Mr. Crossgrove billed over $240,000 for the care provided.[74] The healthcare provider then accepted a $40,000 payment from a collateral source, in satisfaction of the $240,000 bill.[75]

When Mr. Crossgrove hired an attorney to hold Wal-Mart responsible for the injuries that he sustained on their premises, the stage was set for a law-making battle over collateral source benefits.[76] Faced with liability for Mr. Crossgrove's damages, Wal-Mart fought to avoid liability for the $200,000 paid/billed difference in Mr. Crossgrove's treatment; a substantial motivation to get the "amount paid" admitted to the jury as evidence of "reasonable value" of Crossgrove's care.[77] The insurance industry and some in the insurance defense bar sometimes refer to the differences between amounts billed and amounts paid for medical care as "phantom damages."[78]

The growth of HMO (private) first-party health insurers in the 1980s, and the deep discounts that they were able to negotiate with medical service providers, caused a great gap to grow between the amount that a medical provider would bill for a service, and what a first-party HMO insurer would pay in settlement of that bill.[79] Medicare and Medicaid (public), like HMOs, pay deeply-discounted rates for the care received by their beneficiaries.[80] Whether a public or private insurer is involved, the injured are still billed for the full amount, and then the insurer settles the

71. Palmer Park Gardens, Inc. v. Potter, 425 P.2d 268, 272 (1967) (citing Kendall v. Hargrave, 349 P.2d 993, 994 (Colo. 1960)).

72. *Crossgrove*, 280 P.3d at 30.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*; *See* Plaintiff's Various Motions in Limine at 1, 8 Barnes v. McKeever, (Colo. Dist. Ct. 2011) (No. 2011CV569) 2011 WL 740038 (discussing the prejudicial effect of references to plaintiff's attorney, and indicating that any reference to "the Strong Arm" is irrelevant) (Crossgrove retained the same firm).

77. *Crossgrove*, 280 P.3d at 30.

78. *See* Bob Gardner, *'Phantom Damages' Must be Stopped*, Denver Business Journal (Mar. 18, 2011), *available at* http://www.bizjournals.com/denver/print-edition/2011/03/18/phantom-damages-must-be-stopped.html?page=all.

79. *Id.* (arguing that "phantom damages" create an incentive to litigate for personal-injury lawyers).

80. *See Id.*

bill for the negotiated rate. This is the process by which "paid" and "billed" evidence was created in Crossgrove's case.[81]

The Colorado Supreme Court, in *Palmer Park Gardens,* held that the proper measure of a plaintiff's medical expenses is not the amount paid for them, but rather the "reasonable value" as determined by a jury.[82] It is now settled that an award of past medical expenses limited to the "amount paid" does not fully compensate an injured; the "amount paid" does not reflect sacrifices made by the injured-insured to secure a resultant collateral source payment.[83]

In sum, the *Carr* exclusion of collateral source payments from trial prevents a tortfeasor from taking the benefit of the actual collateral source payment, as well as any discount represented by such payment. In a trial for damages, amounts paid by a collateral source should be excluded because a jury is likely to find it dispositive of the "reasonable value" of the services, to the exclusion of all evidence to the contrary.[84] In contrast, evidence of "amounts billed," in the absence of any evidence of a corresponding collateral source payment, combined with testimony regarding the reasonableness of such bills, preserves the determination of "reasonable value" for the jury.[85]

4. *Tort reform of 1986 gives birth to the unfortunately named "Collateral Source Statute," enacted to prevent "double recovery" by plaintiffs*[86]

"Civil actions – reduction of damages for payment from collateral sources" (§111.6) passed into law amongst a wave of "tort reform" statutes in 1986.[87] §111.6 partially abrogated the CLCS; under §111.6, a tortfeasor *does* receive the benefits of collateral source payments, so long as such payments are not attributable to a "contract" paid for by the plaintiff.[88] §111.6 applies post-verdict, and operates by setting-off non-

81. *Crossgrove*, 280 P.3d at 30, 32.

82. Palmer Park Gardens, Inc. v. Potter, 425 P.2d 268, 272 (1967) (citing Kendall v. Hargrave, 349 P.2d 993, 994 (Colo. 1960)).

83. Volunteers of Am. Colo. Branch v. Gardenswartz, 242 P.3d 1080, 1085 (Colo. 2010) (Rice, J., dissenting).

84. *See Crossgrove*, 276 P.3d at 563.

85. *See Volunteers of Am. Colo. Branch*, 242 P.3d at 1087-88 (stating that "the trial setting is the proper forum for the parties to present evidence regarding the proper value of an injured plaintiff's damages").

86. *Id.* at 1084.

87. COLO. REV. STAT. § 13-21-111.6 (2012); *see also* Am. Tort Reform Ass'n, *1986 Tort Reform Enactments and Ballot Initiatives*, Dec. 31, 1986, at 1, http://www.atra.org/sites/default/files/documents/ENACT86.pdf (listing three tort reform statutes for Colorado: SB 70, SB 67, and HB 1197).

88. § 13-21-111.6.

contractual collateral source payment amounts from the judgment.[89]

The somewhat perverse result of §111.6 is that, when an injured person receives collateral source payments from any source outside of a contractual relationship (e.g. friends, family, Medicaid, etc), those amounts go directly into the pocket of the defendant (usually a liability insurer at the back of a tortfeasor) in the form of a reduced judgment.[90] Further, another result of §111.6 is that a plaintiff receives, from a tortfeasor, no greater amount for past medical expenses than that amount which a contractual collateral source has a right to subrogate. Considering that subrogation rights against a plaintiff's judgment will further reduce a plaintiff's recovery after reductions for litigation costs and comparative negligence, "double recovery" by a plaintiff by receipt of collateral source benefits is a doubtful concern. With all the interests adverse to a plaintiff's recovery, §111.6 makes even single-recovery a lofty goal.

§111.6 does not directly address the difference between the amounts billed to an injured party, and the amount paid by a collateral source (billed/paid); but it does increase the risk that a plaintiff will not even receive single-recovery.[91] Mr. Crossgrove's case is a telling example: the billed/paid difference was $200,000. The only collateral source payment to which §111.6 might apply (and set-off to Wal-Mart) was the $40,000 payment in settlement of the $240,000 bill.[92] So Wal-Mart's best attack on the $240,000 bills, claimed in full by Mr. Crossgrove at trial, was to convince the judge to allow evidence of the $40,000 payment to the jury, in derogation of the CLCS.[93]

The judge did allow such evidence at the trial; the jury awarded Mr. Crossgrove exactly $50,000 in past medical expenses, and found him 20% negligent.[94] The $50,000 award of past medical expenses was then reduced by the 20% for contributory negligence to $40,000, and then $40,000 was set-off as a non-contractual collateral source payment under §111.6, leaving no award for past medical expenses to Mr. Crossgrove.[95]

Wal-Mart successfully shifted $40,000 of damages from itself to the collateral source (presumably Medicaid) that provided Mr. Crossgrove's care. Wal-Mart also successfully convinced the court to allow evidence of amounts paid at trial, contrary to the CLCS, resulting in a verdict reflecting the dispositive nature of such evidence in the eyes of a jury. The

89. *Id.*

90. *See Id.* (providing only payments "as a result of a contract" to be excluded from reduction); Wal-Mart Stores, Inc. v. Crossgrove, 276 P.3d at 562, 565 (Colo. 2012).

91. *Crossgrove*, 276 P.3d at 564.

92. *Id.*

93. *Id.* at 563-64.

94. *Id.* at 564.

95. *Id.*

result is that Wal-Mart did not pay for the past medical care Mr. Crossgrove received, even though the jury found Wal-Mart 80% liable for his injuries. Mr. Crossgrove fought this result all the way to the Colorado Supreme Court, which remanded his case for a new trial, without "amounts paid" evidence, consistent with a freshly harmonized Collateral Source Doctrine.[96]

5. The "contracts exception" of §111.6 swallowed the rule, so what payments are set-off by §111.6?

Van Waters & Rogers, Inc. v. Keelan represents Colorado's touchstone interpretation of the "contracts exception" of §111.6.[97] Looking to the legislative history of §111.6, the *Van Waters* Court determined that pension benefits paid under a provision of an employment contract fell within the "contracts exception" because the beneficiary's salary was set-off by some amount on account of the pension plan.[98] This interpretation of §111.6 broadened the "contracts exception" making it applicable to collateral source payments tangential to any contract to which the recipient was a party.[99] The *Van Waters* Court did not address the question of whether §111.6 had abrogated the CLCS rule in regard to evidentiary issues, only noting that, enacting §111.6, ". . . evinces a clear intent by the General Assembly to *change* the common law rule and require damages to be set off by collateral source contributions not specifically excepted by the second clause of the statute." (emphasis supplied)[100]

Even under the broad scope of the "contracts exception" as set out in *Van Waters* and confirmed in *Gardenswartz*, courts have held that Medicaid benefits are not paid for by the beneficiary and are, thus, subject to set-off under §111.6.[101] This result can be translated to mean that it is Colorado policy (§111.6) that, when someone receives Medicaid benefits after sustaining a tortiously caused injury, the public funds paid on behalf of the injured shall benefit the tortfeasor, or the insurer of the tortfeasor, instead of staying with the injured citizen.

6. Colorado's "made whole" statute embodies Carr, brings balance back to Colorado's collateral source doctrine[102]

The "made whole" statute (§135) is intended to give plaintiffs some

96. *Id.* at 568.
97. Van Waters & Rogers, Inc. v. Keelan, 840 P.2d 1070, 1074 (Colo. 1992).
98. *Id.* at 1075.
99. *Id.* at 1078-79.
100. *Id.* at 1076.
101. *Id.* at 1074; Volunteers of Am. Colo. Branch, 242 P.3d 1080, 1085 (Colo. 2010) (Rice, J., dissenting).
102. Carr v. Boyd, 229 P.2d 659, 662-63 (Colo. 1951).

relief from the draconian subrogation rights of first-party insurers.[103] In relation to the CLCS, §135(10)(a) provides "[t]he fact or amount of any collateral source payment or benefits shall not be admitted as evidence in any action against an alleged third-party tortfeasor. . .."[104] This singular clause accomplishes what the long embattled holding of *Carr* intended; that the only way to ensure that a verdict is not prejudiced by collateral source payments is to exclude evidence of them from the jury.[105] Through §135(10)(a), the Colorado legislature harmonized over eighty years of CLCS doctrine with the "collateral source statute (§111.6)" of 1986.[106]

IV. Conclusions

A. Colorado's Collateral Source Doctrine: Statute and Common Law in Harmony.

The trilogy of *Crossgrove, Sunahara*, and *Smith*, announced April 30, 2012, reconcile the CLCS, §111.6, and 135(10)(a).[107] As laid out by Justice Rice in *Crossgrove*, the CLCS rule had both pre-verdict and post-verdict components.[108] The pre-verdict component is an evidentiary exclusion of amounts paid for medical care by collateral sources, as described, and for the reasons set out, in *Carr*.[109] §111.6 does not abrogate the pre-verdict CLCS.[110] §111.6 does, however, abrogate the post-verdict component of the CLCS in regard to non-contractual collateral source payments, while otherwise retaining the CLCS.[111] Finally, the conflict between admissibility of collateral source payments as evidence of "reasonable value," as set out in *Kendall*, versus CLCS's exclusion of all collateral source payments from trial on prejudicial grounds, is resolved in favor of exclusion under the CLCS.[112]

Through their advocates, Mr. Crossgrove and Mr. Sunahara fought long and hard to reshape the collateral source Doctrine in Colorado. Their efforts will benefit the public through a clarification of the law. If Larry Crossgrove's claim against Wal-Mart is retried, collateral source payments will be excluded from the jury.[113] Jack Sunahara will also get a

103. Colo. Rev. Stat. § 10-1-135(1)(b) (2012).
104. § 10-1-135(10)(a).
105. Wal-Mart Stores, Inc. v. Crossgrove, 276 P.3d 562, 567-68 (Colo. 2012).
106. *Id.* at 565-66.
107. *Id.* at 566; Smith v. Jeppsen, 277 P.3d 224, 228-29 (Colo. 2012); Sunahara v. State Farm Mut. Auto. Ins. Co., 280 P.3d 649, 654-55 (Colo. 2012).
108. *Crossgrove*, 276 P.3d at 564.
109. *Id.* at 565.
110. *Id.* at 566.
111. *Id.* at 565-66.
112. *Id.* at 566-67.
113. *Id.* at 568.

new trial on the issue of his past economic damages.[114]

1. Immediate relief

The original dispute between Mr. Smith and Mr. Jeppsen involved a car accident in 2005.[115] The issue of whether the CLCS would exclude evidence of collateral source payments from trial gave rise to years of pre-trial litigation between Mr. Smith and Mr. Jeppsen.[116] §135(10)(a) became law during this litigation and resolved the issue of admissibility in favor of Mr. Smith: Mr. Jeppsen could not admit evidence of collateral source payments at trial. Mr. Jeppsen, whose defense was provided by State Farm Insurance, fought to admit collateral source evidence on grounds that the litigation was already pending at the time §135(10)(a) became law.[117]

The Colorado Supreme Court in *Smith* confirmed that §135(10)(a) applied to all *pending* and future personal injury cases that have yet to reach a final judgment.[118] Under *Smith*, the clear and unambiguous exclusion of collateral source payments from trial under §135(10)(a) immediately relieved the need to argue, in limine, for exclusion of collateral source evidence under the CLCS. The holding of *Smith* should encourage faster settlement of pending personal injury claims.

Note: the *Crossgrove* and *Sunahara* opinions do not cite §135(10)(a) as authority for holding that the CLCS's pre-verdict component is in full force and excludes all evidence of collateral source payments at trial. This is notable because §135(10)(a) is being attacked under the "single subject" provision of the Colorado Constitution.[119] In light of the practical and historical connection between subrogation rights (as in the title of §135) and ensuring subrogable, non-prejudiced judgments (the point of the CLCS as codified by §135(10)(a)), as described by this article, it is difficult to see how those two subjects could be unrelated enough to make §135(10)(a) Constitutionally untenable.[120] Nevertheless, under *Crossgrove* and *Sunahara*, the CLCS stands on its own beside

114. Sunahara v. State Farm Mut. Auto. Ins. Co., 280 P.3d 649, 658 (Colo. 2012).

115. Response to Order and Rule to Show Cause at 1, Smith v. Jeppsen, 227 P.3d 224 (Colo. 2012) (No. 2011SA51), 2012 WL 3693993.

116. Smith v. Jeppsen, 277 P.3d 224, 225-26 (Colo. 2012).

117. *Id.* at 226-27.

118. *Id.* at 229.

119. COLO. CONST. art. V, § 21 ("No bill, except general appropriation bills, shall be passed containing more than one subject. . .").

120. *See, e.g.*, Rhinehart v. Denver & Rio Grande R.R., 158 P. 149, 155 (Colo. 1916) (subrogation portion of act covered act titled "An act to provide a liability against railroad companies for damages caused by fire. . ."). Yes, the same case that brought the CLCS to Co. involved a law regulating subrogation rights.

§135(10)(a); §135(10)(a) bolsters the CLCS, and brings it to bear on pending litigation, but is not necessary to its efficacy.

B. The Next Battle in the Legislature

1. Attacking the judgment

The *Gardenswartz* decision in 2010 sparked a vitriolic response in the media, espousing the injustice of plaintiff's recovering "phantom damages."[121] House Bill 11-1106 was fielded in response to *Gardenswartz*.[122] The intent of the proposed bill could not be clearer, H. B. 11-1106 proposed, in part, to amend §111.6 as follows:

(3) IN ANY ACTION BY ANY PERSON OR A LEGAL REPRESENTATIVE TO RECOVER ECONOMIC DAMAGES... *SHALL INCLUDE ONLY THOSE AMOUNTS ACTUALLY PAID. . .* OR SERVICES HAS NOT BEEN MADE AT THE TIME OF TRIAL OR ARBITRATION, *THEN THE RECOVERABLE AMOUNTS SHALL BE LIMITED TO THE AMOUNTS CUSTOMARILY ACCEPTED BY THE HEALTH CARE SERVICE PROVIDERS IN SATISFACTION OF THEIR BILLS.* (Emphasis added).[123]

This proposed statute would not abrogate the CLCS, but would abrogate the need for it: any difference between "reasonable value" and "amounts paid" would be irrecoverable by a plaintiff.[124] H.B. 11-1106 was postponed indefinitely on March 29, 2011 by the Senate Committee on Local Government.[125]

2. Attacking "reasonable value" as the measure of medical expenses

An alternative strategy to legislatively reduce the recovery of damages is to dictate what evidence a jury may base its award. States that adopt this policy enforce it by allowing only evidence of amounts actually paid, exactly opposite of current Colorado law under the trilogy.[126] This strategy specifically relies on the effects of admitting evidence of collateral source payments, as described in *Carr* so many years ago, to effectuate lower awards of damages. Under this policy, all sacrifices (premiums paid) by a party to secure collateral source payments for medical care are indirectly transferred to the tortfeasor (realistically, the tortfeasor's insurer) by a prejudiced judgment.

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121. *See* Judicial Hellholes, *Colorado Supreme Court: Plaintiffs Can Recover 'Phantom' Medical Damages*, http://www.judicialhellholes.org/colorado-supreme-court-plaintiffs-can-recover-phantom-medical-damages/.

122. H.R. 11-1106, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2011).

123. *Id.*

124. *Id.*

125. *Id.*

126. *See* Wal-Mart Stores, Inc. v. Crossgrove, 276 P.3d 562, 567-68 (Colo. 2012).

As disastrous as H.B. 11-1106 would be to Coloradans who are injured by the negligence of others, plaintiffs in fourteen other states are already subject to similar collateral source legislation.[127] In states that prevent injured citizens from being awarded past medical expenses above what a collateral source paid for them, third-party insurers have effectively secured a right only second to a first-party insurer to a judgment secured by an insured.

C. In 2013, A Substantially New Colorado Legislature May Decide the Future of the Collateral Source Doctrine in Colorado

While it may be short lived, the *Crossgrove* trilogy of cases reconciled the collateral source doctrine in Colorado. A substantially new legislature will likely provide fertile ground for new ideas about what the law should be in Colorado.[128] Colorado is "facing a mass exodus of lawmakers" with thirty-three out of 100 lawmakers leaving at the end of the current term.[129] With the departure of those thirty-three will go a great bulk of the "institutional memory" of the Colorado legislature; the memory of the legislature that voted for 135(10)(a), and refused to transfer the benefits of first party health insurance discounts to liability insurer through H.B. 1106.[130] Those who are interested in people being "made whole" must be ready to educate the forthcoming legislature about the struggle behind Colorado's freshly settled Collateral Source Doctrine.

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127. Bruce A. Menk, *A Review of State Law Concerning Paid vs. Billed Medical Expenses and the Collateral Source Rule*, ALFA Int'l Transp. Update, Fall 2009, at 17-25.

128. *See* Lynn Bartels, *Colorado facing a mass exodus of lawmakers*, Denv. Post (May 6, 2012), http://www.denverpost.com/legislature/ci_20558360/colorado-facing-mass-exodus-lawmakers.

129. *Id.*

130. Colo. Rev. Stat. § 10-1-135 (2012); H.R. 11-1106, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2011).