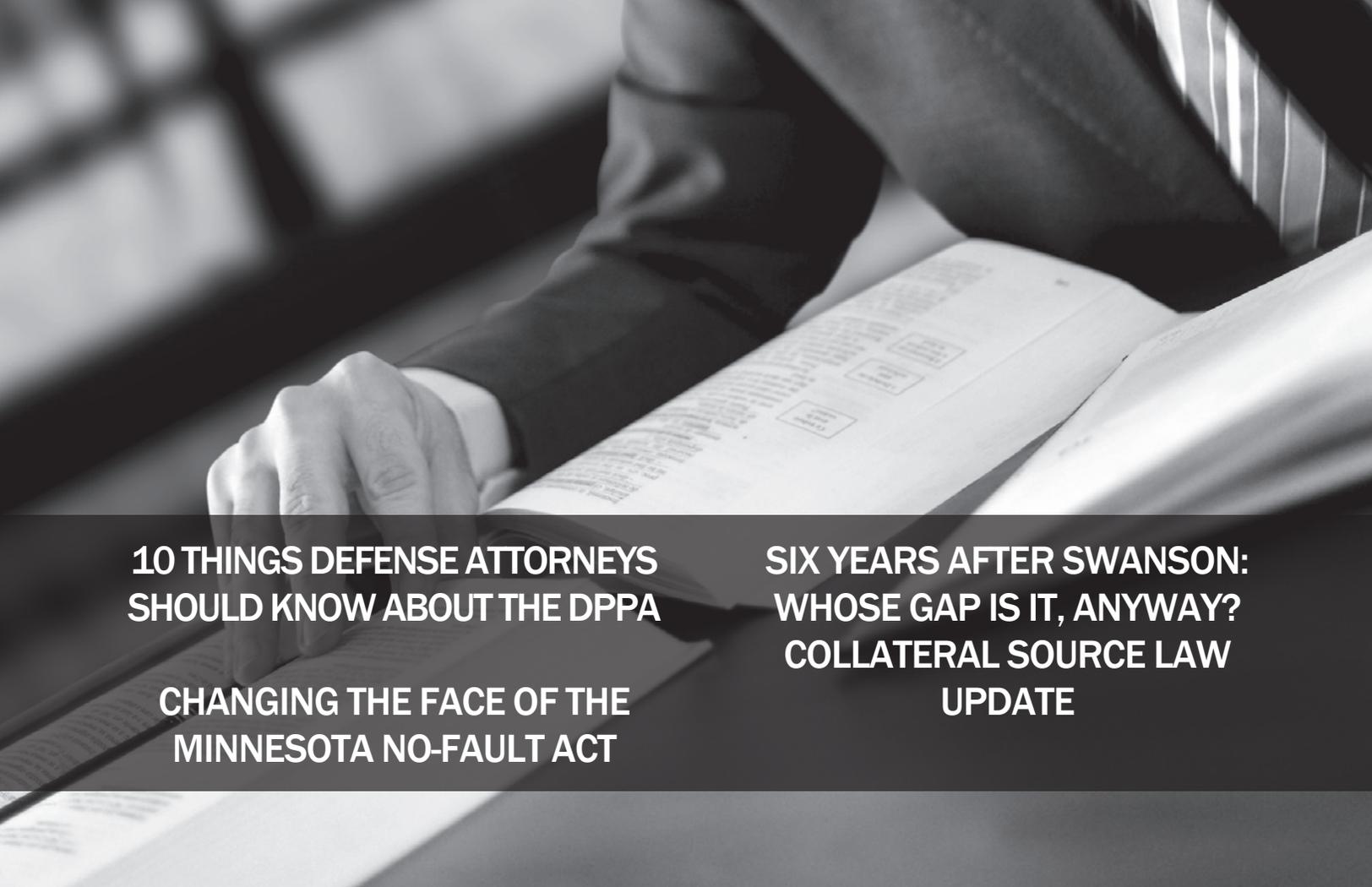


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# SIX YEARS AFTER SWANSON: WHOSE GAP IS IT, ANYWAY? COLLATERAL SOURCE LAW UPDATE

BY JANINE M. LOETSCHER AND BETH A. JENSON PROUTY, BASSFORD REMELE, P.A.

## INTRODUCTION

Following the landmark decision by the Minnesota Supreme Court in *Swanson v. Brewster* in 2010 that negotiated discounts between a provider and an insurer were “collateral sources” by which a verdict must be offset, the plaintiff’s and defense bars were filled with speculation as to how that decision would play out. Would the verdict be offset by Medicare payments or negotiated discounts to such payments? What about Medicaid or Medical Assistance payments and related discounts? Can either party “buy” subrogation rights to a lien — and if so, does the lien include negotiated discounts? How would *Swanson* impact discovery? What about attorney fees paid in settlement with an insurer or workers’ compensation provider?

Today, some of these questions have been answered by Minnesota Courts, but others have not. This article addresses where Minnesota’s collateral source law stands today.

## DEVELOPMENT OF MINNESOTA’S COLLATERAL SOURCE LAW

Minnesota did not adopt a collateral source statute until 1986. Prior to that time, Minnesota courts applied the common law rule collateral source rule, under which “collateral source benefits” — compensation paid on the plaintiff’s behalf from some source other than the defendant tortfeasor, including insurance, government benefits, or gifts — cannot reduce the tortfeasor’s obligation to compensate the plaintiff for injury. In essence, “double recovery” for a plaintiff was the rule: 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.

In 1986, the Minnesota Legislature enacted the Collateral Source Statute (*see* Act of Mar. 25, 1986, ch. 455, § 80, 1986 Minn. Laws 878, 878-79) (now codified at Minn. Stat. § 548.251), which prohibits the recovery of damages from a defendant to the extent a 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. *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990).

A party seeking to offset the verdict by any collateral sources must initiate the procedure by timely bringing a post-trial motion. Importantly, if a motion is not brought within the timeline specified under the statute (“within ten days of the date of entry of the verdict”), the motion will be denied. *See Johnson v. Princeton PUC*, No. A15-0038, 2016 Minn. App. Unpub. LEXIS 5, at \*16-17 (Minn. App. Jan. 4, 2016) (holding that a motion filed eight months before the entry of the verdict was untimely under the statute and that the moving party was not entitled to an offset.)

Once the motion is brought, the court first determines whether there are any collateral sources that have been “paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses,” and if so, the amount of the collateral sources. Only compensation from sources that fit within the statute’s definition of “collateral

*Collateral continued on page 10*



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**Collateral continued from page 9**

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:

(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 . . . , 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 dis-

ability insurance policy where the premiums were wholly paid for by the plaintiff.

Minn. Stat. § 548.251, subd. 1.

All other collateral source benefits not included within this definition are not deducted from any award — even if they have already been paid by another source. Minn. Stat. § 548.251. Gifts, charitable contributions, payments under the United States Social Security Act, or payments for which a subrogation lien is asserted are all outside the definition of “collateral source,” and they do not reduce a verdict.

After the court determines the amount of collateral sources, the court must also 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). The court must then reduce the collateral source offset by the amount paid by or on behalf of the plaintiff, and must the reduce the verdict by the difference in those two amounts. Any reductions for collateral sources must be made prior to the application of any comparative fault reductions under Minn. Stat. § 604.01, subd. 1.

**SWANSON V. BREWSTER CLARIFIES HOW “NEGOTIATED DISCOUNTS” ARE TREATED**

In *Swanson v. Brewster*, the Minnesota Supreme Court finally answered the long-unsettled question of whether negotiated discounts between health insurers and medical pro-  
**Collateral continued on page 11**

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viders — the “gap” between what was billed and what was actually paid — constituted a “collateral source” by which a verdict must be reduced. 784 N.W.2d 264 (Minn. 2010). In *Swanson*, plaintiff was injured when his motorcycle collided with the defendant’s motor vehicle. *Id.* at 266. Liability was not in dispute, and the only issue before the jury was the amount of plaintiff’s damages. *Id.* at 267. Plaintiff incurred medical expenses totaling \$62,259.30. *Id.* His health insurer paid \$17,643.76 in complete satisfaction of the medical provider’s bills, by negotiating a \$43,445.74 discount. *Id.* Following trial, the jury awarded plaintiff \$134,789.30, which included \$62,259.30 for past medical expenses. *Id.* In a post-trial motion, defendant moved for an offset of collateral sources pursuant to Minnesota Statutes section 548.251 and requested that the court reduce the verdict by not only the \$17,643.76 actually paid by the health insurer, but also by the negotiated discount of \$43,445.76. *Id.* The district court rejected defendant’s request, and held that only the \$17,643.76 actually paid was a “collateral source.” *Id.* 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, as required by section 548.251, subd. 2. *Id.* at 267-68. The court of appeals affirmed the lower court’s ruling.

However, the Minnesota Supreme Court reversed, holding that, pursuant to the unambiguous language of section 548.251, the negotiated discount between plaintiff’s health insurer and the medical providers was a “payment related to the injury or disability in question,” and was therefore a collateral source by which the verdict must be offset. *Id.* at 275. The court first concluded the negotiated discount was a “payment,” noting 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.” *Id.* (citing BLACK’S LAW DICTIONARY 1243 (9th ed. 2009)). 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 thing.” *Id.* Further, the court concluded that the negotiated discount was “related to the injury and disability in question” and was made on the plaintiff’s behalf by a “covered” collateral source under the statute — health insurance. *Id.* at 275–76.

In reaching its conclusion, the court emphasized that the legislature’s intent behind the collateral source statute was “prevent[ing] double recoveries in many circumstances,” and reasoned that its opinion was consistent with this intent. *Id.* at 278 (citing *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990)). 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 dis-

counts, differently. Further, the majority noted that holding that negotiated discounts were *not* collateral sources would 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. *Id.* at 279.

### QUESTIONS OPEN AFTER SWANSON

*Swanson* concluded that medical payments (which under *Swanson* include negotiated discounts) between medical providers and private health insurers are treated as a collateral source that can offset the damages paid to a claimant. However, *Swanson* left many open questions as to how its holding would be applied in other common scenarios. First, would *Swanson*’s holding apply to payments pursuant to public benefits, such as by Medicare, Medicaid, or Medical Assistance? Further, how would this apply where the collateral source in question involved a payment of attorney fees? Next, can a plaintiff, as opposed to a defendant, buy a subrogation lien from a party paying collateral sources and enforce it? If so, how is a negotiated discount between health care providers and the party paying collateral sources treated? Finally, how might this impact discovery in personal injury cases?

As predicted after *Swanson*, the plaintiff and defense bars vigorously argued these questions to district and appellate courts. As a result, some of the questions left open by *Swanson* have now been answered, but others remain unsettled. Further, additional questions have arisen as a result of new laws enacted since 2010.

### ARE PUBLIC BENEFIT PAYMENTS “COLLATERAL SOURCES”?

#### A. PAYMENTS BY MEDICARE

Shortly after *Swanson*, various district courts were called upon to decide the question of whether payments by Medicare, or Medicare-negotiated discounts, were collateral sources by which a verdict must be offset, and courts reached varying results. Arguably, the *Swanson* holding could apply to reduce a verdict to the extent of Medicare payments or Medicare-negotiated discounts, because such payments are made “pursuant to” a “public program providing medical expenses.” Minn. Stat. § 548.251, subd. 1(1). However, in 2012, the Minnesota Court of Appeals held that the *Swanson* analysis does not extend to payments made by Medicare or to Medicare-negotiated discounts because they are payments made pursuant to the United States Social Security Act. *Renswick v. Wenzel*, 819 N.W.2d 198 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012).

In *Renswick*, after ingesting alcohol and drugs at a party in defendant’s garage, the plaintiff fell down a staircase leading to the defendant’s basement bathroom. *Id.* at 202-203. As a result of this incident, the plaintiff received medical care and treatment, which was arguably due at least in part to intoxication on her part. *Id.* at 203. At trial, a jury found both parties 50% negligent and awarded \$95,156

*Collateral continued on page 12*

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based on the jury's finding of 50% comparative fault. *Id.* The defendant moved the court to offset the verdict by payments made on the plaintiff's behalf by Medicare and Medicare-negotiated discounts. *Id.* at 204. The court denied the motion, holding that Medicare payments and Medicare-negotiated discounts were "payments made pursuant to the United States Social Security Act." *Id.* at 210.

On appeal, the defendant argued that "Medicare is essentially an insurance program." *Id.* He further argued that, if the verdict was not reduced by Medicare payments or Medicare-negotiated discounts, then the plaintiff would "receive a double recovery based on 'fictitious money' on a debt that she never really owed, thwarting the intent of the legislature." *Id.* The Minnesota Court of Appeals rejected this argument. *Id.* The Court affirmed the lower court's holding that Medicare payments and Medicare-negotiated discounts are paid by "health . . . insurance that provides health benefits . . . pursuant to the United States Social Security Act." *Id.* at 211. Therefore, payments by Medicare are excepted from the definition of "collateral source" offset, and cannot be used to offset a damages award." *Id.* The court refused to disregard the plain language of the statute simply to effectuate the statute's intent of avoiding double recovery to a plaintiff.

### **B. PAYMENTS BY MEDICAID**

Medicaid differs from Medicare (the program under which *Renswick* was decided) in that Medicaid payments are made by the State of Minnesota pursuant to Minnesota law. Minn. Stat. § 256B.041, subd. 2. In contrast, Medicare is a federal health insurance program. Its payments are made pursuant to the federal Social Security Act. The United States itself pays the medical expenses of insured individuals. *Mathis v. Leavitt*, 554 F.3d 731, 732 (8th Cir. 2009); 42 U.S.C. § 1395(g).

But Medicaid is still like Medicare in that Medicaid was created under Title XIX of the United States Social Security Act. See *Adams v. Toyota Motor Corp.*, No. 10-2802 (ADM/JSM), 2015 U.S. Dist. LEXIS 76903, at \*58 (D. Minn. June 15, 2015) (citing *Ark. Dep't. of Health & Human Servs. v. Ahiborn*, 547 U.S. 268 (2006)). Medicaid "is a cooperative federal-state program that pools federal and state funds to

finance the costs of medical care for individuals who cannot afford to pay for medical services." *Id.* (citing 42 U.S.C. § 1396a). "Each state participating in the Medicaid program administers its own program within federally mandated requirements." *Id.* (citing 42 C.F.R. § 430.0). "A participating state must comply with the requirements of Title XIX of the Social Security Act and the regulations promulgated by the United States Secretary of Health and Human Services." *Id.* The state can also offer additional services, in addition to the federally mandated services, and Minnesota has extended its Medicaid program to a number of these additional services. See *Medical Assistance, Information Brief at 10-11*, Minnesota House of Representatives Research Department, Oct. 2015, <http://www.house.leg.state.mn.us/hrd/pubs/medastib.pdf> (last visited February 17, 2016).

Whether or not the holding of *Renswick* regarding Medicare also extends to Medicaid has not yet been addressed by any appellate court in Minnesota. The issue has been addressed by at least one state district court and, most recently, by the Federal District of Minnesota. The outcomes reached have been inconsistent.

In the 2012 opinion of *Burg v. Sullivan*, the Ramsey County District Court determined that medical cost payments made (including negotiated discounts) by UCare Minnesota (a form of insurance provided through Medicaid) were excepted from the collateral source offset to the extent the funds could be traced to Title XIX of the Social Security Act. No. 62-cv-11-2357 (Minn. Dist. Ct., 2d Dist. Oct. 2, 2012). Because 50% of Medicaid's funding during the relevant year came from "federal matching funds" traced to Title XIX, the court held that only 50% of the Medicaid payments (the portion attributable to state-provided funds) was a "collateral source" that could be offset. *Id.*

The Federal District of Minnesota, in the unpublished opinion of *Adams v. Toyota Motor Corporation*, expressly rejected *Burg*, holding instead that stipulated medical payments of \$1 million by Medica and UCare (insurers providing prepaid health plans pursuant to contract with the Department of Human Services as part of the state's Medicaid program) were entirely payments made "pursuant to the Social Security Act" and thus fell within the exception to the definition of "collateral sources" under Minnesota Statutes section 548.251, subdivision 1(2). *Adams v. Toyota Motor Corp.*, No. 10-2802 (ADM/JSM), 2015 U.S. Dist. LEXIS 76903 (D. Minn. June 15, 2015). The court rejected the reasoning of *Burg* as improperly considering the source of "funding" instead of whether the payments were made "pursuant to the United States Social Security Act." *Id.* at \*60 n.9. It then held that "payments made by Minnesota's Medicaid program are 'payments made pursuant to the United States Social Security Act.'" *Id.* at \*60. Even though Medicaid is only partially funded by the Social Security Act and is made under Minnesota's state plan pursuant to Minnesota state law within federal requirements, "this is precisely how the Medicaid program is designed to function under Title XIX of the Social Security Act." *Id.* The Medicaid program is structured as a jointly funded health

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### **Collateral continued from page 12**

insurance program that is administered by states within the confines of federal parameters." *Id.*

Given the unsettled nature of the law, in a case where the payments (including negotiated discounts) by Medicaid are substantial, an insured is likely to dispute any attempt by an insurer to offset payments by Medicaid. If a court applies the rationale of *Adams*, then the negotiated discount is excepted from the collateral source offset and cannot be used to reduce the amount of damages paid to the insured. If a court applies the rationale of *Burg*, it would allow a collateral source offset for the percentage of Medicaid funding that did not come from the "federal matching funds" traced to Title XIX. In 2016, 50% of Medicaid funding will come from such federal funds.

### **C. PAYMENTS BY MEDICAL ASSISTANCE**

Under Medical Assistance, which is Minnesota's Medicaid program (Minn. Stat. § 256B *et al.*; Medical Assistance, Information Brief at 1, 3, Minnesota House of Representatives Research Department, Oct. 2015, <http://www.house.leg.state.mn.us/hrd/pubs/medastib.pdf> [last visited February 17, 2016]), individuals that are uninsured and meet certain criteria can receive assistance through the county to pay medical bills after the bills are incurred. Are such Medical Assistance benefits—which are paid by Medicaid, but are not paid pursuant to any insurance plan—subject to offset?

Referring again to section 548.251, the statute provides:

For purposes of this section, "collateral sources" means *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;*

Minn. Stat. § 548.251, subd. 1(1)-(2). (Emphasis added.)

No Minnesota appellate court has issued an opinion on whether Medical Assistance benefits paid on behalf of someone without insurance are excepted from the collateral source offset.

In both *Adams* and *Burg*, benefits were paid out through UCare or Medica, *insurance plans* providing health care benefits through Medicaid. Therefore, subd. 1(2) applied

because there was "health ... insurance that provides health benefits." The only issue was whether the exception in subd. 1(2) applied to except "payments made pursuant to the United States Social Security Act."

Similarly, in *Renswick*, the tortfeasor argued payments under Medicare should be governed by subd. 1(1) as "payments ... by or pursuant to ... a federal, state, or local ... public program providing medical expenses." *Renswick*, 819 N.W.2d at 210-11. But Medicare payments are made pursuant to a federal health *insurance* program. Therefore, narrowly construing the statute, the court held the payments were excepted from the collateral source offset because they were payments by "health ... insurance that provides health benefits" and were "made pursuant to the United States Social Security Act."

But when an individual does not have health insurance, and receives Medical Assistance to pay for medical bills after they had been incurred, such payments are not made pursuant to "health ... insurance that provides health benefits." In this scenario, the Medical Assistance payments made on an insured's behalf should fall within the "collateral source" definition of Minn. Stat. § 548.251, subd. 1(1), as "payments ... by or pursuant to ... a federal, state, or local ... public program providing medical expenses." Subdivision 1(1) does not contain any exception for payments "made pursuant to the United States Social Security Act." To the contrary, it expressly contemplates that payments made pursuant to a federal program can fall within the definition of a "collateral source."

In opposition, a plaintiff is likely to argue that subd. 1(1) was intended to address programs covering medical expenses for only benefits provided as disability benefits, workers' compensation benefits, or other similar benefits. Payment of medical bills for a qualified individual that does not have health insurance does not fall within these categories. But the plain language of subd. 1(1) does not support this argument. And the case law to date has emphasized that the statute will be narrowly construed according to its plain meaning and that courts will not consider legislative intent.

There is no case law yet developed to support the conclusion that Medical Assistance benefits that are not paid under a health insurance plan fall under subdivision 1(1) rather than subdivision 1(2) and therefore can be offset as a "collateral source." But, narrowly construing section 548.251, subdivision 1, as the courts have done in prior case law, the plain language of the statute favors such position. By a plain reading of the statute, a defendant should be able to offset the negotiated discount that Medical Assistance obtained on medical bills it paid on behalf of an individual that does not have health insurance.

This analysis and conclusion also furthers the public policy purpose for the Collateral Source Statute by preventing double recovery. *See Swanson*, 784 N.W.2d at 278. Arguably, an individual that has already had their medical bills paid

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### **Collateral continued from page 13**

through Medical Assistance, without paying for health insurance, should not be able to recover a double recovery from a defendant.

#### **D. ATTORNEY FEES**

The area of most frequent confusion following *Swanson* has been the court's obligation to reduce any collateral source offset by the amounts paid by or on behalf of a plaintiff to secure the collateral source. In addition to the general questions related to past payments of insurance premiums, plaintiffs have questioned whether attorney fees incurred to secure a "collateral source" benefit reduce the amount of a collateral source offset to a damages award secured in litigation? In *Graff v. Robert M. Swendra Agency, Inc.*, the Minnesota Supreme Court concluded that attorney fees paid to recover workers' compensation benefits are not a "collateral source" under Minn. Stat. § 548.251, subd. 1, and cannot reduce a damages award. 800 N.W.2d 112, 121 (Minn. 2011).

Outside the context of workers' compensation benefits, Minnesota courts have not considered whether attorney fees are defined as a "collateral source" under section 548.251, subdivision 1. However, there are two conflicting unpublished Minnesota Court of Appeals decisions analyzing whether section 548.251, subdivisions 2(2) and (3), allow for attorney fees incurred to recover a collateral source benefit to reduce the amount of a collateral source benefit that applies to offset a damages award. For example, if an insured receives \$10,000 in no-fault benefits, but paid \$2,000 in attorney fees to recover these benefits, is any subsequent damages award in litigation reduced by the full collateral source amount of \$10,000 or does the \$2,000 of attorney fees paid reduce the \$10,000 so that any damages offset is only \$8,000? In *Pappas v. Cummings*, the court held that the plain language of section 548.251, subdivision 2(2), does not allow attorney fees to reduce the amount of a collateral source benefit that offsets a damages award. *Pappas v. Cummings*, No. A09-0167, 2009 Minn. App. Unpub. LEXIS 1096 (Minn. App. Sept. 29, 2009). But in *Kearney v. Orthopaedic & Fracture Clinic, P.A.*, the court held that the public policy purpose for the Collateral Source Statute supports reducing a collateral source benefit that offsets a damages award by the amount of attorney fees incurred to obtain the collateral source benefit. *Kearney v. Orthopaedic & Fracture Clinic, P.A.*, No. A14-1835, 2015 Minn. App. Unpub. LEXIS 905, at \*37-38 (Minn. App. Sept. 8, 2015). These three cases are analyzed and contrasted below.

#### ***Graff v. Robert M. Swendra Agency, Inc.* (2011)**

In the 2011 decision *Graff v. Robert M. Swendra Agency, Inc.*, the Minnesota Supreme Court considered whether attorney fees and costs incurred to obtain workers' compensation benefits should be considered part of the "collateral source" benefit under section 548.251, subdivision 1. *Graff*, 800 N.W.2d at 121. In *Graff*, the insured, Graff, was on duty as a police officer when he was injured in a car

accident with an underinsured motorist. *Id.* The district court reduced Graff's award of underinsured motorist coverage by the amount that Graff recovered from two workers' compensation settlements, but did not reduce the award by the amount of attorney fees paid to obtain the workers' compensation settlements. *Id.* at 114. The Minnesota Supreme Court concluded that payments made to an attorney representing an injured employee in a claim for workers' compensation benefits are not a "collateral source," and do not offset a damages award. *Id.* Minnesota Statute section 548.251, subdivision 1, defines "collateral sources," in relevant part, as "payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf...." Minn. Stat. § 548.251, subd. 1. The Court concluded that unlike an employee's claims for past and future pain, lost wages, loss of future earning capacity, disability and emotional distress, "which flow directly and inextricably from a given injury or disability, payments made for attorney fees do not flow from the injury or disability at all." *Id.* Rather, the attorney fees flow only from the employee's successful claim for compensation. *Id.* The Workers' Compensation Act controls the amount of attorney fees that can be recovered and provides that an attorney can only be paid for legal services if the claim for benefits is successful. Minn. Stat. § 176.081.

The *Graff* Court also explained that its holding would not result in double recovery to Graff, because the percentage of the workers' compensation award allocated to attorney fees was paid directly to Graff's attorney. *Graff*, 800 N.W.2d at 121. Conversely, "allowing the attorney fees to be included in a collateral source offset would leave Graff undercompensated for his injury because those fees were paid directly to his attorneys." *Id.* In a case where attorney fees are not paid directly to the workers' compensation attorney, but are rather paid to the employee, who then pays the attorney, the question remains unanswered whether the Court would find a double recovery inures to the employee. However, such a scenario is not likely to make the attorney fees a "collateral source" because the Court independently concluded that payment of attorney fees in a workers' compensation case is not a "collateral source" because it is not a payment "related to the injury or disability."

Given the unique statutory structure of the Workers' Compensation Act, *Graff* could be limited to attorney fees incurred to recover workers' compensation benefits. Arguably, *Graff* could also be limited to cases where attorney fees are paid directly to the attorney so that the insured never receives them as a benefit. In addition, as explained above, case law determining whether attorney fees reduce the amount of a collateral source offset following trial is inconsistent.

#### ***Kearney v. Orthopaedic & Fracture Clinic, P.A.* (2015)**

In the September 2015 unpublished opinion of *Kearney v. Orthopaedic & Fracture Clinic, P.A.*, the Minnesota Court of Appeals cited to *Graff* to hold that the district court properly reduced the collateral-source offset for disability benefits by the attorney fees that the insured incurred to recover under the disability policy. *Kearney*, 2015 Minn.

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App. Unpub. LEXIS 905, at \*37-38. The court reasoned that “[t]he primary reason of the collateral source statute is to prevent double recoveries by plaintiffs.” *Id.* at \*38 (quoting *Graff*, 800 N.W.2d at 120). Further, statutes should be construed “to avoid unjust results.” *Id.* (quoting *Graff*, 800 N.W.2d at 121). Therefore, the court held that the district court “applied common sense, in light of *Graff*, to achieve the essential purpose of the collateral-source-offset statute: avoiding a double recovery while not leaving the prevailing party ‘under compensated.’” *Id.* at \*40. The court affirmed the reduction of the collateral-source offset by appellant’s attorney fees incurred in recovering under the disability policy. *Id.* at \*40-41.

The *Kearney* opinion does not address the earlier September 2009 unpublished court of appeals opinion in *Pappas v. Cummings*, in which the Minnesota Court of Appeals applied Minn. Stat. § 548.251, subd. 2(2) and (3), to hold that a collateral source offset is not reduced by attorney fees incurred to obtain the collateral source benefit. *Pappas*, 2009 Minn. App. Unpub. LEXIS 1096. Minnesota Statute section 548.251, subdivision 2(2) and (3), provides that a collateral source offset is reduced by “amounts that have been paid . . . by, or on behalf of, the plaintiff . . . for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses.” For example, medical bills paid by an insurer are a “collateral source,” but the amount considered to be a “collateral source” is reduced by the amount the insured paid for health insurance during the previous two years.

In *Pappas*, Pappas recovered \$11,451.89 in no-fault medical benefits from her no-fault insurer. *Id.* at \*3. She then filed suit, claiming she was entitled to additional benefits. *Id.* The jury determined her reasonable medical expenses to be \$10,000. *Id.* The court then offset the award by the \$11,451.89 already paid to Pappas, reducing the award to zero. *Id.* Pappas argued that the court erred in failing to deduct her costs and attorney fees incurred in arbitration with her no-fault insurer from the \$11,451.89 collateral source amount. *Id.* But the court held that attorney fees and costs do not reduce a collateral source offset because in order to offset a collateral source, the fees and costs must be paid during “the two-year period *immediately before* the accrual of the action to secure the right to a collateral source benefit.” *Id.* at \*3-4 (emphasis added). Attorney fees and costs incurred to recover no-fault benefits are not incurred in the two year period *before* the accrual of the action for such benefit; they are incurred *after*.

Thus, the issue of whether attorney fees reduce a collateral source amount remains unsettled.

### **E. PURCHASING SUBROGATION RIGHTS — WHAT DOES THIS MEAN?**

Minnesota Statutes section 548.251 expressly excludes from the definition of “collateral sources” payments for which a subrogation right is asserted. In other words, if a subrogation interest is asserted for a payment or benefit to the plaintiff, the amount of the subrogation interest cannot be offset.

In *Swanson*, the defendant was able to avoid this result, even though plaintiff’s health insurer initially asserted a lien for \$17,643.76, by purchasing the lien from the health insurer. 784 N.W.2d at 267. In doing so, the defendant eliminated the lien and, therefore, was entitled to a collateral source offset for the full amount of the medical expenses that were discharged. Thus, *Swanson* makes it clear that a defendant can “buy” the lien (including any gap created by negotiated discount) in order to bring the full discharged amount within the definition of a collateral source. However, *Swanson* did not address what happens when a plaintiff purchases a lien from a payor of collateral source benefits, such as a health insurer. Not surprisingly, following *Swanson*, an increasing number of plaintiffs are purchasing the subrogation interests of their health insurers, and attempting to assert that lien in order to avoid the collateral source statute. The only appellate case to date appears to hold that, where a plaintiff purchases subrogation rights, she is only entitled to assert the subrogation rights that existed, and only to the extent they were assigned. While the law continues to develop, no Minnesota appellate court has held that a subrogation lien can exist for negotiated discounts (amounts discounted by providers and not actually paid) in the first place, let alone be assigned or purchased.

In *Schneewind v. Austin Mut. Ins. Co.*, the plaintiff was injured in a car accident, and she sought UIM benefits after she reached a \$45,000 settlement with the tortfeasor, who was insured by a \$100,000 liability policy. No. A13-2285, 2014 Minn. App. Unpub. LEXIS 990, at \*2 (Minn. App. Sept. 8, 2014). A jury awarded her \$120,100 in damages, \$62,100 of which were for past medical expenses. *Id.* The insurer moved to offset the verdict by the amounts the plaintiff received as collateral sources, and the district court found that plaintiff had received \$62,100 in collateral sources: \$20,000 in no-fault benefits, and \$42,100 in health insurance benefits paid by Medica. *Id.* at \*3. However, the district court found that Medica had asserted a subrogation lien, and it reduced the collateral source deductions by the amount of that lien. *Id.* Ultimately, the amount of damages was \$82,642.70, and because this amount was less than the tortfeasor’s liability policy, the court determined that the plaintiff was not entitled to UIM benefits. *Id.*

On appeal, the plaintiff argued that the verdict should not have been offset by the \$42,100 in health insurance paid by Medica, because (1) Medica had a right to subrogate both payments it made on her behalf, as well as any negotiated discount, (2) she had purchased Medica’s subrogation right, and (3) she was asserting the subrogation right on her own behalf. *Id.* at \*7. The Minnesota Court of Appeals noted that no Minnesota appellate court had addressed the question of whether an insurer could subrogate a discount that it negotiated on behalf of its insured. *Id.* at \*8. The court then declined to address the merits of this argument, noting that there was no evidence in the record that Medica ever possessed, much less assigned, any rights to the negotiated discount to the plaintiff. *Id.* at \*8-10. The only evidence presented regarding any subrogation right was (1) a March 2011 letter stating that a company had

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been retained “to pursue a recovery for the medical benefits that have been paid” in the amount of \$10,498, and (2) defense counsel’s affidavit stating that Medica informed him that Medica’s total subrogation claim was \$10,696.91, and that the plaintiff had satisfied that amount. *Id.* at \*8-9. In turn, the court explained that the plaintiff failed to present any written evidence directly establishing that Medica had assigned its subrogation rights to her and, if so, to what extent. *Id.* at \*9-10. The court held that the plaintiff’s counsel’s statement at the hearing that the plaintiff “bought” the subrogation right was insufficient evidence to establish any subrogation right because such statement is not “written evidence,” and the Collateral Source Statute requires that “the parties shall submit written evidence of” the existence and amount of collateral sources. *Id.* Further, the court held, *Swanson* did not support Plaintiff’s argument that she could purchase and enforce a subrogation lien for a negotiated discount because *Swanson* did not address either the subrogation exception to the Collateral Source Statute, or whether negotiated discounts could be subrogated. *Id.* at \*10.

However, in a recent district court case from Kanabec County, the court held that, where a plaintiff purchased a lien from her health insurer and purported to assert it on her own behalf, the negotiated discount was not a collateral source. *Auers v. Progressive Direct Insurance Company*, No. 33-CV-14-286 (Minn. Dist. Ct., 10th Dist. Sept. 16, 2015). In *Auers*, a plaintiff injured in a car accident sought UIM benefits after she reached a settlement with the tortfeasor for his \$100,000 liability policy limits. Importantly, the plaintiff died prior to the trial of this matter (for reasons unrelated to the accident), and therefore, the only damages at issue were medical expenses. It was undisputed that Plaintiff incurred \$177,782.44 in reasonable and necessary medical expenses as a result of the accident. She received \$20,000 in no-fault benefits. Her health insurer, BCBS, satisfied her remaining medical expenses, which were \$158,083.44. Specifically, BCBS negotiated a discount of \$85,869.59 and paid \$72,216.85. Notably, the lien was only asserted for the amount actually paid. Thereafter, Plaintiff obtained a “Release of Subrogation Interest and Claim” from BCBS, pursuant to which BCBS assigned its subrogation rights to the extent permitted under *Swanson v. Brewster* to Plaintiff.

The issue came before the court on cross-motions for summary judgment, on stipulated facts. The district court held that, because Plaintiff purchased BCBS’s subrogation rights to the negotiated discount, the court was precluded from considering the negotiated discount as a collateral source. The court did not address the fact that BCBS asserted a subrogation interest for only the \$72,216.85 paid, and not the \$85,869.59 negotiated discount. This case is currently on appeal, with oral argument scheduled for March 2016.

There is one apparent distinction from the position of the defendant in *Swanson* and the plaintiffs in the *Schneewind* and *Auers* cases. In *Swanson*, there was no lien at issue, because the defendant had purchased the lien. With no lien at issue, the *Swanson* Court was only called upon to

determine the amount of collateral source payments and offsets. In deciding that the negotiated discount between the fees that were billed and the amount actually paid by the health insurer was a collateral source, the *Swanson* Court was guided by the purpose of the Collateral Source Statute: avoiding double recovery. It is important to note that the *Swanson* Court *did not* hold that State Farm was entitled to the negotiated discount because it purchased the lien; rather, it simply held that the negotiated discount was a collateral source because the plaintiff would never have to repay it. In fact, *Swanson* expressly stated that the defendant “purchased and now owns any right HealthPartners had to recover any money paid by HealthPartners on [plaintiff’s] behalf.” 784 N.W.2d at 267.

But the question raised in *Schneewind* and *Auers* is different from *Swanson*. Unlike in *Swanson*, a lien was at issue in both of these cases because the plaintiffs purchased it and asserted it. Those courts were accordingly called upon to determine the effect of and the amount of the lien — questions *Swanson* never addressed. As the *Schneewind* court appears to recognize, the purpose of the Collateral Source Statute should be considered in determining this amount. Further, *Schneewind* also recognized that the lien amount must be established by written evidence, and because the plaintiff failed to show that there was ever a lien for the negotiated discount (a seemingly strange proposition to begin with, because one would generally not have a lien for money it did not pay), that negotiated discount was a collateral source.

While several questions regarding the purchase of a subrogation lien remain unanswered at this time, litigants should be aware that plaintiffs are frequently purchasing subrogation liens and then asserting the lien in an attempt to remove any negotiated discounts from the reach of the Collateral Source Statute.

### **F. DISCOVERY CONSIDERATIONS**

As a final issue, even before *Swanson* was decided, plaintiffs often refused to provide information regarding collateral sources in discovery, on the basis that such information is outside the scope of Minnesota Rule 26.02 because information regarding collateral sources is generally inadmissible during trial. During the last six years, this position has been asserted with even more frequency - in some occasions, in effort to hide the existence of a subrogation lien until the Plaintiff is able to negotiate a deal and purchase the lien from the health or other insurer.

As a practical matter, Minnesota Rule of Civil Procedure 26.02 does not preclude or prevent discovery of information regarding collateral sources. That rule provides that “parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party.” Minn. R. Civ. P. 26.02(b). Even if information is itself inadmissible, it is nevertheless discoverable, so long as “the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” It is difficult to com-

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prehend how discovery requesting information regarding “payments related to the injury or disability in question made to the plaintiff, or on the plaintiff’s behalf” is not likely to lead to the discovery of admissible evidence.

There is no appellate case law expressly holding that information regarding collateral sources is, or is not, discoverable. However, at least one district court has held that failure to produce information regarding collateral sources and subrogation liens, where such information was specifically requested in discovery, was “not adequate compliance with discovery.” *Gjertson v. Peterson*, No. 02-cv-09-5053, 2010 Minn. Dist. LEXIS 74, at \*17 (Minn. Dist. Ct., 10th Dist. Sept. 28, 2010) (declining to deduct from the collateral source calculation a purported settlement between Plaintiff and her health insurer, which plaintiff claimed discharged a subrogation lien). However, two unpublished Minnesota Court of Appeals decisions underscore the importance of parties submitting evidence in support (or in opposition to) a motion to determine collateral sources. See, e.g., *Schneewind*, No. A13-2285, 2014 Minn. App. Unpub. LEXIS 990; *Crawford v. State Farm Mut. Ins. Co.*, No. A12-0254, A12-1321, 2012 Minn. App. Unpub. LEXIS 1182 (Minn. App. Dec. 17, 2012).

As noted above, the plaintiff in *Schneewind* argued that she purchased the subrogation rights to both the lien asserted by Medica (\$10,696,91), as well as the discount Medica negotiated with plaintiff’s health care providers, and that she was asserting the subrogation rights to both (for the total amount of the medical expenses, \$42,100). *Schneewind*, No. A13-2285, 2014 Minn. App. Unpub. LEXIS 990 at \*7-8. The court rejected her argument and held that she at most purchased a subrogation lien for the amount of \$10,696.91. *Id.* at \*10. Therefore, the court held that was the only amount for which a subrogation right was actually asserted, and that was the only amount that would be excepted from the definition of “collateral source” (as opposed to the entire \$42,100). *Id.* at \*10-11. In so holding, the court reasoned that the only written evidence submitted to the court showed that Medica had asserted a lien in the amount of \$10,696.91, and that Plaintiff purchased the subrogation rights to that lien. *Id.* at \*9-10. The court further held that plaintiff’s counsel’s mere verbal assertion that plaintiff purchased subrogation rights to the entire \$42,100 was insufficient to warrant reduction of the collateral source amount by \$42,100. *Id.*

The *Crawford* court performed a similar analysis. In *Crawford*, the plaintiff was injured in two separate car accidents, and reaching a \$40,000 settlement with the tortfeasor (who was insured under a \$50,000 liability policy), sued her defendant insurer for denying no-fault benefits for both accidents, and for UIM benefits for the first accident. No. A12-0254, A12-1321, 2012 Minn. App. Unpub. LEXIS 1182, at \*2-3. At trial, the jury awarded plaintiff past medical expenses, and the defendant then moved for collateral source offsets. *Id.* at \*4-5. The plaintiff submitted evidence that she remained liable for \$28,478.62 in unpaid medical

services, in the form of bills requesting payment in that amount. *Id.* at \*12. Defendant argued that it was very likely that plaintiff’s bills had been paid, negotiated, or discounted, but submitted no written evidence in support of this argument. *Id.* at \*14-15. The district court offset the verdict by \$28,478.62, reasoning that plaintiff failed to show “that reimbursement is sought for these expenses or a subrogation interest has been asserted. *Id.* at \*13-14.

The Minnesota Court of Appeals reversed. *Id.* at \*15-16. The court held that plaintiff met her burden by submitting written evidence that she remains responsible for medical bills in the amount of \$28,478.62. *Id.* at \*15. In contrast, the defendant failed to submit any written evidence that the bills had been paid, negotiated, or discounted. *Id.* Accordingly, the court noted, there was no evidence of double recovery by the plaintiff. *Id.*

At first glance, the *Schneewind* and *Crawford* opinions appear inconsistent. However, these cases are consistent, in that they establish that written evidence is essential to establish or rebut a claim regarding collateral source offsets or reductions of collateral source offsets — and the party who fails to submit written evidence is not likely to prevail. Accordingly, it is imperative that defendants obtain information regarding potential collateral sources, including information regarding discounts or subrogation rights, in discovery, and insist upon adequate compliance with discovery.

## CONCLUSION

Six years after *Swanson*, certain questions regarding application of Minnesota’s Collateral Source statute have been answered, but others remain. While courts have concluded that Medicare payments and Medicare-negotiated discounts are not collateral sources and will not offset the verdict, no appellate court has reached a conclusion as to whether Medicaid payments and Medicaid-negotiated discounts are collateral sources. And while there are trial court decisions at both the state and federal level, those decisions are inconsistent. In addition, Minnesota courts have not reached the question of whether Medical Assistance payments (paid by Minnesota’s Medicaid program, but not under an insurance plan) are collateral sources and the question of whether attorney fees are a collateral source also remains open. Further, while the purchase of a lien by defendant was relevant to the *Swanson* decision, the question of who can buy a lien, and whether negotiated discounts can be subrogated, remains unanswered. Finally, no appellate court decisions expressly hold that information regarding collateral sources are, or are not, discoverable. However, recent cases have stressed the importance of parties obtaining, and supporting their collateral source arguments, with written evidence. Many of these issues will likely pass before the appellate courts in the near future. Stay tuned.