Navigating the Muddy Waters of Minnesota's Collateral Source Law

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The American folk singer Pete Seeger once said "any darn fool can make something complex; it takes a genius to make something simple." Minnesota's collateral source law is certainly no exception to this statement. As with many aspects of law, Minnesota's collateral source law has developed from the somewhat simple and understandable version that was the common law, to the relative simplicity presented by statute, to the increasingly complex under recent case law.

This article will provide an abridged history of the collateral source law in Minnesota, summarize the treatment of the collateral source rule in the Minnesota Supreme Court's decision in *Swanson v. Brewster*, 784 N.W.2d 264 (Minn. 2010) and the Minnesota Court of Appeals' decision in *Renswick v. Wenzel*, 819 N.W.2d 198 (Minn. Ct. App. 2012), *pet. for rev. denied* (Minn. Oct. 16, 2012). This article also discusses practical considerations for practitioners when handling cases involving collateral sources and collateral source offsets.

Collateral Sources Under Minnesota Law

The Minnesota legislature passed the collateral source statute, Minnesota Statute § 548.251, in 1986 to prevent double recovery by plaintiffs. Before its passage, plaintiffs could recover doubly for the same injury, receiving compensatory payments from third-party contributors, such as insurers and also an award of damages against the tortfeasor. *See Swanson v. Brewster*, 784 N.W.2d at 268-69. Under common law, the collateral-source payments a plaintiff received had no bearing on a tortfeasor's responsibility to pay damages to the plaintiff. *Id.* at 268. Thus, plaintiffs could receive more than the actual amount paid for medical expenses because a tortfeasor could be required to pay the entire amount billed by health care providers regardless of other compensation sources. *Id.* This rule had the public-policy benefit of retaining the deterrent effect of civil litigation against a tortfeasor while also retaining the incentive for potential plaintiffs to secure their own sources of self-protection.

Minnesota Statute § 548.251 describes collateral sources as payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:

(1) A federal, state, or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;
(2) Health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;
(3) A contract or agreement of a group, organization, partnership or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or
(4) A contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where premiums were wholly paid for by the plaintiff.

Minn. Stat. § 548.251, subd. 1. Under the collateral source statute, a district court may reduce an award to a plaintiff by amounts paid to plaintiff as described above. This is done on a motion filed within ten (10) days of the date of entry of the verdict requesting a determination of collateral sources. Minn. Stat. § 548.251, subd. 2. On such a motion, the district court first determines the amount of collateral sources that were paid for the benefit of the plaintiff as a result of losses, except those for which a subrogation right has been asserted, and then determines any amounts that were paid on behalf of plaintiff or members of plaintiff's immediate family for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that plaintiff received as a result of the loss. Minn. Stat. § 548.251, subd. 2, (1) & (2). The court then reduces plaintiff's award by the amounts determined to be collateral sources and offsets any reduction in the award by the amounts paid on behalf of plaintiff to secure the right to a collateral source benefit. Minn. Stat. § 548.251, subd. 3.

For example, where a plaintiff is successful in obtaining a verdict against a defendant and wins an award that includes past medical expenses, the plaintiff's award will be reduced by medical benefits related to the injury in question where plaintiff's insurance company does not assert a subrogation claim but the reduction is offset by any amounts paid by plaintiff to secure medical insurance benefits for the two-year period immediately before the accrual of the action.

Collateral Sources and the Insurer's Negotiated Discount

In a March 4, 2013 article published in Time Magazine, "Bitter Pill: Why Medical Bills Are Killing Us," Steven Brill highlighted the disparities in healthcare costs and the fact that no one except the uninsured actually pays full price for healthcare. Insurers routinely negotiate discounts. Minnesota appellate courts have addressed the treatment of an insurer's negotiated discount in the context of the collateral source statute in recent years.

In *Swanson v. Brewster*, the Minnesota Supreme Court held that in addition to non-subrogated payments made by insurance companies, the discount that a health insurer receives from a health care provider is also a collateral source within the meaning of the statute. 784 N.W.2d at 277. The court held that the words "pay" and "payments" include the concept of discharging or satisfying a debt. In addition to being a "payment" under the ordinary and plain meaning of that word, a negotiated discount also satisfies the other statutory requirements to qualify as a collateral source. Namely, that the payment is "related to the injury or disability in question" and that the payment is made on the plaintiff's behalf under a health insurance policy. In so holding, the court determined this interpretation of the statute effectuates the intention of the legislature.

Although this seems simple enough, don't forget that the collateral source statute expressly excepts payments made to a plaintiff under the United States Social Security Act.

In *Renswick v. Wenzel*, the Minnesota Court of Appeals addressed the issue of whether the collateral source statute excluded payments and negotiated discounts made by Medicare. The appellate court held that Medicare falls within the Social Security Act and is a medical insurance program for certain citizens. The court reasoned that based on its plain and unambiguous language, the collateral source statute expressly excepts payments made under the Act from its general rule preventing double recovery. Minn. Stat. § 548.251, subd. 1(2). The statute sits in the context of the common-law rule that plaintiffs are generally entitled to full recovery from a tortfeasor irrespective of any collateral source payments, and legislation abrogating the common

law must be narrowly construed to those circumstances within the legislation's express abrogation. *Swanson*, 784 N.W.2d at 279-80. Thus, *Swanson* and *Renswick* appear to lead to conflicting results – one that effectuates legislative intent and one that does not.

Negotiated Discounts After *Swanson* and *Renswick*

In general, an insurer's negotiated discounts are collateral sources and defendants are able to deduct the negotiated discounts as collateral sources. Medicare falls under the exception in the statute and Medicare negotiated discounts are not deducted as collateral sources. Following *Swanson* and *Renswick*, identical personal injury claims could be valued quite distinctly. A privately insured plaintiff's claim would likely be valued much lower than a plaintiff with the same injuries insured by Medicare because of an available collateral source offset. Likewise, the Medicare-insured plaintiff, having the right to recover a negotiated discount, presents a far more significant threat to a defendant.

Practical Implications for the Practitioner

Under the current state of the collateral source law in Minnesota, there are several practical considerations for legal practitioners including discovery, the presentation of evidence, and the decision to purchase the subrogation interests of insurers.

Discovery should be developed to identify Medicare-insured plaintiffs early in the case. Well-crafted discovery aimed at identifying Medicare-insured plaintiffs should assist attorneys in properly and realistically valuing personal injury claims and thus engaging in more effective and meaningful mediations.

During trial, juries are not informed of collateral sources. In addition, the statute does not state which party has the burden of proving collateral amounts to the court. *Heine v. Simon*, 702 N.W.2d 752, 765 (Minn. 2005). Instead, both parties are permitted to submit evidence of the collateral sources paid or available, as well as amounts the plaintiff paid to secure the right to the benefits. *Id.* at 764. However, Minnesota courts have held that a plaintiff bears the burden of establishing that any medical expenses incurred were reasonable. Because of this standard, there may be an opportunity for presentation of evidence regarding negotiated discounts to establish the reasonableness of medical expenses. If counsel determines this type of evidence is necessary, he or she should consider a possible pre-trial motion explaining why collateral source evidence should be permitted.

An additional consideration is the decision to purchase subrogation interests of insurers. The collateral source statute expressly excludes from the definition of "collateral sources" payments for which a subrogation right is asserted. *Swanson* does provide guidance as to how subrogation liens may be handled. In Swanson, plaintiff's health insurer initially asserted a lien for the $17,643.76 it paid to satisfy the bills of plaintiff's medical bills. However, before trial, defendant's liability insurer purchased the lien from the health insurer for $10,500.33 The court concluded defendant was entitled to a collateral offset for the $17,643.76 payment—not just the $10,500 the liability insurer paid for the lien. *Swanson*, 784 N.W.2d at 267. *Swanson* suggests that it is possible for either a plaintiff or a defendant to purchase the subrogation lien from a health insurer in a personal injury case. If the plaintiff chooses to do so, the plaintiff would clearly avoid the application of collateral source statute. But if the defendant purchases the lien,

the defendant may then drag the amount of the lien, previously outside the reach of the statute, back within the statute's offset provisions—and likely obtain credit for the full amount against the tortfeasor.

Conclusion

The development of Minnesota's collateral source law appears far from settled. As attorneys apply *Swanson* and *Renswick* to personal injury cases, additional questions will arise regarding the proper valuation of cases, the presentation of evidence, and the treatment of negotiated discounts and payments where both Medicare and private insurers make payments on behalf of the plaintiff.