

An Introduction to the Economics of Collateral Sources

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I. Introduction

The mechanics of economic evaluations in personal injury and wrongful death actions are fairly straightforward. That is, the economist calculates the value of the subject's potential earnings and fringe benefits, future medical expenses, and lost ability to perform household services, projecting the resulting figure through various ages, and then testifies at trial regarding his or her findings. While income taxes may be taken into account in some cases, and while personal consumption is often considered in wrongful death matters, it is assumed that any payments that an individual or his or her beneficiaries have obtained or will obtain as a result of his or her injury or death from a source other than the tortfeasor are not a factor in economic evaluations. This exclusion of benefits that an individual or his or her beneficiaries may have received and may receive in the future from a source other than tortfeasor or the tortfeasor's insurer is known as the "collateral source rule."

The collateral source rule was summarized by the New York State Court of Appeals in the case of *Oden v. Chemung County*, 87 N.Y.2d 81, 661 N.E.2d 142, 67 N.Y.S.2d 670 (1995). The *Oden* court noted that, "[u]nder traditional common-law principles, a personal – injury [or wrongful death] award may not be reduced or offset by the amount of any compensation that the injured person may receive from a source other than the tortfeasor (see, *Kish v. Board of Educ. of City of New York*, 76 N.Y.2d 379, 384; *Healy v. Rennert*, 9 N.Y. 2d 202, 206). The collateral source rule, which is both a rule of evidence and a rule of damages, is based on the premise that a negligent defendant should not, in fairness, be permitted to reduce its liability by the proceeds of insurance or some other source to which that defendant has not contributed (*Kish v. Board of Education of City of New York*, supra, at 384; *Healy v. Rennert*, supra, at 206; see, *Standard Oil Co. v. United States*, 153 F.2d 958, aff'd 332 U.S. 301)." In response to pressure to reduce the cost of litigation, however, a number of states have enacted statutes that modify the common law collateral source rule. In states where the collateral source rule has been modified, an economist may be required to modify his or her calculations or to prepare additional analyses to account for collateral source income.

II. Types of Statutes Modifying the Collateral Source Rule

In general, there are three major categories of statutes modifying the common law collateral source rule. The first general category includes statutes that reduce the verdict solely for collateral source income that has actually been received¹ as compared with statutes that allow

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¹ See, e.g. Alaska Stat. §09.55.548, Conn. Gen. Stat. §52-225a, Fla. Stat. Ann. §768.76, Minn. Stat. Ann. §548.36. The Florida statute does not specifically limit exceptions to the collateral source rule to payments actually received, however, caselaw interpreting the statute contains this limitation. See *White v. Westlund*, App. 4. Dist., 624 So.2d 1148 (1993), review granted 634 So.2d 629, review dismissed 640 So.2d 1109.

offsets for collateral source income that has been received prior to the date of the verdict and for income that is likely to be received in the future.² Another classification includes statutes that eliminate the collateral source rule altogether³ and statutes that modify the collateral source rule in specific cases.⁴ A third general category differentiates between statutes that require consideration of collateral source offsets during the trial, or case in chief,⁵ and statutes that require a hearing after liability has been established.⁶ While expert economic testimony is not required where the relevant statute only allows an offset for amounts that have been paid prior to the date of the verdict, all other types of statutes may require expert economic testimony regarding collateral source income either at trial or during a separate post trial hearing.

As with any other facet of the law of damages, the attorney and the forensic economist must be aware of how his or her jurisdiction treats collateral source income. As noted above, in general, no economic testimony is required in those states where the only collateral source offset allowed is for payments that have actually been received. However, an economist who testifies in personal injury or wrongful death actions may not be aware that while testimony regarding collateral source income is generally excluded in a specific jurisdiction, collateral source offsets in the same jurisdiction may be accounted for in medical malpractice actions,⁷ in automobile accident cases,⁸ in product liability cases,⁹ and in suits against the government or a public employer.¹⁰ Even in states where there are comprehensive statutes allowing collateral source offsets, there may be exceptions that prohibit or restrict setoffs for collateral source income in particular situations.¹¹ The attorney may not require a forensic economist to provide any collateral source income projections at all, may call upon an economist to provide collateral source income projections in all personal injury or wrongful death actions, or may require an evaluation of collateral source income only in specific types of cases.

While a number of states as noted above allow consideration of collateral source income at trial, the general rule is that any consideration of collateral source payments must be made during a post verdict hearing. The policy behind this rule is to avoid prejudicing the jury in their evaluation of damages as a result of introducing evidence at trial of insurance or other sources of income unrelated to the losses resulting from the plaintiff's actions.¹² In New York State,

² See, e.g. Ariz. Rev. Stat. Ann. §12-565, Cal. Civ. Code §3333.1, Del. Code Ann. tit. 18 §6862, Iowa Code Ann. §147.136, Mich. Comp. Laws §600.6303, N.Y. CPLR §4545(c).

³ See 3 M. Minzer, J. Nates, C. Kimball, D. Axelrod & R. Goldstein, *Damages in Tort Actions* §17.04 fn. 8 (1993) [hereinafter cited as Minzer, Nates].

⁴ *Id.* At §17.04 fns. 9-13.

⁵ See, e.g. Ariz. Rev. Stat. Ann. §12-565, Cal. Civ. Code §3333.1, Del. Code Ann. tit. 18 §6862.

⁶ Alaska Stat. §09.55.548, Conn. Gen. Stat. §52-225a, Fla. Stat. Ann. §768.76, Iowa Code Ann. §147.136, Mich. Comp. Laws §600.6303, Minn. Stat. Ann. §548.36, N.Y. CPLR §4545(c).

⁷ See, Minzer, Nates at §17.04 fn. 12.

⁸ See, Minzer, Nates at §17.04 fn. 13.

⁹ See, Minzer, Nates at §17.04 fn. 9.

¹⁰ See, Minzer, Nates at §17.04 fns. 10-11.

¹¹ See, e.g., *Mario Iazzetti, et. al. v. The City of New York*, 94 N.Y.2d 183 (1999), referring to N.Y. CPLR §4545(b). CPLR §4545(b) limits collateral source offsets in actions by public employees against public employers to collateral source income actually received, as compared with the comprehensive provisions of §4545(c), which allows consideration of probable future as well as past collateral source income.

¹² See, Minzer, Nates at §§17.00 – 17.01.

collateral source offsets are only considered in a post-verdict hearing,¹³ and the burden is on the defendant to timely request a post trial hearing to consider collateral source offsets.¹⁴

III. Payments Considered in Collateral Source Rule Exceptions

Because state statutes allowing consideration of collateral source payments are an exception to the common law rule, the types of payments that may be considered are generally specified by the collateral source statute. Nearly all collateral source rule statutes allow an offset against an award for lost earnings for Social Security Disability Income payments, either explicitly¹⁵ or through general reference to governmental or public collateral sources.¹⁶ Other sources generally specified in these statutes include Workers' Compensation payments, public or private health insurance payments, life insurance proceeds,¹⁷ automobile insurance payments, and wage continuation plan benefits. Regardless of the type of collateral source income, whether or not a type of payment is considered a collateral source that can be used as an offset for damages generally depends upon whether the entity making such payments has a right of subrogation or a lien against proceeds from damages awards, and whether or not the plaintiff has paid a premium for the receipt of such benefits.

Rupp's Insurance and Risk Management Glossary defines subrogation as "[t]he right of a person to assume a legal claim of another; the right of a person who has paid a liability or obligation of another to be indemnified by that person; an insurer's substitution in place of the insured in regard to a claim against a third party for indemnification of a loss paid by the insurer."¹⁸ Subrogation is important in the consideration of potential collateral source income because the entity that has a right of subrogation has a right to participate in any action for damages where the damages that were incurred were covered in part by payments from that entity. Companies that make payments to an injured individual for health or disability insurance coverage generally have a right of subrogation. Thus, if an injured individual has received medical or disability insurance payments as a result of an injury, and then files suit to recover damages from a tortfeasor for the same injury, the insurance company generally has a right of subrogation to recover the amounts that it paid. If income from a potential collateral source is obtained from an insurance company or other entity that has a right of subrogation, then such income is generally exempt from statutes allowing for collateral source offsets.

While subrogation rights exist as a general legal principal, collateral source payments may also be eliminated from consideration as an offset to damages as a result of a contractual lien. A lien is defined as "any official claim or charge against property or funds for payment of a

¹³ CPLR §4545

¹⁴ *See Ventriglio v. Active Airport Serv. Inc.*, 257 A.D.2d 657, 682 N.Y.S.2d 915 (2nd Dept. 1999); *Boone v. Hopkins*, 298 A.D.2d 866, 747 N.Y.S.2d 826 (4th Dept. 2002).

¹⁵ *See*, for example, Ariz. Rev. Stat. Ann. §12-565, Cal. Civ. Code §3333.1, Fla. Stat. Ann. §768.76(2)(a)(1), Mich. Comp. Laws §600.6303(4), N.Y. CPLR §4545(c).

¹⁶ *See*, for example, Del. Code Ann. tit. 18 §6862(1), Iowa Code Ann. §147.136, Minn. Stat. Ann. §548.36(1).

¹⁷ In a number of collateral source statutes, life insurance proceeds are specifically excluded. *See*, for example, Del. Code Ann. tit. 18 §6862(2), Fla. Stat. Ann. §768.76(2)(a)(2), Mich. Comp. Laws §600.6303(4), Minn. Stat. Ann. §548.36(2).

¹⁸ *Rupp's Insurance and Risk Management Glossary*, (NILS Publishing, 2002), as listed on the CCH Insurance Services Internet Site (www.insurance.cch.com/rupps/subrogation.htm).

debt or an amount owed for services rendered.”¹⁹ In order to receive medical or disability insurance, the insured individual must agree to the terms of the insurance contract. Insurance contracts often contain a clause that allow the insurance carrier to assert a lien against any potential recovery made by an insured for payments that have been made for the same incident. Similarly, Workers’ Compensation statutes may contain a provision that specifies that, in return for receiving benefits from the Workers’ Compensation system, the worker gives the system the right to obtain reimbursement from a tortfeasor for amounts paid as a result of injuries or death for which that tortfeasor is liable.²⁰ In effect, then, by operation of subrogation and liens, an insurance company or other entity has a right to recover back from a tortfeasor any amounts paid to an injured party as a result of that tortfeasor’s actions. Payments that are made to an individual that are subject to subrogation or a lien are thus not considered to be collateral source payments because such amounts must be repaid.

A type of governmental payment that may or may not be a collateral source offset is payments from Social Security. As noted earlier, a number of statutes allowing consideration of collateral source income as an offset to a personal injury or wrongful death award specifically mention payments from Social Security. Including benefits to the individual, his or her spouse, payments to children, and funding for vocational rehabilitation services, there are seven types of Social Security disability payments.²¹ Of those seven types of benefits, two types are specifically paid to an individual as a result of his or her disability.

Social Security Disabled Worker’s Benefits are available for individuals who have been employed and “paid into” the Social Security system for at least twenty quarters during the forty quarter period ending with the quarter of disability.²² Disabled Worker’s Benefits may be reduced by the amount of Worker’s Compensation or public disability income payments that an injured individual receives, but are not reduced for the receipt of proceeds of a lawsuit or because of an individual’s assets.²³

Social Security Supplemental Security Income benefits are based upon need, and are reduced or eliminated if an individual has assets, or resources,²⁴ in excess of the statutory minimum levels.²⁵ Unlike Disabled Worker’s Benefits, Supplemental Security Income benefits will end if an individual receives cash payments as a result of a lawsuit. Thus, while Social Security Disabled Worker’s Benefits are a collateral source that can be applied as an offset to damages, Social Security Supplemental Security Income benefits are not.

Social Security Survivor’s benefits have also been considered as potential collateral source offsets. In the case of *Bryant v. New York City Health and Hospitals Corporation*, 93 N.Y.2d 592, 716 N.E.2d 1084, 695 N.Y.S.2d 39 (1999), the court held that because Social Security Survivor’s benefits provide compensation for the economic support that is no longer provided by a deceased parent, an award for lost earnings can be reduced by the amount of such benefits.²⁶ In the matter of *Krum v. Green Island Construction Corporation*, 249 A.D.2d 730 (3d Dept. 1995), however, the court held that because the plaintiff was receiving Social Security

¹⁹ Law.com Law Dictionary (www.dictionary.law.com).

²⁰ See, for example, N.Y. Workers’ Compensation Law §29.

²¹ 2001 *Social Security Handbook* §500 (available from the Social Security Administration Internet Site, www.ssa.gov).

²² *Social Security Handbook* §207.

²³ *Social Security Handbook* §§503-504.

²⁴ *Social Security Handbook* §2148.

²⁵ *Social Security Handbook* §§2153, 2156.

²⁶ 93 N.Y.2d at 607.

widow's benefits, which are similar to life insurance payments, rather than Social Security Survivor's benefits, the amounts received were not collateral source payments that could be applied as an offset to an award for lost earnings. Thus, the type of Social Security benefit being received is an important factor in evaluating whether such benefits are a collateral source offset.

While almost all statutes allowing an offset against damages for collateral source income apply to governmental payments such as Social Security Disabled Worker's Benefits and state disability program payments, a lesser number of statutes allow offsets for the receipt of private contractual payments.²⁷ Private contractual payments include such items as medical insurance coverage, disability insurance payments, and life insurance proceeds. If an injured or deceased individual's private contractual payments were funded by premiums paid entirely by that individual's employer, and if the insurer providing such payments fails to assert a right of subrogation or a contractual lien, then any amounts paid are generally considered a collateral source offset against damages, regardless of the amount of premiums paid by the employer.²⁸ If, however, the premiums were paid by the injured or deceased individual's family, the collateral source offset against damages is nearly always reduced in some fashion by the amount of premiums paid.²⁹ While a number of statutes allow a reduction in the collateral source offset for all premiums paid to obtain such coverage,³⁰ other statutes reference a specific period over which premiums have been paid, commonly two years.³¹

In summary, while almost all collateral source statutes allow an offset against damages for payments received from public sources, such as Social Security, allowing an offset for payments received from private sources, such as insurance proceeds, is less common. Collateral source offsets for payments received from private sources are also often limited because private source payors may retain subrogation or contractual lien rights to recover amounts paid. Further, even where private source payments may be considered as a collateral source offset, some consideration is generally made for the premiums paid to obtain such coverage. The actual amount of a collateral source offset may thus be somewhat complicated to calculate.

Once it has been determined that there may be collateral source offsets in a particular case, a further consideration in the determination of any potential collateral source offset is the terms by which collateral source payments have been and will be made. The terms governing collateral source payments may be either statutory, applicable to governmental sources, or contractual, which would apply to private sources of collateral source income. As noted earlier, if payments are made subject to subrogation rights or a lien, they are generally not considered a collateral source offset. Thus, if subrogation or lien rights are specified either by statute or contract, a particular source of payments may not qualify as a collateral source offset.

If potential collateral source payments are made from a public source, such as Social Security, the terms of such payments are governed by statute, and can only be properly evaluated if the economist understands how the controlling statute applies. Thus, for example, Social Security Disabled Worker's Benefits are reduced for Workers' Compensation payments. The amount of this reduction depends upon the individual's "average current earnings" and total

²⁷ See, for example, Ariz. Rev. Stat. Ann. §12-565, Cal. Civ. Code §3333.1, Fla. Stat. Ann. §768.76, Iowa Code Ann. §147.136, Mich. Comp. Laws §600.6303(4), Minn. Stat. Ann. §548.36, N.Y. CPLR §4545(c).

²⁸ But see Mich. Comp. Laws §600.6303(2), which specifically reduces the collateral source offset by the premiums paid by the individual's employer to obtain coverage.

²⁹ But see Fla. Stat. Ann. §768.76, Iowa Code Ann. §147.136.

³⁰ Ariz. Rev. Stat. Ann. §12-565, Cal. Civ. Code §3333.1, Mich. Comp. Laws §600.6303(2).

³¹ Minn. Stat. Ann. §548.36, N.Y. CPLR §4545(c).

family benefits received.³² If Workers' Compensation benefits end, however, for example, because of the receipt of proceeds from a lawsuit,³³ the injured individual's Social Security Disabled Worker's Benefits may increase. The collateral source offset for an injured individual's Social Security Disabled Worker's Benefits may thus increase after an award for damages is received and Workers' Compensation payments end.

The collateral source offset for the receipt of private contractual benefits can only be made subject to the terms of the contract for receipt of such benefits. The contract governing such payments may either be a traditional insurance contract or, in the case of employer funded health or pension plans, the plan document or summary plan description. As noted above, private contractual payments are often provided subject to subrogation and lien rights. Health insurance companies almost always reserve subrogation and lien rights against benefits paid. For other private sources of collateral source income, such as disability income policies, there may be a reduction in benefits for the receipt of Workers' Compensation, an offset for Social Security Disabled Worker's Benefits, a limited payment term as in short term disability policies, or inflation indexing. Pension plans that provide for disability benefits may classify such benefits as disability pension income and thus subject to collateral source offset rules through normal retirement age, and as normal retirement benefits, not subject to collateral source rules, after normal retirement age.³⁴ The collateral source offset for private payment sources thus cannot be properly evaluated without a careful reading of the contract providing for such payments.

A final consideration in evaluating potential collateral source offsets is whether it is likely that such benefits will continue to be received in the future. In general, the burden is on the defendant to prove that the plaintiff will receive future collateral source payments.³⁵ An example of the type of collateral source benefit that may not continue indefinitely into the future is Social Security Disabled Worker's Benefits. Because Social Security Disabled Worker's Benefits end if an individual is able to return to "substantial gainful employment,"³⁶ a collateral source offset for this type of payment is readily available only in cases of permanent total disability.³⁷ The same considerations often apply to the evaluation of private disability insurance policy benefits and disability pension payments because in many instances an individual is not eligible to receive payments from these policies or plans unless he or she is eligible to receive Social Security Disabled Worker's Benefits. The probability of continued

³² *Social Security Handbook* §504.

³³ See, for example, N.Y. Workers' Compensation Law §29(4).

³⁴ For a discussion of disability pension benefits as a collateral source offset, see *Oden v. Chemung County Industrial Development Agency*, 87 N.Y.2d 81, 661 N.E.2d 142, 637 N.Y.S.2d 670 (1995).

³⁵ Ariz. Rev. Stat. Ann. §12-565, Cal. Civ. Code §3333.1, Minn. Stat. Ann. §548.36, N.Y. CPLR §4545(c).

³⁶ *Social Security Handbook* §505.F.

³⁷ It is often unclear from a jury verdict whether the award was made assuming that the plaintiff was fully and totally disabled or whether it was assumed that the plaintiff would return to some form of gainful employment at some time in the future. In the case of *Charles Smith v. M.V. Woods Construction*, Index No. 92-6239 (Supp. Ct. Onondaga Cty. 2002), evidence was presented by the plaintiff at trial that he was fully and totally disabled. The jury verdict did not specifically indicate whether the lost earnings award was diminished by an offset for potential post injury employment. At the time of trial the plaintiff had, in fact, been receiving Social Security Disability payments since 1994. At a collateral source hearing in 2003, however, the plaintiff presented evidence that he was now able to return to employment, and thus that collateral source Social Security Disability benefits would soon end. The trial judge held that evidence of the plaintiff's sudden recovery from his disability was inconsistent with the evidence presented at trial, and thus that the collateral source offset for Social Security Disability would be applied to reduce the award for future lost earnings regardless of whether the plaintiff was now able to return to some form of employment.

future receipt of collateral source income has been discussed by a number of cases in the state of New York³⁸ and in Michigan.³⁹

Collateral source offsets against awards for damages in personal injury and wrongful death cases vary from jurisdiction to jurisdiction depending upon the terms of the relevant collateral source statute. Whether a specific type of payment can be considered as a collateral source offset and how the amount of such payments is determined depends upon the state specific collateral source statute and the relevant caselaw. In addition, the terms governing collateral source payments may be dictated by statute or by contract. The economist must thus be aware not only whether specific items may be counted as collateral source offsets, but how payments will be made from potential sources and the term for continued payments.

IV. The Economics of Collateral Source Income

In states where the only collateral source offsets allowed are for payments that have actually been made, there is no need for expert economic testimony to value collateral source income. The evaluation of collateral source payments that are likely to be received in the future, however, is more complex. For example, Social Security Disabled Worker's Benefits are indexed for inflation.⁴⁰ Private disability policy payments may also be inflation indexed, depending upon the contract terms. If disability pension payments are received as a collateral source offset, expert testimony may be required to establish the amount of the disability benefit as compared with the retirement benefit that the injured individual would otherwise have become eligible to receive. Thus, in New York, at least, it has been held that the defense is entitled to introduce expert economic testimony at a post trial hearing to provide evidence of the value of offsetting collateral source income that a plaintiff is likely to receive.⁴¹

The first part of the economist's role in evaluating potential collateral source income is to identify any such payments that a plaintiff may be receiving. The economist's retaining attorney is, of course, responsible for obtaining the proper information. However, the attorney may not know what documents the economist needs to properly evaluate potential collateral source income. Thus, for example, while the retaining attorney may have records showing the amount of Social Security Disabled Worker's Benefits that the plaintiff has received, he or she may not have obtained a copy of the plaintiff's Social Security award letter. Without a copy of the Social Security award letter, there is no way to determine whether and to what extent the plaintiff's benefits are being reduced as an offset for Workers' Compensation payments, and thus what the plaintiff's benefit will ultimately be upon the receipt of lawsuit proceeds and the termination of Workers' Compensation payments. Similarly, the retaining attorney may have obtained information regarding the dollar value of benefits that the plaintiff is receiving as disability pension payments, without any additional documentation to show how these payments were calculated. Without additional information indicating how the plaintiff's disability pension was calculated, and without a copy of the Summary Plan Description for the pension plan, the economist will have a difficult time separating the normal retirement benefit that the plaintiff had earned prior to his or her injury from the disability benefits that the plaintiff is currently

³⁸ See the cases listed at note 7 to N.Y. CPLR§4545 (McKinney Supp. 2005).

³⁹ See the cases listed at note 2 to Michigan Compiled Laws Annotated §600.6303 (West Publishing, St. Paul, MN, 2000).

⁴⁰ *Social Security Handbook* §719.

⁴¹ *Underwood v. B-E Holdings, Inc.*, 269 F. Supp.2d 125, 141 (W.D.N.Y. 2003).

receiving. Thus, it is important for the economist to work with his or her retaining attorney in order to obtain the documentation necessary to properly evaluate collateral source payments that the plaintiff may be receiving.

It is worth noting that potential collateral source offsets are important for the plaintiff's evaluation as well as for the defense analysis. If the plaintiff's economist values lost earnings at trial, only to have the court determine in a post trial hearing that almost all of the lost earnings that the economist testified to at trial will be offset by collateral source income, then the economist has failed to provide the plaintiff with an accurate case value. Regardless of whether the economist is retained by the plaintiff or the defendant, then, he or she must be aware of how collateral source offsets are applied in his or her jurisdiction.

Once it has been determined that there may be collateral sources of income for a plaintiff that will reduce his or her award, there are a number of variables that must be taken into consideration in placing a dollar value on collateral source income. Initially, the economist must determine the total amount received through the date of the verdict, that is, past collateral source income. Next, the economist must consider the amount that will be received after the verdict, as, for example, when the plaintiff's Workers' Compensation payments end and Social Security Disabled Worker's Benefits potentially increase. A further consideration is whether future collateral source payments will be inflation indexed and, if so, how the relevant index is determined. Finally, the economist must determine when the collateral offset payments will end. While for collateral source offset purposes disability pension payments are usually assumed to end at the termination of the injured worker's pre injury worklife expectancy, Social Security Disabled Worker's Benefits are payable through the month before the disabled worker attains age 65.⁴² Each of these variables, then, are ingredients in the economist's collateral source analysis.

After the economist has completed his or her collateral source analysis, the results must be considered by the trier of fact to determine whether or not there is a collateral source offset. As noted earlier, in a number of states, the results of the collateral source analysis are presented during the case in chief, at trial.⁴³ Evidence presented at trial requires the economist to appear and provide testimony regarding the results of his or her calculations. In the alternative, evidence of collateral source income may be presented out of the hearing of the jury, in a post trial hearing.⁴⁴ At the trier of fact's discretion, evidence at a post trial hearing may be presented in the form of sworn statements provided to the court for its consideration or in the form of a formal hearing, requiring the economist to be present to provide testimony. Regardless of whether evidence of collateral source income is presented during or after trial, the economist must provide an accurate evaluation of potential collateral source offsets for the court's consideration.

V. Collateral Source Evaluations in New York

In order to obtain collateral source offsets to damages in New York, there are a number of rules that must be followed. Initially, it should be noted that courts in New York strictly apply the collateral source rule as an exception to the common law. Thus, collateral source offsets are

⁴² *Social Security Handbook* §506.B.

⁴³ Ariz. Rev. Stat. Ann. §12-565, Cal. Civ. Code §3333.1, Del. Code Ann. tit. 18 §6862.

⁴⁴ Iowa Code Ann. §147.136, Mich. Comp. Laws §600.6303(4), N.Y. CPLR §4545(c).

only available against specific items of damages.⁴⁵ Courts have gone so far as to deny a collateral source offset for the receipt of a disability pension where there was a jury award for damages for loss of future earnings and benefits, without a specific separate award for lost pension benefits.⁴⁶ Before a verdict is rendered, then, the defense attorney must be careful to ensure that specific elements of damages are itemized separately in the verdict sheet in order to preserve the right to obtain offsets for collateral source income.

As noted earlier, the burden is on the defendant to request a collateral source hearing.⁴⁷ While one court has held that a motion requesting a collateral source hearing must be made within 15 days of the verdict,⁴⁸ other courts have allowed the request to be made any time before the judgment is entered.⁴⁹ Once a hearing has been requested, the burden is on the defendant to provide “clear and convincing proof” that collateral source payments have been received and/or will be received in the future.⁵⁰ The mere fact that a plaintiff is eligible to receive benefits that could be a collateral source offset to damages is insufficient; the defense must show that such benefits have been applied and approved for receipt.⁵¹ Similarly, courts have held that where evidence has been introduced at trial that the plaintiff’s physical condition will improve,⁵² or where the evidence at trial presumes that the plaintiff will return to gainful employment,⁵³ offsets for the potential receipt of future collateral source income have been denied. However, the mere assertion by the plaintiff that the underlying condition may improve, resulting in a termination of collateral source payments, is insufficient to preclude the defense from obtaining a collateral source offset against future damages.⁵⁴

Finally, although not strictly a collateral source, income taxes may be subtracted from an award for lost earnings in medical, dental, or podiatric malpractice cases under CPLR §4546. As indicated by this statute, “...evidence shall be admissible for consideration by the court, outside of the presence of the jury, to establish the federal, state and local personal income taxes which the plaintiff would have been obligated by law to pay.”⁵⁵ The amount of the offset for income taxes, then, must be determined by the court based upon competent economic evidence.⁵⁶

VI. Conclusion

At common law, in a personal injury or wrongful death action, the collateral source rule prohibited courts from considering any income that a plaintiff received as a result of injury or

⁴⁵ *Oden v Chemung County Indus. Dev. Agency*, 211 App Div 2d 997, 621 NYS2d 744 (3rd Dept. 1995), appeal granted 85 NY2d 809, 628 NYS2d 52, 651 NE2d 920 (1995), *affd* 87 NY2d 81, 637 NYS2d 670, 661 NE2d 142 (1995).

⁴⁶ *Vancho Boshnakov et al. v. Board of Education of Town of Eden et al.*, 277 A.D.2d 996, 716 N.Y.S.2d 520 (4th Dept. 2000).

⁴⁷ *Ventriglio v. Active Airport Serv. Inc.*, 257 A.D.2d 657, 682 N.Y.S.2d 915 (2nd Dept. 1999).

⁴⁸ *Bongiovanni v Staten Is. Med. Group*, 188 Misc 2d 362, 728 NYS2d 345 (Supp. Ct. Richmond Cnty2001).

⁴⁹ *Firmes v. Chase Manhattan Automotive Fin. Corp.*, 50 A.D.3d 18, 852 N.Y.S.2d 148 (2nd Dept. 2008).

⁵⁰ *Caruso v LeFrois Bldrs.*, 217 AD2d 256, 258-259 (4th Dept. 1995); *Sternfeld v Forcier*, 248 App. Div. 2d 14, 679 NYS2d 219 (3rd Dept. 1998).

⁵¹ *Young v. Tops Mkts., Inc.*, 283 A.D.2d 923, 725 N.Y.S.2d 489 (4th Dept. 2001).

⁵² *Malloy v. Stellar Mgt.*, 68 A.D.3d 668, 892 N.Y.S.2d 86 (1st Dept. 2009).

⁵³ *Ruby v Budget Rent A Car Corp.*, 23 AD3d 257, 806 NYS2d 12 (1st Dept. 2005), *lv denied* 6 NY3d 712, 849 NE2d 970, 816 NYS2d 747 (2006).

⁵⁴ *Young v Knickerbocker Arena*, 281 App Div 2d 761, 722 NYS2d 596 (3rd Dept. 2001).

⁵⁵ NY CLS CPLR §4546 (2012).

⁵⁶ *Cabrera v New York City Health & Hosps. Corp.*, 272 App Div 2d 495, 708 NYS2d 429 (2nd Dept. 2000).

death from any source other than the tortfeasor. In response to pressure from medical practitioners and from the insurance industry, many states now allow offsets against personal injury or wrongful death awards for the receipt of collateral source income. Given continued pressure to reduce the cost of litigation, it is likely that additional jurisdictions will enact similar legislation in the future.

In all jurisdictions that allow an offset for collateral source income that is likely to be received by the plaintiff in the future, the economist must provide an accurate evaluation of potential collateral source income. On the defense side, failing to account for potential collateral source income may result in an award to the plaintiff substantially in excess of the amount that he or she should be entitled to. If the economist fails to provide the plaintiff with an accurate evaluation of potential collateral source offsets, he or she will present an inaccurate value of the case. It is important, then, in any jurisdiction where there could be potential future collateral source offsets, for the economist and his or her retaining attorney to obtain the proper information necessary to accurately value all potential collateral source reductions.

References

- Alaska Statutes §09.55.548
- Arizona Revised Statutes Annotated §12-565 (West Publishing, St. Paul, MN, 2003)
- Bongiovanni v Staten Is. Med. Group*, 188 Misc 2d 362, 728 NYS2d 345 (Sup. Ct. Richmond Cnty 2001)
- Boone v. Hopkins*, 298 A.D.2d 866, 747 N.Y.S.2d 826 (4th Dept. 2002)
- Boshnakov v. Board of Education of Town of Eden.*, 277 A.D.2d 996, 716 N.Y.S.2d 520 (4th Dept. 2000)
- Bryant v. New York City Health and Hospitals Corporation*, 93 N.Y.2d 592, 716 N.E.2d 1084, 695 N.Y.S.2d 39 (1999)
- Cabrera v New York City Health & Hosps. Corp.*, 272 App Div 2d 495, 708 NYS2d 429 (2nd Dept. 2000).
- West's Annotated California Codes Civil Code §3333.1 (West Publishing, St. Paul, MN, 1997 & Supp. 2005)
- Caruso v LeFrois Bldrs.*, 217 AD2d 256, 258-259 (4th Dept. 1995)
- Conn. Gen. Stat. §52-225a
- Delaware Code Annotated Title 18 §6862 (Michie, Charlottesville, VA, 1999)
- Firmes v. Chase Manhattan Automotive Fin. Corp.*, 50 A.D.3d 18, 852 N.Y.S.2d 148 (2nd Dept. 2008)
- West's Florida Statutes Annotated §768.76 (West Publishing, St. Paul, MN, 1997 & Supp. 2005)
- Mario Iazzetti, et. al. v. The City of New York*, 94 N.Y.2d 183 (1999)
- Iowa Code Annotated §147.136 (West Publishing, St. Paul, MN, 1997)
- Krum v. Green Island Construction Corporation*, 249 A.D.2d 730 (3d Dept. 1995)
- Law.com Law Dictionary (www.dictionary.law.com)
- Malloy v. Stellar Mgt.*, 68 A.D.3d 668, 892 N.Y.S.2d 86 (1st Dept. 2009)
- Michigan Compiled Laws Annotated §600.6303 (West Publishing, St. Paul, MN, 2000)
- Minnesota Statutes Annotated §548.36 (West Publishing, St. Paul, MN, 2000 & Supp. 2005)
- Marilyn Minzer, Jerome Nates, Clark Kimball, Diana Axelrod & Richard Goldstein, *Damages in Tort Actions* (Matthew Bender, New York, 1993)
- McKinney's Consolidated Laws of New York Annotated CPLR §4111(f), CPLR §4545(c), and Workers' Compensation Law §29 (West Publishing, St. Paul, MN, 1992 & Supp. 2005)
- New York Consolidated Laws Services CPLR § 4546 (2012)
- Oden v. Chemung County*, 87 N.Y.2d 81, 661 N.E.2d 142, 67 N.Y.S.2d 670 (1995)
- Rohring v. City of Niagara Falls*, 192 A.D.2d 228, 601 N.Y.S.2d 740 (4th Dept. 1993)
- Ruby v Budget Rent A Car Corp*, 23 AD3d 257, 806 NYS2d 12 (1st Dept. 2005), *lv denied* 6 NY3d 712, 849 NE2d 970, 816 NYS2d 747 (2006)
- Rupp's Insurance and Risk Management Glossary, (NILS Publishing, 2002), as listed on the CCH Insurance Services Internet Site (www.insurance.cch.com/rupps/subrogation.htm)
- Sternfeld v Forcier*, 248 App. Div. 2d 14, 679 NYS2d 219 (3rd Dept. 1998)
- Schultz v. Harrison Radiator Division General Motors Corporation*, 90 N.Y.2d 311, 683 N.E.2d 307, 660 N.Y.S.2d 685 (1997)
- Charles Smith v. M.V. Woods Construction*, Index No. 92-6239 (Supp. Ct. Onondaga Cty. 2002)

2001 Social Security Handbook (available from the Social Security Administration Internet Site, www.ssa.gov)

Underwood v. B-E Holdings, Inc., 269 F. Supp.2d 125, 141 (W.D.N.Y. 2003)

Ventriglio v. Active Airport Serv. Inc., 257 A.D.2d 657, 682 N.Y.S.2d 915 (2nd Dept. 1999)

White v. Westlund, App. 4. Dist., 624 So.2d 1148 (1993), review granted 634 So.2d 629, review dismissed 640 So.2d 1109

Young v Knickerbocker Arena, 281 App Div 2d 761, 722 NYS2d 596 (3rd Dept. 2001)

Young v. Tops Mkts., Inc., 283 A.D.2d 923, 725 N.Y.S.2d 489 (4th Dept. 2001)