BRIDGING THE GAP :
MAJOR CHANGES TO MINNESOTA'S COLLATERAL SOURCE LAW IN *SWANSON V. BREWSTER*

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Consider this typical liability scenario: Plaintiff in a personal injury lawsuit arising out of a motor vehicle accident incurs medical expenses totaling $75,000. Defendant disputes liability, and as they work through the protracted litigation process, Plaintiff's health insurer pays Plaintiff's medical expenses. The health insurer then negotiates a discount with the medical provider and pays only $15,000 for the *total* satisfaction of the $75,000 billed medical expenses. The matter proceeds to trial and Plaintiff obtains an award for past medical expenses equal to the amount billed. Fast forward to the court's determination of collateral source off-sets. By what amount must the verdict be offset? The $15,000 that was paid by Plaintiff's health insurer? The $60,000 "gap" between the amount billed by the provider and the amount actually paid by the insurer? By the whole $75,000 billed?

Prior to June 2010, the general rule was that only amounts *actually paid*—for which no asserted subrogation lien was asserted—were considered to be "collateral sources." But on June 30, 2010, the Minnesota Supreme Court ruled that the "gap" constituted a "payment" of medical expenses and was therefore unambiguously a "collateral source" as defined in Minnesota's Collateral Source Statute.[1] This article will briefly explain the history of collateral source law in Minnesota, summarize the majority's holding in *Swanson*, and provide analysis as to how the changes to Minnesota's collateral source law may impact the approach and arguments made by attorneys on both sides of personal injury cases.

[1] *Swanson v. Brewster*, 784 N.W.2d 264 (Minn. 2010).

HISTORY OF MINNESOTA'S COLLATERAL SOURCE LAW AND CURRENT STATUTE

A brief history of Minnesota's collateral source law provides insight into the recent changes. Prior to 1986, Minnesota had not adopted any collateral source statute and followed only the common law collateral source rule. Under the common law rule, "collateral source benefits"—compensation paid on the plaintiff's behalf from some source other than the defendant tortfeasor, including insurance, government benefits, or gifts—do not reduce the tortfeasor's obligation to compensate the plaintiff for injury. Pursuant to this rule, plaintiffs were permitted to receive a double recovery, because the at-fault defendant had to pay the entire amount of the plaintiff's damages, regardless of whether those amounts had been totally or partially satisfied by compensation from another source.

However, in 1986, the Minnesota Legislature enacted the Collateral Source Statute,[2] which provides that a plaintiff cannot recover damages from the defendant, to the extent the plaintiff has already recovered compensation for those damages from certain, specified other sources. The primary purpose of the statute is to prevent double recoveries by plaintiffs.[3]

Under the current version of the Collateral Source Statute, this purpose is accomplished via a procedure in which the district court—not the jury—determines the amount of collateral sources and reduces any damages verdict by that amount.[4] The procedure is initiated by post-trial motion, pursuant to which the court must first determine the amount of collateral sources that have been "paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses" (excluding those for which a subrogation right is asserted).[5] The court must also

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[2] *See* Act of Mar. 25, 1986, ch. 455, § 80, 1986 Minn. Laws 878, 878-79 (now codified at Minn. Stat. § 548.251).
[3] *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990).
[4] Minn. Stat. § 548.251, subd. 2.
[5] *Id*., subd. 2(1).

determine the amount paid by or on behalf of the plaintiff for the two-year period before the injury to secure the collateral source benefit (i.e. insurance premiums).[6] The court must then reduce the former amount by the latter amount, and then must reduce the verdict by the difference in those two amounts.[7] Any reductions for collateral sources must be made prior to the application of any comparative fault reductions under Minn. Stat. § 604.01, subd. 1.[8]

The Collateral Source Statute only partially abrogated the common law rule; it did not wipe it out completely.[9] Only compensation from sources that fit within the statute's definition of "collateral sources" may be deducted from a plaintiff's award, and these include:

> [P]ayments 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:
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> (1) a federal, state, or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;
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> (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 . . . , payments made pursuant to the United States Social Security Act, or pension payments;
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> (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
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> (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 the premiums were wholly paid for by the plaintiff.[10]

All other collateral source benefits not included within this definition—including gifts, charitable contributions, payments under the United States Social Security Act, or payments for which a

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[6] *Id.*, subd. 2(2).
[7] *Id.*, subd. 2.
[8] Minn. Stat. § 548.251, subd. 3(c).
[9] *Swanson*, 784 N.W.2d at 270.
[10] Minn. Stat. § 548.251, subd. 1.

subrogation lien is asserted—are dealt with under the common law collateral source law, and thus are not deducted from any award, even if already paid from another source.[11] Accordingly, the statute does not necessarily prevent a plaintiff from obtaining a "double recovery" in all scenarios.

ARE NEGOTIATED DISCOUNTS BETWEEN A HEALTH INSURER AND MEDICAL PROVIDER A "COLLATERAL SOURCE" UNDER MINNESOTA'S COLLATERAL SOURCE STATUTE?

Prior to *Swanson*, Minnesota Courts had not conclusively addressed the issue of whether negotiated discounts between health insurers and medical providers—the so-called "gap" between what was billed and what was actually paid—constituted a "collateral source" by which a verdict must be reduced. In at least two published opinions, the court of appeals held that negotiated discounts between an insurer and a medical provider were not "collateral sources" as defined by the Collateral Source Statute.[12] The first of these, *Foust v. McFarland*, relied on *Stout v. AMCO Insurance Co.*,[13] in reaching its conclusion.[14] However, as more fully discussed below (and as pointed out by the majority in *Swanson*), the *Stout* case did not address negotiated discounts in the context of the Collateral Source Statute. *Stout* instead held that negotiated discounts between a health insurer and a medical provider did not reduce an insurer's obligation under the *Minnesota No-Fault Act* to compensate an insured for the full amount of his medical expenses.[15] The second, *Tezak v. Bachke*, relied, without substantive analysis, on the holding of *Foust*.[16]

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[11] Minn. Stat. § 548.251.
[12] *Foust v. McFarland*, 698 N.W.2d 24 (Minn. App. 2005), *rev. denied* (Minn. Aug. 16, 2005); *Tezak v. Bachke*, 698 N.W.2d 37 (Minn. App. 2005), *rev. denied* (Minn. Aug. 24, 2005)).
[13] 645 N.W.2d 108 (Minn. 2002).
[14] *Foust*, 698 N.W.2d at 35–36.
[15] *Stout*, 645 N.W.2d at 114.
[16] *Tezak*, 698 N.W.2d at 42.

But prior to the *Foust* and *Tezak* decisions, in the unpublished opinion *Mikulay v. Dial Corp.*,[17] the court of appeals held that a negotiated "write off" between the plaintiff's medical provider and Medicare, *was* a "payment" under the Collateral Source Statute, by which the plaintiff's award must be reduced. In so holding, the court reasoned:

> This write-off was made on appellant's behalf pursuant to a federal program providing medical care. . . . Appellant certainly received a benefit from the services provided by SPRMC. Allowing appellant to receive the medical services at no cost and recover the cost of the services from respondent would result in a double recovery and contravene the purpose of the statute.[18]

However, in *Swanson v. Brewster*, the Minnesota Supreme Court finally provided a definitive decision regarding the treatment of negotiated discounts under the Collateral Source Statute. In *Swanson*, plaintiff was injured when his motorcycle collided with the defendant's motor vehicle.[19] Liability was not in dispute. Plaintiff incurred medical expenses totaling $62,259.30. His health insurer paid $17,643.76 in complete satisfaction of the medical provider's bills, by negotiating a $43,445.74 discount. Following trial, the jury awarded plaintiff $134,789.30, which included $62,259.30 for past medical expenses. In a post-trial motion, defendant moved for an off-set of collateral sources pursuant to Minn. Stat. § 548.251, requesting that the court reduce the verdict by not only the $17,643.76[20] actually paid by the health insurer, but also by the negotiated discount of $43,445.76. The district court rejected defendant's request, and held that only the $17,643.76 was a "collateral source." The court reduced the verdict by that amount, less the amount of co-payments and health insurance premiums paid by plaintiff in the two-year period preceding the accident, pursuant to Minn. Stat.

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[17] No. C9-89-1711, 1990 WL 57530 (Minn. App. May 8, 1990).
[18] *Id*. at *3.
[19] The Minnesota No-Fault Act was not at issue in this case, as that Act does not apply to motorcycles. Minn. Stat. § 65B.46, subd. 3.
[20] For reasons discussed more fully below, there was no subrogation lien at issue at trial.

§ 548.251, subd. 2. The court of appeals affirmed the lower court's ruling, relying on its previous published opinions in *Faust* and *Tezak*. However, the court stated that defendant's argument had merit, and acknowledged that the discharge of a debt was similar to the actual expenditure of funds. Further, the court noted, failing to reduce a verdict by a negotiated discount resulted in double recovery to a plaintiff, which contradicts the purpose of the Collateral Source Statute.

In a five-two opinion, the Minnesota Supreme Court reversed the Court of Appeals' ruling.[21] The majority acknowledged that the Collateral Source Statute only partially abrogates the common law collateral source rule, and sources that do not fall within the statute's definition of "collateral sources" must be treated under the common law rule; that is, they cannot be deducted from a verdict.[22] The court went on to conclude that, pursuant to the unambiguous language of Minn. Stat. § 548.251, the negotiated discount between plaintiff's health insurer and the medical providers was a "payment."[23] In so holding, the court concluded that the plain meaning of the word "payment" includes not only "an amount paid" (i.e. money given in exchange for services) but also included some "other valuable thing so delivered in satisfaction of an obligation."[24] Here, the negotiated discount was not a gratuitous exchange, but rather the result of an agreement between the health insurer and the medical provider: the health insurer refers its policyholders to the medical provider, and in exchange, the health insurer receives a discount on the services provided. Accordingly, each party received some "other valuable

[21] Justice Helen Meyer wrote a dissent, in which Justice Alan Page joined, and Justice Dietzen issued a separate concurring opinion.
[22] *Swanson*, 784 N.W.2d at 270.
[23] *Id*. at 275.
[24] *Id*. (citing BLACK'S LAW DICTIONARY 1243 (9th ed. 2009)).

thing."[25] Finally, in addition to being a "payment," the majority concluded the discount also satisfied the other requirements to qualify as a "collateral source" in that it was "related to the injury or disability in question" and was made on the plaintiff's behalf by a "covered" collateral source under the statute—health insurance.[26]

The majority did acknowledge that, where a statute derogates from the common law, it must be strictly interpreted.[27] However, it also recognized that a statute cannot be so narrowly construed so as to disregard the legislature's intent.[28] The majority determined that its conclusion effectuates the legislature's intent of "prevent[ing] double recoveries in many circumstances."[29] The statute's plain language demonstrates the legislature's intent to abrogate the common-law rule with respect to coverage by a plaintiff's health insurer, and there is no principle or reason indicating the legislature intended to treat the two types of insurance compensation, payments and negotiated discounts, differently. Further, the majority noted that the consequence of holding that negotiated discounts were *not* collateral sources would be to award the plaintiff "a sum of money based on a portion of his medical bills that he never paid and will never have to pay"—in other words, a double recovery.

In her dissent, Justice Helen Meyer argued that the majority failed to follow its obligation to strictly construe a derogation from the common law, and concluded that the majority's interpretation of the word "payment" to include a negotiated discount is unacceptably broad. Justice Meyer also disagreed that the majority's holding effectuates legislative intent, and found nothing in the statute that "express[ly] declar[es]" the legislature's intent to abrogate the common

[25] *Id*.
[26] *Id*. at 275–76.
[27] *Id*. at 280.
[28] *Id*.
[29] *Id*. at 278 (citing *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990)).

law collateral source rule with respect to negotiated discounts. Finally, Justice Meyer pointed out, "denying the plaintiff the benefit of a negotiated insurance discount represents a distinct minority view among state courts that have considered the issue."[30] However, as noted in the majority's opinion, in all but one of the cases from other states cited by the dissent in support of this argument, the courts were construing the common law collateral source rule, as opposed to a collateral source statute.[31] Further, in the one cited case that did construe a similar statute, the statute at issue specifically provided that insurance benefits may not be deducted as a collateral source from a verdict or award.[32]

IMPLICATIONS OF *SWANSON* FOR BOTH THE PLAINTIFFS' AND DEFENSE BARS

Swanson provides one answer to the initial inquiry set forth above: what is the appropriate collateral source offset? Under the holding in *Swanson*, it is clear the $60,000 negotiated discount is a collateral source by which an award for past medical expenses must be offset/reduced. But several questions remain unanswered for litigation attorneys. For instance, what about the $15,000 paid by the insurer—who gets the benefit of that? Does support exist for the position that the entire $75,000 should be treated as a collateral source offset? What if the payment is made not by a private health insurer, but instead by Medicare? In short, what impact might *Swanson* have on personal injury lawsuits in the future?

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[30] *Id*. at 285. In turn, the majority relied upon a decision in *Goble v. Frohman*, in which the Florida Supreme Court held that negotiated discounts are collateral sources by which an award must be reduced. *Id*. at 276–77. (citing to *Goble v. Frohman*, 901 So.2d 830, 833 (Fla. 2005)). As the majority points out, Florida's collateral source statute, Fla. Stat. § 768.76 (2009), is similar to Minn. Stat. § 548.251. *Swanson*, 784 N.W.2d at 276, n.9. Justice Meyer's dissent does not substantively address or distinguish the holding in *Goble*. *See id*. at 285.

[31] *Id*. at 280.

[32] *Id*. at 280–81 (citing *White v. Jubitz Corp.*, 219 P.3d 566 (Or. 2009)).

1. Subrogation Liens—They have it, you want it.

Minn. Stat. § 548.251 expressly excludes from the definition of "collateral sources" payments for which a subrogation right is asserted. Therefore, in our initial hypothetical, as long as that subrogation lien remains, the $15,000 paid by plaintiff's health insurer cannot be offset. Then how should that payment be treated? Interestingly, although there was no subrogation lien at issue at the time of trial in *Swanson*, and the Supreme Court did not directly address it, the case provides 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, prior to trial, defendant's liability insurer purchased the lien from the health insurer for $10,500.[33] And remarkably, when concluding the total amount of collateral source offset, the three courts were in agreement on one thing: 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.[34]

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

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[33] *Swanson*, 784 N.W.2d at 267.

[34] *Id*. at 282. Settlements of this type are common in the workers' compensation arena. In *Buck v. Schneider*, 413 N.W.2d 568 (Minn. App. 1987), the court of appeals recognized a plaintiff's right to purchase a subrogation right from a workers' compensation insurer to preserve its right to pursue the full amount against the tortfeasor. By doing so, the plaintiff was able to avoid the offset provisions under the collateral source statute. Likewise, in *Folstand v. Eder*, 467 N.W.2d at 608 (Minn. 1991), the supreme court acknowledged that a defendant tortfeasor could likewise purchase the workers' compensation carrier's subrogation lien, thereby avoiding payment of that amount to the plaintiff.

full amount of the health insurer's lien, versus only the amount that the defendant paid for the lien. In certain circumstances, such as where there is no viable liability defense, or where plaintiff does not have substantial personal assets, the purchase of the subrogation lien may serve as a substantial potential benefit to a defendant.

2. Negotiated discounts between Medicare and the Providers

Swanson clarifies how negotiated discounts between medical providers and private health insurers are treated for collateral source offset purposes. But should this analysis extend to a negotiated discount between Medicare and a medical provider? Neither the legislature nor the Minnesota Supreme Court has directly answered this question, and the outcome is far from clear.

Minn. Stat. § 548.251 specifically includes within its definition of collateral sources "payments by or pursuant to . . . a public program providing medical expenses, disability payments or similar benefits."[35] However, the statute expressly excludes from that definition "payments made pursuant to the United States Social Security Act."[36] As *Swanson* makes clear, "negotiated discounts" are "payments" within this definition. But is a negotiated discount on behalf of Medicare a "payment" that is subject to the collateral source statute? Arguably, Medicare could be deemed to be a "payment pursuant to the United States Social Security Act," as Medicare is one of many benefits programs established under the United States Social Security Act.[37] On the other hand, Medicare could easily qualify under the statute's definition of "collateral source" as a "public program providing medical expenses, disability payments, or similar benefits."

[35] Minn. Stat. 548.251, subd. 1 (1).
[36] *Id*., subd. 1(2).
[37] 42 U.S.C. § 1395, *et seq.*

A recent Todd County District Court opinion addressed this very issue in December 2010, four months after *Swanson* was decided.[38] In the district court opinion, the court acknowledged that Medicare appeared to be both a public program and part of the United States Security Act, and therefore the application of Minn. Stat. § 548.210 was ambiguous on this point. The court next looked to the intent of the legislature, and concluded that negotiated discounts between Medicare and healthcare providers were collateral sources for which an award must be offset. In support of its conclusion, the court cited *Swanson's* conclusion that the legislature intended to prevent double recoveries and noted there was no reason to treat Medicare negotiated discounts any differently than those by private insurers. The court also cited to *Mikulay*, which previously held that Medicare "write offs" were collateral sources subject to offset.[39] Further, the court noted that the statute could be reconciled in that the United States Social Security Act provides for *many* types of benefits that do not implicate health insurance or a public program providing medical expenses. In other words, the statute could apply only to those Social Security Act benefits that are not expressly covered by the definition of "collateral sources."

In contrast, a Sherburne County District Court opinion dated March 24, 2011 held that Medicare negotiated discounts *were* classified as payments under the United States Social Security Act and were therefore expressly excluded from the statute's definition of "collateral source."[40] The opinion did not substantively address whether the "public program" provision

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[38] *Arvid Johnson v. Mid-American Auction, Co.*, No 77-CV-09-1164 (Minn. Dist. Court December 20, 2010). This decision has since been appealed to the Minnesota Court of Appeals; oral arguments have not yet been scheduled.

[39] *Id*. at *6 (citing *Mikulay v. Dial Corp*., No. C9-89-1711, 1990 WL 57530 (Minn. App. May 8, 1990)).

[40] *Malzahn v. American Family Mut. Ins. Co.*, No. 71-CV-10-1666 (Minn. Dist. Court March 24, 2011). The procedural posture of this case is noteworthy, as the parties raised the Medicare/collateral source issue *prior* to trial, in the hopes that judicial insight on this issue would aid resolution of the case.

rendered the statute ambiguous. Instead, the court concluded that the statute was not "superfluous" despite the "public program" provision, as that provision would also apply to payments by programs such as Medical Assistance.

The Medicare negotiated discount question remains open to interpretation. However, in the aftermath of *Swanson*, there remains a strong argument that negotiated discounts—whether by a private health insurer *or* by Medicare—are collateral sources for which the defendant is entitled to an offset.

CAUTION: *SWANSON* DOES NOT APPLY TO NO-FAULT ACTIONS!

For those hoping to extend the rule in *Swanson* to no-fault claims, be warned: *Swanson* has no such application. As noted above, the No-Fault Act was not at issue in *Swanson* because the plaintiff was driving a motorcycle at the time of the accident.[41] More importantly, the majority effectively stated its holding would not apply to no-fault claims because the No-Fault Act[42] and the Collateral Source Statute are intended to serve different purposes.

The primary purpose of the Collateral Source Statute is to prevent double recoveries by plaintiffs.[43] Conversely, a main purpose of the No-Fault Act is to ensure that persons injured in motor vehicle accidents are promptly compensated for their injuries, regardless of who is at fault for the accident.[44] The No-Fault Act accomplishes this goal of prompt payment by designating no-fault benefits as primary to benefits payable from other sources.[45]

Given the distinct difference in purpose between these two legal standards, it is not surprising that the Minnesota Supreme Court has treated the issue of negotiated discounts

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[41] *See* Minn. Stat. § 65B.46, subd. 3
[42] Minn. Stat. § 65B.41, *et seq*.
[43] *Swanson*, 784 N.W.2d at 273 (citing *Imlay*, 453 N.W.2d at 331).
[44] *Swanson*, 784 N.W.2d at 273 (citing Minn. Stat. § 65B.42(1)).
[45] Workers' Compensation benefits are an exception to this rule. Minn. Stat. § 65B.51, subd. 1; *see also Swanson*, 784 N.W.2d at 273.

between a health insurer and a medical provider differently in the no-fault context than in a liability/collateral source context. In *Stout v. AMCO Insurance Co.*,[46] the Minnesota Supreme Court held that where a no-fault insurer delayed payment for an insured's claim for basic economic loss benefits, thereby forcing the insured to turn to their health insurer for payment, the no-fault insurer is not entitled to the benefit of any negotiated discount between the health insurer and the medical provider. To the contrary, the no-fault insurer must reimburse the insured for the full amount billed by the medical provider. In support of this holding, the court reasoned that forcing the no-fault insurer to pay the full amount billed would "remove the incentive for no-fault insurers to delay the payment of meritorious claims in the hope that the injured person's health insurer will step in and pay his or her medical bills at a discounted rate."[47]

As stated above, the court in *Swanson* reached the opposite conclusion with respect to the Collateral Source Statute. However, in doing so, the *Swanson* court did not overrule or call into doubt the holding in *Stout* with respect to no-fault claims. Instead, the *Swanson* court carefully distinguished *Stout* by noting that it applied only to no-fault claims, and in doing so, discussed in detail the differences between the No-Fault Act and the Collateral Source Statute:

> Because the form, purpose, and function of the No-Fault Act and Collateral-Source Statute are different, we conclude that our reasoning in Stout is not controlling for our interpretation of Minn. Stat. § 548.251. Therefore, our analysis of Minn. Stat. § 548.251 and our determination of whether a negotiated discount is a "collateral source" under the collateral-source statute must focus on an interpretation of the words used in ***that*** statute.[48]

Thus, it is clear that the Minnesota Supreme Court intended that its holding in *Swanson* would not apply to no-fault claims, and *Stout* remains good law today.

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[46] 604 N.W.2d 108, 114–15 (Minn. 2002).
[47] *Id*. at 114.
[48] *Swanson*, 784 N.W.2d at 273.

CONCLUSION

Swanson represents a substantial shift in interpretation of Minnesota's collateral source law. While it appears that *Swanson* does not affect payments or payment obligations under the No-Fault Act, just how much *Swanson* will impact both plaintiffs and defendants at different stages of litigation in personal injury claims remains to be seen. It can reasonably be anticipated that the purchase of subrogation liens by one party or another may become more frequent. Attorneys who litigate these claims might consider whether purchasing the subrogation lien is in their clients' best strategic interests, and whether their opponents might try to "outbid" for the liens or otherwise interfere with the negotiation. In addition, the battle of whether Medicare write-offs or negotiated discounts are collateral sources may come to the forefront. Stay tuned.

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