

Victim's Rights Versus Special Interest: A Difficult Choice for the Kansas Legislature in Its Fight to Abrogate the Collateral Source Rule

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I. INTRODUCTION

The collateral source rule is a common law concept that allows injured persons to recover the reasonable value of the economic damages incurred from the tortfeasor even when insurance, or another third party independent of the tortfeasor, paid some or all of those damages.¹ Under the common law collateral source rule, an injured plaintiff is allowed to present evidence of the full amount of the medical bills incurred.² The tortfeasor is not allowed to counter the plaintiff's evidence of medical damages with evidence that the injured plaintiff was covered by insurance and that the insurance company paid some or all of the medical bills.³ The injured plaintiff is allowed to recover the full amount of medical expenses incurred from the tortfeasor, even though some or all of those medical bills were already paid.⁴

During the last twenty-five years, advocates of tort reform have targeted the collateral source rule, and the rule has been either limited or abolished in most jurisdictions.⁵ The common law collateral source rule is applicable in Kansas today,⁶ but it has been the topic of decades of contentious debate.⁷ Beginning in the 1970s, the Kansas legislature introduced a variety of tort reform measures, including abrogation of the collateral source rule, in response to the purported medical malpractice "crisis" caused by soaring malpractice insurance premiums.⁸ The Kansas legislature was successful in passing legislation to eliminate the collateral source rule three times, but Kansas

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1. *Bates v. Hogg*, 921 P.2d 249, 252 (Kan. Ct. App. 1996).

2. *See id.* at 252-53 (quoting *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939 (Kan. 1985)).

3. *Id.* at 252 (citing *Masterson v. Boliden-Allis, Inc.*, 865 P.2d 1031 (Kan. Ct. App. 1993)).

4. *Id.*

5. CTR. FOR JUSTICE & DEMOCRACY, THE MEDICAL PROFESSION—MORE PROTECTION FOR NEGLIGENCE THAN ANY PROFESSION IN THE COUNTRY, <http://www.centerjd.org/free/medmallist.htm> (last visited Oct. 21, 2005) [hereinafter CTR. FOR JUSTICE & DEMOCRACY, THE MEDICAL PROFESSION].

6. *See Zak v. Riffel*, 115 P.3d 165 (Kan. Ct. App. 2005) (applying the collateral source rule).

7. *See infra* Part II.B.1.

8. SPECIAL COMM. ON MED. MALPRACTICE, REPORT ON KANSAS LEGISLATIVE INTERIM STUDIES TO THE 1976 LEGISLATURE, PROPOSAL NO. 42, at 1143, 1159-65 (1976) [hereinafter 1976 REPORT ON PROPOSAL NO. 42].

courts held all three pieces of legislation unconstitutional.⁹ Legislative interim studies conducted throughout the years concluded that abrogation of the collateral source rule would do nothing to affect soaring medical malpractice premiums.¹⁰ Despite the rulings of the courts and conclusions of the legislative special committees, the Kansas legislature has continued to introduce legislation to abolish the rule.¹¹ The most recent legislation was introduced in the 2005 session but did not pass.¹² Many anticipate a revival of the legislation in the 2006 session.¹³

This note begins with an explanation of the purpose of the common law collateral source rule and discusses the arguments offered by those against the rule. Next, this note describes the steps taken in Kansas to remedy the medical malpractice “crisis,” including legislative action to abrogate the collateral source rule, by examining the legislative history and court action on the issue. Recently, one Kansas court decision altered the common law collateral source rule, resulting in discrimination against injured plaintiffs insured by Medicaid.¹⁴ This note explores the constitutional questions that the decision raises and concludes that the discrimination cannot be justified. More recently, the Kansas courts have issued three conflicting decisions on the issue of whether the rule applies to the amount written off by an injured plaintiff’s collateral sources.¹⁵ This note discusses the conflicting decisions that have left the Kansas practitioner unsure of the status of the law.

This note also examines whether Kansas should abolish the collateral source rule by analyzing the effect the rule has on insurance premiums, the purported medical malpractice “crisis,” and the impact that elimination of the rule would have on injured Kansans. Ultimately, this note concludes that the grave societal impact that abolishing the rule would have on persons injured by the negligent acts of others far outweighs the slight benefit that abolition of the rule would bestow on insurance companies. Finally, if the Kansas legislature

9. KAN. STAT. ANN. § 60-471 (originally enacted as 1976 Kan. Sess. Laws 968) (repealed 1985), *invalidated by* *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939 (Kan. 1985); KAN. STAT. ANN. § 60-3403 (originally enacted as 1985 Kan. Sess. Laws 951) (repealed 1988), *invalidated by* *Farley v. Engelken*, 740 P.2d 1058 (Kan. 1987); KAN. STAT. ANN. § 60-3802 (1994), *invalidated by* *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993).

10. *See infra* Part II.B.I.

11. *See infra* Part II.B.I.

12. S.B. 102, 2005 Sess. (Kan. 2005).

13. Telephone Interview with Jim Clark, Legislative Counsel, Kansas Bar Association, in Topeka, Kan. (Sept. 29, 2005) [hereinafter Clark Interview].

14. *See Bates v. Hogg*, 921 P.2d 249 (Kan. Ct. App. 1996).

15. *See Rose v. Via Christi Health Sys., Inc. (Rose II)*, 113 P.3d 241 (Kan. 2005); *Fischer v. Farmers Ins. Co.*, No. 90,246, slip op. (Kan. Ct. App. Feb. 18, 2005); *Rose v. Via Christi Health Sys., Inc. (Rose I)*, 78 P.3d 798 (Kan. 2003), *modified on reh'g*, 113 P.3d 241 (Kan. 2005).

seeks to abrogate the rule in the future, this note anticipates the resulting constitutional problems.

II. BACKGROUND

A. *History of the Collateral Source Rule*

1. The Beginning of the Collateral Source Rule

The common law collateral source rule provides that “benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.”¹⁶ When an insurance company or other third party pays a plaintiff’s medical bills, the collateral source rule precludes the tortfeasor from admitting evidence of the payments from that source to reduce the damages for which the tortfeasor is liable.¹⁷ The rule first appeared in 1854 in *The Propeller Monticello v. Mollison*,¹⁸ a United States Supreme Court case in which the defendant argued that the plaintiff had been made whole by its insurance coverage for damage done to its boat and, therefore, should not be allowed to recover damages from the defendant.¹⁹ The Court ruled that the plaintiff could pursue damages from the defendant, reasoning that the amount the plaintiff received from insurance played no part in the determination of the defendant’s liability.²⁰ The defendant was liable for the damages he caused, regardless of any amounts received for the injury by the plaintiff from any third party.²¹ In the following years, the common law collateral source rule took shape and became a recognized rule that prevents a defendant from introducing evidence of any payments made on behalf of the plaintiff by collateral sources.²²

During the last thirty years, nearly every state has enacted legislation that limits or abrogates the rule.²³ Only thirteen states apply the common law collateral source rule.²⁴ Many states have statutes that

16. Farley v. Engelken, 740 P.2d 1058, 1060 (Kan. 1987) (quoting Allman v. Holleman, 667 P.2d 296 (Kan. 1983)).

17. *Id.*

18. 58 U.S. 152 (1855).

19. *Id.* at 155.

20. *Id.* at 155-56.

21. *Id.* Several years later, a New York court extended the collateral source rule to a wrongful death action in which a defendant sought to introduce evidence of life insurance proceeds to reduce the damages owed by the defendant. Althorff v. Wolfe, 22 N.Y. 355, 358 (1860).

22. See, e.g., Southard v. Lira, 512 P.2d 409 (Kan. 1973); Rexroad v. Kan. Power & Light Co., 388 P.2d 832 (Kan. 1964); Lewark v. Parkinson, 85 P. 601 (Kan. 1906).

23. See CTR. FOR JUSTICE & DEMOCRACY, THE MEDICAL PROFESSION, *supra* note 5.

24. *Id.* Arkansas, Hawaii, Louisiana, Mississippi, New Hampshire, New Mexico, North Carolina, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wyoming apply the common law collateral source rule. *Id.* Hawaii has a unique collateral source rule statute that allows liens to be filed by third parties against the plaintiff’s award. The statute does not allow evidence of collateral source benefits to reduce the damages paid to the plaintiff by the defendant. AM.

only allow evidence of collateral source benefits in medical malpractice cases.²⁵ All other states do not apply the rule and allow evidence of collateral source benefits to reduce the damages owed by the defendant.²⁶ Three states, including Kansas, have enacted laws eliminating the collateral source rule, which were later declared unconstitutional.²⁷

2. The Purpose of the Collateral Source Rule

Courts have relied on several rationales in upholding the common law collateral source rule. First, the rule holds the negligent tortfeasor responsible for the full amount of damages he caused.²⁸ Without the rule, the tortfeasor escapes responsibility for his actions.²⁹ Reduction of the injured plaintiff's damages by collateral source benefits relieves the negligent tortfeasor from paying the entire amount of damages.³⁰

Second, when a tortfeasor is not required to pay the full amount of the damages he caused, the tortfeasor is no longer deterred by tort law.³¹ A tortfeasor may act reasonably when he knows that he will be held responsible for the full amount of damages he caused.³² If, however, the tortfeasor knows that the injured party's insurance company will pay for the damages he caused, he may have less incentive to act reasonably.³³ Furthermore, society encourages people to insure themselves, but without the collateral source rule, the tortfeasor has less incentive to obtain his own insurance.³⁴

Critics of the collateral source rule argue that the rule grants an injured plaintiff a windfall by allowing her to recover twice for one

TORT REFORM ASS'N, HAWAII REFORMS, <http://www.atra.org/states/HI> (last visited Oct. 21, 2005).

25. See CTR. FOR JUSTICE & DEMOCRACY, THE MEDICAL PROFESSION, *supra* note 5. Arizona, California, Connecticut, Illinois, Maine, Massachusetts, Nevada, Rhode Island, South Dakota, Tennessee, Utah, Washington, and Wisconsin only allow evidence of collateral source benefits in medical malpractice cases. *Id.* These states' laws are similar to section 60-471 of the Kansas Statutes Annotated, which was found unconstitutional. See *infra* Part II.B.1.a.

26. See CTR. FOR JUSTICE & DEMOCRACY, THE MEDICAL PROFESSION, *supra* note 5. Alaska, Colorado, Delaware, District of Columbia, Florida, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, and Pennsylvania have abrogated the common law collateral source rule. *Id.*

27. *Id.* Kansas, Georgia, and Kentucky enacted laws abrogating the collateral source rule, which were declared unconstitutional. *Id.* Alabama also declared its statute abrogating the collateral source rule unconstitutional; however, this decision was overruled in 2000. *Id.*

28. Bates v. Hogg, 921 P.2d 249, 255 (Kan. Ct. App. 1996) (Rulon, J., dissenting) (citing 2 MINZER ET AL., DAMAGES IN TORT ACTIONS § 9.60, at 9-88 (1991)).

29. *Id.*

30. *Id.*

31. PUBLIC CITIZEN, THE COLLATERAL SOURCE RULE: HELPING TO BALANCE THE SCALES OF JUSTICE, http://www.citizen.org/print_article.cfm?ID=831 (last visited Oct. 21, 2005).

32. *Id.*

33. *Id.*

34. *Id.*

injury, once from insurance and then again from the tortfeasor.³⁵ Many courts, however, find that in cases of a windfall, it is better to allow the innocently injured party to profit than to allow the wrongdoer to escape full responsibility for the damages he caused.³⁶ Furthermore, a windfall is rarely realized by an injured victim.³⁷ When an injured party has contracted for and secured insurance coverage, she should receive the benefit of her bargain.³⁸ In such cases, the injured party paid premiums for the insurance coverage, and as a result, the insurance company has a duty to pay the benefits under the policy.³⁹ Regardless of whether the insured has a right of recovery against a tortfeasor, the insurance company has a contractual obligation to pay the benefits under the policy.⁴⁰

Moreover, whenever the insurance company pays medical bills on behalf of its insured, the amount paid is charged against the insured's lifetime cap.⁴¹ When an injured party uses her health insurance to pay for medical bills incurred because of the tortfeasor's negligence, the amount paid lowers the remaining amount available under her lifetime cap.⁴² If she exceeds the cap in her lifetime, she will not have coverage for possible future injuries or illnesses.⁴³ An injured party may suffer similar consequences for receiving benefits under other lines of insurance. For example, if an insured has too many claims under her automobile policy, then the insurance company may discontinue coverage or increase her premiums in exchange for continued coverage.

Additionally, an injured party is rarely compensated in full by a jury verdict or settlement.⁴⁴ Non-economic awards, such as pain and suffering or the death of a loved one, are difficult to value.⁴⁵ In the case of such damages, the jury is forced to merely estimate how the injury or loss converts into a monetary award.⁴⁶ The Tenth Circuit

35. Joseph M. Engl, Comment, *Gratuitous Nursing Services Rendered by Extended Family Members and Other Third Parties: Can Injured Parties Receive Reimbursement Under Wisconsin's Collateral Source Rule?*, 85 MARO. L. REV. 1003, 1008 (2002).

36. *Rose v. Via Christi Health Sys., Inc. (Rose I)*, 78 P.3d 798, 802 (Kan. 2003), modified on reh'g, 113 P.3d 241 (Kan. 2005).

37. See David L. Edwards, Note, *Jurgensen v. Smith: Shutting the Door on Collateral Source Evidence in South Dakota*, 46 S.D. L. REV. 316, 322 (2001); Christian D. Saine, Note, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 CASE W. RES. L. REV. 1075, 1078 (1997).

38. Edwards, *supra* note 37, at 321.

39. *Id.* at 321-22.

40. Saine, *supra* note 37, at 1078.

41. KAN. INS. DEP'T, HEALTH INSURANCE IN KANSAS 12-13, available at <http://www.ksinsurance.org/consumers/publications/healthbk03minuscover.pdf?id=0143> (last visited Oct. 21, 2005) [hereinafter HEALTH INSURANCE IN KANSAS].

42. *Id.*

43. *Id.*

44. Saine, *supra* note 37, at 1078.

45. *Id.*

46. *Id.*

explained that “notwithstanding that the law contemplates full compensation, incidental losses and handicaps are suffered in a great number of personal injury cases which are not, and cannot be, fully compensated.”⁴⁷ Furthermore, jurors judge the severity of the claim by the amount of the medical bills incurred.⁴⁸ The higher the medical bills, the higher the award for pain and suffering.⁴⁹ When the jury is presented with few or no medical bills, the jury may believe that the injury was insignificant and award a lower amount for non-economic damages.⁵⁰ Also, the injured party pays the legal costs of pursuing recovery from a tortfeasor.⁵¹ A plaintiff’s trial expenses can alone range from \$35,000 to \$50,000 or more, not including attorney’s fees.⁵² A plaintiff also pays her own attorney’s fees, ranging anywhere from thirty-three percent or more of the total amount awarded by the jury.⁵³ Limiting jury awards to exact reimbursement of damages incurred results in a net loss to the injured party.⁵⁴

B. *Kansas and the Collateral Source Rule*

1. Legislative Attempts to Repeal the Collateral Source Rule

Kansas courts have long applied the common law collateral source rule, dating as far back as 1906.⁵⁵ In the early 1970s, however, medical malpractice premiums increased significantly, and the nation experienced what appeared at the time to be a medical malpractice crisis.⁵⁶ In response, many state legislatures introduced some type of tort reform measures with the intention that such measures would make malpractice insurance more affordable.⁵⁷ Similarly, the Kansas legislature embarked on an effort to balance the need for affordable liability insurance with the rights of those injured by the negligent acts of others.⁵⁸ The Kansas legislature began studying the issue in an ef-

47. *Crowe v. Wigglesworth*, 623 F. Supp. 699, 701 (D. Kan. 1985).

48. Brief of Amicus Curiae—Kansas Trial Lawyers Ass’n at 13, *Rose v. Via Christi Health Sys., Inc. (Rose I)*, 78 P.3d 798 (Kan. 2003) (No. 88,434) [hereinafter KTLA Brief].

49. *Id.*

50. *Id.*

51. Edwards, *supra* note 37, at 322.

52. Dr. William P. Gunnar, Article, *Is There an Acceptable Answer to Rising Medical Malpractice Premiums?*, 13 ANNALS HEALTH L. 465, 479 (2004) (citing Monique A. Anawis, Symposium, Medical Malpractice: Innovative Practice Applications, in 6 DEPAUL J. HEALTH CARE L. 309, 311 (2003)).

53. *Id.*

54. Edwards, *supra* note 37, at 322.

55. See, e.g., *Coburn v. Agustin*, 627 F. Supp. 983, 985 (D. Kan. 1985) (citing *Southard v. Lira*, 512 P.2d 409 (Kan. 1973); *Rexroad v. Kan. Power & Light Co.*, 388 P.2d 832 (Kan. 1963); *Lewark v. Parkinson*, 85 P. 601 (Kan. 1906)).

56. *Coburn*, 627 F. Supp. at 985; 1976 REPORT ON PROPOSAL NO. 42, *supra* note 8, at 1143.

57. H. STANDING COMM. ON JUDICIARY, 1971 REPORTS AND RECOMMENDATIONS OF SPECIAL, STANDING, AND SUBCOMMITTEES TO THE 1972 SESSION OF THE KANSAS LEGISLATURE, MALPRACTICE (H.B. 1633), at 483 [hereinafter 1971 REPORT].

58. *Id.*

fort to determine whether legislative action could remedy the situation.⁵⁹

Between 1970 and 1974, three special committees conducted interim studies on the medical malpractice issue.⁶⁰ All three committees concluded that while malpractice claims had increased, legislative action would not remedy the situation.⁶¹ Instead, the committees recommended internal controls within the medical field to reduce incidents of malpractice, rather than legislative action to limit the right to a recovery after the malpractice occurred.⁶²

A 1976 Kansas legislative interim report conducted by the Special Committee on Medical Malpractice was the first to recommend legislative action in response to the perceived medical malpractice crisis.⁶³ After hearing from representatives of the healthcare industry, the insurance industry, and the legal profession, the committee was persuaded to recommend several pieces of legislation, including Senate Bill 639, which sought to allow evidence of payments from collateral sources in actions against healthcare providers.⁶⁴ The report, however, stated that the legislature should proceed with caution and included recommendations for the creation of a committee to study and monitor the impact of the legislation, if enacted, on the perceived problem at some point in the future.⁶⁵ At the time of the report, Kansas healthcare providers had experienced an increase in premiums over only a six-month period.⁶⁶ The committee recognized that many other factors affected malpractice insurance and that additional time was needed to determine whether the suggested measures achieved the goal.⁶⁷

59. *Id.*

60. SPECIAL COMM. ON CIVIL LAW & PROCEDURE, REPORTS OF SPECIAL COMMITTEES TO THE 1974 KANSAS LEGISLATURE, PROPOSAL NO. 89, at 89-1 [hereinafter 1974 REPORT ON PROPOSAL NO. 89]. The first interim committee, the Kansas Legislative Council Judiciary Committee, performed an exhaustive study of professional malpractice during the 1970 interim session. *Id.*

House Bill 1633, which was introduced in the 1971 session, sought, among other things, to reduce the statute of limitations for medical malpractice actions. The bill did not pass, and in response, the second interim committee was created. *Id.*; H.B. 1633, 1971 Sess. (Kan. 1971). House Bill 1633 did not address the collateral source rule. H.B. 1633, 1971 Sess. (Kan. 1971).

61. 1974 REPORT ON PROPOSAL NO. 89, *supra* note 60, at 89-2.

62. *Id.* at 89-1. The third interim committee examined a number of concurrent studies conducted at the federal level, all of which concluded that legislative action would not affect the medical malpractice problem and instead recommended internal controls in the medical field. *Id.*

63. 1976 REPORT ON PROPOSAL NO. 42, *supra* note 8, at 1159-65.

64. *Id.* at 1150-53, 1159-65.

65. *Id.* at 1164-65.

66. *Id.* at 1155.

67. *Id.* at 1164-65.

a. *Section 60-471 of the Kansas Statutes Annotated*

Senate Bill 639 passed the 1976 Kansas legislative session and became section 60-471 of the Kansas Statutes Annotated.⁶⁸ The statute allowed juries to hear evidence of payments made to either reimburse or indemnify the plaintiff for the injuries sustained from the alleged medical malpractice; however, evidence of such payments was not admissible when the plaintiff's individual insurance policy or the plaintiff's employer-provided insurance policy made the payments.⁶⁹ The statute provided special protection to negligent healthcare providers by allowing only those defendant providers to introduce evidence of collateral source payments.⁷⁰ Furthermore, the statute created two classes of plaintiffs: those who paid for insurance or had employers who provided insurance, and those without insurance whose medical bills were paid by charity or other gratuitous care.⁷¹

Three years after its enactment, the statute was contested on equal protection grounds.⁷² The statute was first upheld by the United States District Court for the District of Kansas in *Marlatt v. Hutton*⁷³ in 1979 and was again upheld in *Holman v. The Menninger Foundation*⁷⁴ in 1982.⁷⁵ In 1981, however, Judge Frank Theis ruled in *Doran v. Priddy*⁷⁶ that section 60-471 violated the Equal Protection Clause of the United States Constitution, as well as the Equal Protection Clause of the Kansas Constitution.⁷⁷ The court applied intermediate scrutiny and held that the statute did indeed discriminate between those victims of medical malpractice with insurance and those victims without.⁷⁸ Such discrimination did not have a "reasonable and substantial relation" to the legislature's purported purpose of lowering medical malpractice insurance premiums.⁷⁹ The legislation,

68. KAN. STAT. ANN. § 60-471 (originally enacted as 1976 Kan. Sess. Laws 968) (repealed 1985), *invalidated* by *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939 (Kan. 1985). Senate Bill 852 was also introduced in the 1976 session. S.B. 852, 1976 Sess. (Kan. 1976). The bill included the language regarding the collateral source rule of Senate Bill 639 in an extensive act relating to civil procedure. *Id.*

69. § 60-471.

70. *Id.*

71. *Id.*

72. *Wentling*, 701 P.2d at 949. In 1978, the legislature sought to amend section 60-471 in House Bill 2892 and Senate Bill 625, making section 60-471 applicable to all personal injury actions, not just those against health care providers. H.B. 2892, 1978 Sess. (Kan. 1978); S.B. 625, 1978 Sess. (Kan. 1978). In 1981, the legislature again sought to amend section 60-471 in Senate Bill 333, this time admitting evidence of the injured party's right to any *future* reimbursement or indemnification, as section 60-471 only allowed evidence of the amount already received by the injured party. S.B. 333, 1981 Sess. (Kan. 1981).

73. No. 76-46-C5 (D. Kan. Apr. 3, 1979).

74. No. 79-4090 (D. Kan. July 13, 1982).

75. *Wentling*, 701 P.2d at 949.

76. 534 F. Supp. 30 (D. Kan. 1981).

77. *Id.* at 37.

78. *Id.* Although many of the courts discussed throughout this note refer to "heightened scrutiny," for clarity, this note will use the term "intermediate scrutiny."

79. *Id.* at 38.

instead, undermined the legislative purpose and did so to the detriment of the indigent litigant.⁸⁰ Accordingly, the federal court ruled that section 60-471 violated the Fourteenth Amendment to the United States Constitution and opined that the Kansas Supreme Court would find that the statute also violated Article 2, Section 17 of the Kansas Constitution.⁸¹

Section 60-471 of the Kansas Statutes Annotated finally came before the Kansas Supreme Court in 1985.⁸² The Kansas Supreme Court in *Wentling v. Medical Anesthesia Services*,⁸³ following the reasoning in *Doran*, held section 60-471 unconstitutional for violating the equal protection clauses of the United States and Kansas constitutions.⁸⁴ Using intermediate scrutiny, the court found that the statute unlawfully discriminated between plaintiffs with insurance and plaintiffs without.⁸⁵

b. *Section 60-3403 of the Kansas Statutes Annotated*

Prior to the decision in *Wentling*, the Kansas legislature apparently recognized the statute's failures and repealed section 60-471 through Senate Bill 110 in late April 1985.⁸⁶ Senate Bill 110 led to the enactment of section 60-3403 of the Kansas Statutes Annotated.⁸⁷ The statute allowed evidence of insurance payments in medical malpractice cases, including those payments made by insurance paid for by the plaintiff.⁸⁸ This time, however, the statute allowed plaintiffs to counter such evidence with evidence of liens held against any recovery by the insurance company that made the payment.⁸⁹

As a result of the debate on Senate Bill 110, all interested parties recognized the complexity of the issue and requested further study and debate. Before Senate Bill 110 passed, the Insurance Commissioner established a Blue Ribbon Commission to study the medical malpractice issue.⁹⁰ The commission determined that the affordability

80. *Id.* at 37.

81. *Id.*

82. *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939, 949 (Kan. 1985).

83. 701 P.2d 939 (Kan. 1985).

84. *Id.* at 951.

85. *Id.* at 950.

86. *Crowe v. Wigglesworth*, 623 F. Supp. 699, 700 (D. Kan. 1985).

87. KAN. STAT. ANN. § 60-3403 (originally enacted as 1985 Kan. Sess. Laws 951) (repealed 1988), *invalidated* by *Farley v. Engelken*, 740 P.2d 1058 (Kan. 1987).

88. *Id.* § 60-3403(a).

89. *Id.* § 60-3403(b).

90. Letter from John Anderson, Jr., Chairman, to Fletcher Bell, Commissioner of Insurance (Jan. 2, 1986), in BLUE RIBBON COMM'N, REPORT OF THE KANSAS CITIZENS COMMITTEE FOR THE REVIEW OF THE TORT SYSTEM AS IT AFFECTS INSURANCE AND RELATED MATTERS (1985) [hereinafter Anderson Letter]. The Blue Ribbon Commission studied the issues of affordability and availability of medical malpractice insurance. *Id.* When the first medical malpractice "crisis" occurred, many feared that insurance companies would stop selling malpractice insurance, making the coverage unavailable to some health care providers. BLUE RIBBON COMM'N, REPORT OF THE KANSAS CITIZENS COMMITTEE FOR THE REVIEW OF THE TORT SYSTEM AS IT AF-

of malpractice insurance was a major problem and made numerous recommendations to lower premium costs;⁹¹ however, the committee did not make specific recommendations regarding abrogation of the collateral source rule.⁹² The commission did discuss Senate Bill 110 but found the bill unable to correct the problem of affordable malpractice insurance.⁹³ In fact, the commission specifically disavowed the claims of the would-be tort reforms: "limitations upon the common law collateral source rule are unlikely, by themselves, to reduce significantly insurance premiums"⁹⁴ Despite the Blue Ribbon Commission's recommendations, the Kansas legislature passed Senate Bill 110, codified in section 60-3403 of the Kansas Statutes Annotated, allowing evidence of insurance payments in medical malpractice cases.⁹⁵

After Senate Bill 110 passed, two interim committees were appointed to study the issue of rising malpractice premiums.⁹⁶ The first committee concluded that liability insurance premiums were rising and needed to be addressed to assure affordable malpractice coverage for Kansas healthcare providers.⁹⁷ The first committee opined that jury awards and an increase in the number of lawsuits filed were affecting the cost of insurance and recommended an extensive amount of tort, insurance, and healthcare legislation.⁹⁸ The report mentioned the enactment of Senate Bill 110 but did not make any specific recommendations for abolishing the collateral source rule.⁹⁹

The first committee's report also contained a minority report.¹⁰⁰ The minority criticized the committee for failing to devote more attention to the cycle of the insurance industry's effect on premium increases.¹⁰¹ The minority found that the insurance industry increased

FFECTS INSURANCE AND RELATED MATTERS, at 3-4 (1985) [hereinafter BLUE RIBBON COMM'N REPORT]. In response to such concerns, Kansas created the Health Care Stabilization Fund, which provides excess insurance coverage to Kansas healthcare providers, and the Health Care Provider Insurance Availability Plan, which provides primary coverage to those healthcare providers unable to obtain coverage through traditional means. *Id.* The commission found that the availability of malpractice insurance that was thought to be a problem in the 1970s was no longer a problem. Anderson Letter, *supra*.

91. BLUE RIBBON COMM'N REPORT, *supra* note 90, at 49, 58-80.

92. *See id.* at 58-80.

93. *Id.* at 50.

94. *Id.*

95. KAN. STAT. ANN. § 60-3403(a) (originally enacted as 1985 Kan. Sess. Laws 951) (repealed 1988), *invalidated by* Farley v. Engelken, 740 P.2d 1058 (Kan. 1987).

96. SPECIAL COMM. ON MED. MALPRACTICE, PROPOSAL NO. 47, at 817 (Kan. 1985) [hereinafter 1985 REPORT ON PROPOSAL NO. 47]; SPECIAL COMM. ON TORT REFORM & LIABILITY INS., PROPOSAL NO. 29, at 565 (Kan. 1986) [hereinafter 1986 REPORT ON PROPOSAL NO. 29].

97. 1985 REPORT ON PROPOSAL NO. 47, *supra* note 96, at 858.

98. *Id.* at 858, 860-64.

99. *Id.* at 822-23. By the time the committee's study was published, courts in Kansas had already found Senate Bill 110 unconstitutional. *See* Coburn v. Agustin, 627 F. Supp. 983, 997 (D. Kan. 1985); Fretz v. Keltner, 109 F.R.D. 303, 307 (D. Kan. 1985).

100. 1985 REPORT ON PROPOSAL NO. 47, *supra* note 96, at 865.

101. *Id.* at 868-70.

premiums to make up for losses in prior years caused by the insurance industry's under-pricing of its products in the early 1980s and the insurance industry's losses on investments.¹⁰² Foreseeing the grave social harm of the tort reforms proposed by the committee, the minority's report stated that "[t]he answer to medical malpractice insurance problems is not to further victimize those who have had the misfortune to have suffered a serious injury through medical negligence."¹⁰³ Concluding that the insurance industry needed to bear the burden of correcting prior mistakes, the minority stated that "it is irresponsible for the Kansas [l]egislature to curtail the rights of the public to protect the purses of a special interest."¹⁰⁴

The second committee studied the issue the following year, and like the first committee, also did not recommend eliminating the collateral source rule.¹⁰⁵ In reaching its conclusions, the committee reviewed a number of national studies conducted on the issue of rising malpractice premiums.¹⁰⁶ Ultimately, the second committee recommended extensive legislation aimed at increased insurance regulation and reform.¹⁰⁷ The committee also recommended tort legislation, but it specifically stated that the suggested legislation was justified on its

102. *Id.* at 870. The minority also found that insurance companies further increased rates when the insurance department placed a 110% surcharge on premiums for contribution to the State of Kansas Health Care Stabilization Fund. *Id.* at 869. The surcharge was implemented to make up for a three-year period in which physicians paid no surcharge on premiums but enjoyed unlimited coverage from the fund. *Id.*

103. *Id.* at 873.

104. *Id.* at 870.

105. 1986 REPORT ON PROPOSAL NO. 29, *supra* note 96, at 565, 595. The Special Committee on Tort Reform and Liability Insurance reviewed the Kansas tort system and the Kansas liability insurance system to determine the impact of prior enacted tort reforms on the increasing problem of obtaining affordable liability insurance. *Id.* at 565.

106. *Id.* at 566-72. The second committee reviewed two federal studies that suggested a number of tort reform measures, including abrogating the collateral source rule. *Id.* at 568-69. The first study was titled "The United States Justice Department's Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability." The second study, commissioned by the American Insurance Alliance and conducted by Tillinghast, Nelson, and Warren, Inc., was titled "The Cost of the U.S. Tort System."

The second committee also reviewed other federal studies that determined that tort reform was not needed in Kansas. *See id.* at 570-72. A report released by the National Association of Attorneys General concluded that the insurance industry was not in a state of financial crisis, but rather was experiencing a stable and improving financial condition. *Id.* at 570. The report further noted that tort claims had not increased significantly but had only grown in conjunction with population gain and inflation increases. *Id.* The association also found that the tort reforms proposed by the insurance industry would not affect insurance premiums because the reasons for rate increases were a result of the insurance industries' management practices and not a result of tort claims. *Id.* at 570-71. A press release of United States Representative and Chairman of the United States House Judiciary Subcommittee Peter Rodino reported that the liability insurance carriers were not suffering financial losses as a result of claims but, instead, were taking in twice as much in premiums as they were paying out in claims. *Id.* at 571. A *Consumer Reports* article titled, "The Manufactured Crisis—Liability Insurance Companies Have Created a Crisis and Dumped It on You," further concluded that the only cure to rising premiums was increased insurance regulation. *Id.* at 572.

107. *Id.* at 595-98.

own merits and would not impact malpractice premiums.¹⁰⁸ The report noted that Kansas had already implemented a number of tort reform measures but did not find any evidence that such measures had beneficially impacted premiums.¹⁰⁹ Furthermore, the insurance industry gave the committee no assurance that any future tort reform measures would aid in lowering or even maintaining insurance premiums.¹¹⁰ The second committee specifically did not recommend abrogation of the collateral source rule.¹¹¹

c. *Section 60-3403 of the Kansas Statute Annotated
Held Unconstitutional*

Once again, the Kansas legislature's attempt to abolish the collateral source rule was held unconstitutional by the Kansas Supreme Court in its 1987 decision, *Farley v. Engelken*.¹¹² Prior to the decision in *Farley*, four Kansas federal trial courts reviewed the constitutionality of section 60-3403 of the Kansas Statutes Annotated.¹¹³ In *Crowe v. Wigglesworth*,¹¹⁴ and *Ferguson v. Garmon*,¹¹⁵ the United States District Court for the District of Kansas ruled section 60-3403 constitutional under a rational basis review, but both courts strongly criticized the Kansas legislature because the legislation would not achieve the legislature's purported objective of ensuring quality healthcare for Kansans.¹¹⁶ In *Coburn v. Agustin*,¹¹⁷ and *Fretz v. Keltner*,¹¹⁸ however, the courts applied intermediate scrutiny, ruling that the statute violated the equal protection clauses of both the United States and Kansas constitutions.¹¹⁹

108. *Id.* at 590-95. For example, the committee recommended a law requiring the jury to itemize verdicts in all personal injury actions. *Id.* at 591-92. The committee recommended the legislation because all agreed that the itemized verdicts would help gather data about the types of damages awarded by juries for the future. *Id.*

109. *Id.* at 590.

110. *Id.*

111. *See id.* at 595. Furthermore, the committee found abrogation of the rule was not justified on its own merits as were the other tort reform measures. *Id.*

112. 740 P.2d 1058, 1068 (Kan. 1987).

113. *Id.* at 1060.

114. 623 F. Supp. 699 (D. Kan. 1985).

115. 643 F. Supp. 335 (D. Kan. 1986).

116. *Id.* at 340-41. The court in *Ferguson* stated the following:

Before applying the rational basis test, we feel compelled to make two observations. First, we strongly doubt that a medical malpractice "crisis" exists or that, if it does, that it has been caused by excessive verdicts, as the insurance industry self-servedly suggests. Other factors, including poor business judgment exercised by insurance companies in the 1970's, are at least as responsible for the recent surge in medical malpractice premiums. Second, we tend to believe that the legislature has acted unfairly in changing the collateral source rule only to benefit physicians, hospitals, and of course, ultimately the insurance industry. If the rule is unwise or unnecessary, it should be changed across the board, regardless of whom the tortfeasor happens to be.

Id.; see *infra* text accompanying note 134.

117. 627 F. Supp. 983 (D. Kan. 1985).

118. 109 F.R.D. 303 (D. Kan. 1985).

119. *Coburn*, 627 F. Supp. at 997; *Fretz*, 109 F.R.D. at 307.

Like the court in *Wentling*, the Kansas Supreme Court in *Farley* held that the statute violated the Equal Protection Clause of the Kansas Bill of Rights.¹²⁰ Section 1 of the Kansas Bill of Rights, titled “Equal rights,” provides, “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”¹²¹ The court applied intermediate scrutiny after determining that the statutory classification of malpractice victims created a suspect class and that the fundamental interest of the right to a remedy was implicated.¹²² While the traditional “suspect” classes are gender and legitimacy, they are suspect because they share certain characteristics, including the lack of political power.¹²³ The court reasoned that medical malpractice victims also lacked such political power and were therefore entitled to protection of their individual rights through an intermediate level of scrutiny.¹²⁴

Additionally, the court used intermediate scrutiny because a fundamental interest was at issue.¹²⁵ Justice without delay is guaranteed under Section 18 of the Kansas Bill of Rights, which provides, “All persons, for injuries suffered in person, reputation or property, shall have a remedy by due course of law, and justice administered without delay.”¹²⁶ The court did not address whether section 60-3403 violated Section 18, but it did find that the plaintiffs’ important right to a remedy was impaired by the statute, which necessitated intermediate review.¹²⁷

The court ruled that the statute did not survive intermediate review.¹²⁸ The state asserted that the statutory purpose was to cure the state’s medical malpractice “crisis” by reducing medical malpractice verdicts, which in turn, would ensure continued available, affordable, quality healthcare in Kansas.¹²⁹ The court, however, was not convinced that the classification was directly related to the state’s goal.¹³⁰ First, the legislation rewarded negligent healthcare providers by pro-

120. *Farley v. Engelken*, 740 P.2d 1058, 1068 (Kan. 1987).

121. KAN. CONST., Bill of Rights, § 1.

122. *Farley*, 740 P.2d at 1064. Justice Tyler C. Lockett, in his concurring opinion, opined that the statute violated the Equal Protection Clause of the Kansas Bill of Rights under a rational basis test without resorting to intermediate review because there was no legitimate state purpose justifying the classification. *Id.* at 1068-69 (Lockett, J. concurring).

123. *Id.* at 1064 (majority opinion).

124. *Id.* The court further explained that while the United States Supreme Court has treated only classifications based on gender and illegitimacy as “suspect,” the Kansas Supreme Court is not limited by such applications. *Id.* at 1066. When interpreting the Kansas Constitution, Kansas courts have the authority to provide more protection to Kansas citizens than the Supreme Court has provided to all United States citizens. *Id.*

125. *Id.* at 1063-64.

126. KAN. CONST., Bill of Rights, § 18.

127. *Farley*, 740 P.2d at 1064.

128. *Id.* at 1068.

129. *Id.* at 1067.

130. *Id.*

protecting the negligent provider from high jury awards.¹³¹ Such a reward encouraged negligent healthcare and did not ensure quality healthcare to Kansans.¹³² Second, while the state maintained that the legislation would reduce medical malpractice insurance premiums to healthcare providers, effectually it shifted the burden to the injured party and/or her insurance company.¹³³ Although the court did not specifically rely upon the interim reports to the legislature, which had concluded that abrogation of the collateral source rule would not cure the problem of rising malpractice premiums, the court did state the following:

On a more fundamental level, this Court is not at all persuaded this discriminatory legislation is needed or that it will achieve its stated goals. Regarding need, defendants cavalierly refer to the "obvious" medical malpractice crisis justifying this legislation. What is apparently so clear to the medical profession, the insurance industry, their respective lobbyists, and the [l]egislature is a matter of deep and growing concern to this Court as well a[s] a number of commentators and other courts across the country. In the [l]egislature's haste to remedy the situation, it has overlooked or, more likely, ignored the fundamental cause of the so-called crisis: *it is the unmistakable result not of excessive verdicts, but of excessive malpractice by health care providers.*¹³⁴

The court held that section 60-3403 of the Kansas Statutes Annotated treated a class of persons, "negligent healthcare providers and their victims[,] differently from other persons similarly situated"¹³⁵ Furthermore, the classifications created by the statute were not justified by and directly related to a legitimate state interest.¹³⁶

d. *Section 60-3801 of the Kansas Statutes Annotated*

Aware of the constitutional challenge to section 60-3403, the Kansas legislature introduced House Bill 2471 in the 1987 legislative session.¹³⁷ The legislature sought to repeal section 60-3403 and replace it with a statute that allowed evidence of collateral source payments for all personal injury actions.¹³⁸ The bill failed to pass the Kansas House of Representatives.¹³⁹

Wasting no time, the Kansas legislature introduced House Bill 2693 in the 1988 legislative session, and sections 60-3802 through 60-

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1068 (quoting *Crowe v. Wigglesworth*, 623 F. Supp. 699, 706 (D. Kan. 1985)).

135. *Farley*, 740 P.2d at 1068.

136. *Id.*

137. H.B. 2471, 1987 Sess. (Kan. 1987).

138. *Id.*

139. James Concannon & Ron Smith, *More Goo for Our Tort Stew: Implementing the Kansas Collateral Source Rule*, 58 J. KAN. B. ASS'N. 19, 20 (Feb. 1989).

3805 of the Kansas Statutes Annotated were enacted.¹⁴⁰ This time, the statute made payments from collateral sources admissible only when the plaintiff's claim for damages exceeded \$150,000.¹⁴¹ If the plaintiff sought less than \$150,000 in damages, payments from collateral sources were inadmissible.¹⁴² The statute also made the plaintiff's cost of securing the collateral source benefits, such as insurance premiums, admissible.¹⁴³ The statute also required the court to reduce the amount of the judgment by the total amount of collateral source benefits received by the plaintiff.¹⁴⁴

In 1993, the Kansas Supreme Court, in *Thompson v. KFB Insurance*,¹⁴⁵ held sections 60-3802 through 60-3805 of the Kansas Statutes Annotated unconstitutional for violating the equal protection clauses of both the United States and the Kansas constitutions.¹⁴⁶ The court applied a rational basis test, reasoning that the classification based on the amount of damages sought by the plaintiff was arbitrary and served no purpose other than to discriminate against the group seeking \$150,000 or more.¹⁴⁷ The classification was not rationally related to the legislature's purpose in enacting the statute, which was to reduce insurance costs.¹⁴⁸ Additionally, the court determined that the \$150,000 provision was not severable, and therefore, sections 60-3802 through 60-3805 of the Kansas Statutes Annotated were unconstitutional and void.¹⁴⁹

The legislature tried to save section 60-3802 and introduced Senate Bill 761 in the 1994 session.¹⁵⁰ The bill eliminated the \$150,000 threshold, but Governor Joan Finney vetoed it.¹⁵¹ The following year, the same legislation was introduced in the House under House Bill 2218 and House Bill 2220, but both bills failed to pass.¹⁵²

140. See KAN. STAT. ANN. §§ 60-3802-60-3805 (1994), *invalidated by* *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993).

141. *Id.* § 60-3802.

142. *Id.*

143. *Id.* § 60-3803.

144. *Id.* § 60-3805.

145. 850 P.2d 773 (Kan. 1993).

146. *Id.* at 782.

147. *Id.*

148. *Id.*

149. *Id.* at 783.

150. S.B. 761, 1994 Sess. (Kan. 1994).

151. *Id.*; OFFICE OF REVISOR OF STATUTES, SENATE AND HOUSE ACTIONS REPORT AND SUBJECT INDEX REPORT, 1994 Sess., at 111 (Kan. 1994).

152. H.B. 2220, 1995 Sess. (Kan. 1995); H.B. 2218, 1995 Sess. (Kan. 1995); OFFICE OF REVISOR OF STATUTES, SENATE AND HOUSE ACTIONS REPORT AND SUBJECT INDEX REPORT, 1995 Sess., at 39-40 (Kan. 1995).

e. *Senate Bill 102 and House Bill 2150*

For ten years, the state legislature abandoned its effort to abolish the collateral source rule.¹⁵³ In 2003, however, the United States House of Representatives passed the Help Efficient, Accessible, Low-Cost, Timely Healthcare Act (Health Act).¹⁵⁴ “The [Health] Act was the culmination of the American Medical Association’s year-long all-out attack on the latest medical liability crisis in conjunction with the most serious lobbying yet pushed by the Bush [A]dministration.”¹⁵⁵ The Health Act included nearly every possible tort reform and explicitly preempted all state tort laws.¹⁵⁶ Abrogation of the collateral source rule was included in the litany of tort reform measures.¹⁵⁷ Under the Health Act, the amount of damages owed by the defendant for his negligent acts would be reduced by the amount received by the plaintiff from collateral sources.¹⁵⁸ The Health Act, however, never passed the Senate.¹⁵⁹ National efforts ignited the introduction of tort reform measures once again, and in response, the Kansas legislature introduced Senate Bill 102 in the 2005 session. The legislature tried to amend section 60-3802 of the Kansas Statutes Annotated by removing the \$150,000 threshold and making collateral source benefits admissible in every personal injury action, regardless of the amount of damages claimed.¹⁶⁰ Senate Bill 102 did not pass in the 2005 session, but an interim committee was assembled to study the bill.¹⁶¹

Since the 1970s, the Kansas legislature has studied whether abolition of the collateral source rule will affect malpractice insurance premiums.¹⁶² The first three interim studies determined that legislative action would not correct problems with malpractice insurance. The 1976 interim study was the first to conclude that abrogation of the common law collateral source rule may help in the effort to correct the malpractice insurance problem, but it cautioned that such legislation would need to be studied in the future to determine its effectiveness.¹⁶³ In 1985, the Kansas Supreme Court held the resulting legislation unconstitutional.¹⁶⁴ Following the decision, the Blue Ribbon Commission, assembled by Kansas Insurance Commissioner

153. S.B. 102, 2005 Sess. (Kan. 2005).

154. Melissa A. Wojtylak et al., *Recent Developments in Medicine and Law*, 39 TORT TRIAL & INS. PRAC. L.J. 597, 598 (2004).

155. *Id.*

156. *Id.* at 598-600.

157. *Id.* at 599.

158. *Id.*

159. *Id.* at 600.

160. S.B. 102, 2005 Sess. (Kan. 2005).

161. Clark Interview, *supra* note 13.

162. See 1971 REPORT, *supra* note 57.

163. See *supra* notes 63-67 and accompanying text.

164. *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939, 950-51 (Kan. 1985).

Fletcher Bell, recommended no legislative changes to the rule.¹⁶⁵ The Kansas legislature, however, enacted legislation that did just that.¹⁶⁶ Following enactment of section 60-3403, an interim committee was assembled to study the legislation recommended in 1976, and the committee found no need to eliminate the collateral source rule.¹⁶⁷ Another interim report the following year also made no recommendations regarding the rule.¹⁶⁸ Shortly thereafter, the Kansas Supreme Court held section 60-3403 unconstitutional.¹⁶⁹ One year later, the Kansas legislature passed section 60-3802, which again abolished the rule.¹⁷⁰ The Kansas Supreme Court held, for the third time, that the statute abrogating the rule was unconstitutional.¹⁷¹ Despite six interim reports refusing to recommend legislation to abrogate the collateral source rule and three Kansas Supreme Court decisions holding that such laws were unconstitutional, the Kansas legislature continues to introduce legislation to invalidate the rule.¹⁷² Interested parties anticipate more of the same from the Kansas legislature in the 2006 legislative session and the years to come.¹⁷³

2. Case Law Currently Limiting Application of the Collateral Source Rule

In the midst of the legislative action to abolish the rule, Kansas courts also placed limits on the rule. In 1996, the Kansas Court of Appeals ruled in *Bates v. Hogg*¹⁷⁴ that the collateral source rule is not applicable to the amount written off when Medicaid pays the plaintiff's medical bills.¹⁷⁵ In the years following the decision, defendants asked trial courts to interpret the decision and to rule on whether the rule was applicable to the amount written off when other sources paid the plaintiff's medical bills.¹⁷⁶ In 2003, the Kansas Supreme Court ruled in *Rose v. Via Christi Health System, Inc. (Rose I)*¹⁷⁷ that the court of appeals decision was limited to cases involving Medicaid and

165. See *supra* notes 90-95 and accompanying text.

166. KAN. STAT. ANN. § 60-3403(a) (originally enacted as 1985 Kan. Sess. Laws 951) (repealed 1988), *invalidated by* Farley v. Engelken, 740 P.2d 1058 (Kan. 1987).

167. See *supra* notes 96-111 and accompanying text.

168. See *supra* notes 96-111 and accompanying text.

169. Farley, 740 P.2d at 1068.

170. KAN. STAT. ANN. § 60-3802 (1994), *invalidated by* Thompson v. KFB Ins. Co., 850 P.2d 773 (Kan. 1993).

171. See *Thompson*, 850 P.2d at 782.

172. See S.B. 102, 2005 Sess. (Kan. 2005); H.B. 2220, 1995 Sess. (Kan. 1995); H.B. 2218, 1995 Sess. (Kan. 1995).

173. Clark Interview, *supra* note 13.

174. 921 P.2d 249 (Kan. Ct. App. 1996).

175. *Id.* at 253.

176. See, e.g., *Rose v. Via Christi Health Sys., Inc. (Rose I)*, 78 P.3d 798, 802 (Kan. 2003), *modified on reh'g*, 113 P.3d 241 (Kan. 2005).

177. 78 P.3d 798 (Kan. 2003).

that the collateral source rule was still applicable to the full amount of medical bills paid by all other collateral sources.¹⁷⁸

The confusion returned in 2005 when the Kansas Supreme Court withdrew its 2003 opinion in *Rose I* and substituted an opinion that failed to address the collateral source issue.¹⁷⁹ In the meantime, the Kansas Court of Appeals decided *Fischer v. Farmers Insurance Co.*,¹⁸⁰ in opposition to the 2003 decision in *Rose I*. In an unpublished opinion, the court in *Fischer* held that the collateral source rule is not applicable to the amount written off by all forms of insurance.¹⁸¹ The disconnect between the Kansas Court of Appeals and the Kansas Supreme Court has left the Kansas practitioner unsure of the correct application of the rule to the amount written off by collateral sources.

a. *Bates v. Hogg*

In 1996, the Kansas Court of Appeals ruled that the collateral source rule is not applicable to the amount written off when Medicaid pays the plaintiff's medical bills.¹⁸² In *Bates v. Hogg*,¹⁸³ Medicaid paid some of the plaintiff's medical bills incurred as a result of her injury.¹⁸⁴ Prior to trial, the defendant filed a motion in limine and asked the court to exclude evidence of the total medical bills incurred and, instead, to limit the plaintiff to introducing evidence of medical expenses only in the amount actually paid by Medicaid.¹⁸⁵ The medical bills actually incurred by the plaintiff exceeded \$2,000, but Medicaid only paid \$1,305.23 in medical bills in accordance with the contractual relationship between Medicaid and the medical providers.¹⁸⁶ The remaining medical bills were written off according to the contract.¹⁸⁷ The court granted the defendant's motion and limited the plaintiff's evidence of medical bills to only the amount actually paid by Medicaid.¹⁸⁸ The plaintiff appealed the trial court's order, arguing that the limitation violated the collateral source rule.¹⁸⁹

As a matter of first impression, the Kansas Court of Appeals addressed whether a plaintiff could introduce evidence of the reasonable value of her medical expenses or whether she was limited to introducing evidence only of the amount actually paid by the collateral

178. *Id.* at 803.

179. *Rose v. Via Christi Health Sys., Inc. (Rose II)*, 113 P.3d 241, 243 (Kan. 2005).

180. No. 90,246, slip op. (Kan. Ct. App. Feb. 18, 2005).

181. *Id.*

182. *Bates v. Hogg*, 921 P.2d 249, 253 (Kan. Ct. App. 1996).

183. *Id.* at 249.

184. *Id.* at 251.

185. *Id.*

186. *Id.* at 252.

187. *Id.*

188. *Id.* at 251.

189. *Id.* at 252.

source.¹⁹⁰ The court stated that the basic law of damages is that an injured plaintiff is “entitled to recover the reasonable value of medical care and expenses for the treatment of his or her injuries”¹⁹¹ The court ruled, however, that when Medicaid pays the medical expenses, the plaintiff is only entitled to recover the amount actually paid by Medicaid.¹⁹² The court reasoned that under the Medicaid contract, the amount paid by Medicaid becomes the reasonable value for the services provided.¹⁹³ The court relied on the following rationale from a North Carolina case: “It would be unconscionable to permit the taxpayers to bear the expense of providing free medical care to a person and then allow that person to recover damages for medical services from a tortfeasor and pocket the windfall.”¹⁹⁴

b. *Rose v. Via Christi Health System, Inc. (Rose I & II)*

Following the decision in *Bates*, defendants across the state attempted to extend the decision to include write-offs of all other collateral sources.¹⁹⁵ Trial courts throughout Kansas, however, failed to agree on the application of *Bates*.¹⁹⁶ The defendants in *Rose* wanted to extend *Bates* to Medicare write-offs.¹⁹⁷ The plaintiff in *Rose*, an inpatient awaiting medical treatment, fell at Via Christi Regional Medical Center-St. Francis campus (Via Christi).¹⁹⁸ He suffered a head injury from the fall, incurring \$242,104.84 in medical bills from services provided by Via Christi.¹⁹⁹ Medicare paid \$87,911.60 of the medical bills.²⁰⁰ Via Christi, both the medical provider and the tortfeasor, wrote off the remaining balance of \$154,193.24.²⁰¹ Prior to trial, Via Christi filed a motion in limine requesting the court to limit the plaintiff’s evidence of medical expenses to those expenses actually paid.²⁰² The defendant asked that the jury be allowed to hear evi-

190. *Id.*

191. *Id.* at 252-53 (citing 22 AM. JUR. 2D, *Damages* § 197, 169).

192. *Id.*

193. *Id.* at 253.

194. *Id.* (quoting *Gordon v. Forsyth County Hosp. Auth., Inc.*, 409 F. Supp. 708, 719 (M.D.N.C. 1976)). The plaintiff also argued that not applying the collateral source rule to Medicaid recipients violated her constitutional rights to equal protection under state and federal law. *Id.* at 253. The court found that argument unpersuasive. *Id.*

195. Brief of Amicus Curiae Kansas Hospital Ass’n at 8-9, *Rose v. Via Christi Health Sys., Inc. (Rose I)*, 78 P.3d 798 (Kan. 2003) (No. 88,434), *modified on reh’g*, 113 P.3d 241 (Kan. 2005) [hereinafter *Kansas Hospital Ass’n Brief*].

196. *Id.* at 8.

197. *Rose I*, 78 P.3d at 802. Medicaid is a joint federal and state plan that pays for medical care for those individuals who qualify, usually due to limited income and resources. Medicare, on the other hand, is a federal health insurance plan for persons over sixty-five that is funded in part by payroll deductions. Medicare, <http://www.medicare.gov/Glossary/search.asp?SelectAlphabet=M&Language=English#Content> (last visited Oct. 21, 2005).

198. *Rose I*, 78 P.3d at 800.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

dence of medical expenses totaling \$87,911.60, rather than the \$242,104.84 actually charged.²⁰³ The trial court denied the motion.²⁰⁴ The plaintiff introduced evidence of the full amount of medical expenses incurred, and the jury returned a verdict for the total medical expenses.²⁰⁵

Following the verdict, Via Christi made a motion to offset the verdict by the amount of medical bills written off.²⁰⁶ The court granted the motion and allowed Via Christi an offset.²⁰⁷ The plaintiff appealed, arguing that the court incorrectly granted the offset.²⁰⁸ Via Christi responded that the offset was proper, and in a cross appeal, argued that the court erred in failing to grant Via Christi's motion in limine to exclude the amount of medical bills written off.²⁰⁹

On October 31, 2003, the Kansas Supreme Court agreed with the plaintiff that the trial court had no authority to grant Via Christi an offset.²¹⁰ Accordingly, the court addressed Via Christi's cross appeal.²¹¹ The cross appeal contained two issues: one, whether *Bates* should be extended to Medicare benefits, and two, whether Medicare write-offs fall under the collateral source rule.²¹² First, the court stated that "[t]he purpose for the collateral source rule is to prevent the tortfeasor from escaping from the full liability resulting from his or her actions by requiring the tortfeasor to compensate the injured party for all of the harm he or she causes, not just the injured party's net loss."²¹³ The court explained that any benefits received by the injured party from collateral sources should not reduce the tortfeasor's liability.²¹⁴ If the injured party should receive benefits from both a collateral source and the tortfeasor for the same damages, it is better that the windfall go to the injured party.²¹⁵ The court ruled that *Bates* is limited to cases in which Medicaid pays the injured

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Brief of Appellant/Cross-Appellee at 9-10, *Rose I*, 78 P.3d 798 (No. 88,434).

209. Brief of Appellee/Cross-Appellant at 7-12, 15-22, *Rose I*, 78 P.3d 798 (No. 88,434). The plaintiff responded to Via Christi's cross appeal, arguing that the trial court properly allowed the plaintiff to show evidence of the total amount of medical bills charged. Appeal Brief of Cross-Appellee at 2-4, *Rose I*, 78 P.3d 798 (No. 88,434). The plaintiff argued that a tortfeasor is liable for the reasonable value of the medical bills resulting from the negligent acts, not the amount actually paid by the injured party's collateral sources. *Id.* at 2-3. The plaintiff also argued that *Bates* should be overruled for violating the equal protection clauses of the state and federal constitutions because applying the holding in *Bates* results in tortfeasors suffering different liability depending on the wealth of the victim. *See id.* at 9-10.

210. *Rose I*, 78 P.3d at 802.

211. *Id.*

212. *Id.* at 803.

213. *Id.* at 802.

214. *Id.*

215. *Id.*

party's medical expenses.²¹⁶ The court reasoned that Medicare is similar to private health insurance because the insured pays for the coverage through wage deductions,²¹⁷ unlike Medicaid which is funded by federal and state government contributions.²¹⁸ Because the Medicare recipient pays for Medicare benefits like private insurance, the injured party should get the benefit of that coverage.²¹⁹ When the Medicaid recipient receives Medicaid benefits free of charge by simply qualifying for the assistance, the injured party has not bargained for any benefit.²²⁰

Addressing the question of whether Medicare write-offs are covered by the collateral source rule, the court held that the collateral source rule does indeed apply to Medicare write-offs.²²¹ The plaintiff, therefore, would be allowed to introduce evidence of the total amount of medical bills charged and would not be limited to presenting evidence of only those medical bills paid by Medicare.²²² As the issue was one of first impression in Kansas, the court reviewed decisions from three jurisdictions that had ruled on the issue and determined that the collateral source rule applies to Medicare write-offs.²²³ Each jurisdiction found Medicare and private insurance materially similar and ruled that the collateral source rule applies to Medicare write-offs as well as private insurance.²²⁴ Because the court determined that Medicare is essentially the same as private insurance, the court also concluded that the rule applied to the amount written off.²²⁵ Finally, the court stated that

[p]ublic policy in Kansas supports the theory that any windfall from the injured party's collateral sources should benefit the injured party rather than the tortfeasor, who should bear the full liability of his or her tortious actions without regard to the injured parties' method of financing his or her medical treatment.²²⁶

Following the decision, Via Christi filed a motion for rehearing, and the court granted the motion.²²⁷ On June 3, 2005, the Kansas Supreme Court delivered a startling opinion on rehearing.²²⁸ The court affirmed the original trial court decision, which allowed Via

216. *Id.* at 803.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 806.

223. *Id.* at 803 (citing *Chandler Hosp. v. Dent*, 491 S.E.2d 868 (Ga. App. 1997); *Walmart Stores, Inc. v. Frierson*, 818 So. 2d 1135, 1140 (Miss. 2002); *Brown v. Van Noy*, 879 S.W.2d 667 (Mo. App. 1994)).

224. *Id.* at 803-04.

225. *Id.* at 806.

226. *Id.*

227. *Rose v. Via Christi Health Sys., Inc. (Rose II)*, 113 P.3d 241, 243 (Kan. 2005).

228. *Id.*

Christi to offset the verdict by the amount of medical bills written off.²²⁹ Accordingly, the court did not reach the collateral source issue from the cross appeal.²³⁰

c. *Fischer v. Farmers Insurance Co.*

After the Kansas Supreme Court decided *Rose I* on October 31, 2003, but before the court issued its second opinion on June 3, 2005, the Kansas Court of Appeals addressed the collateral source issue.²³¹ In *Fischer v. Farmers Insurance Co.*,²³² the trial court granted the defendant's motion in limine, which limited the plaintiff's damages to the medical bills actually paid by private insurance and excluded the amount written off by private insurance.²³³ The Kansas Court of Appeals acknowledged that the Kansas Supreme Court's decision in *Rose I* mandated a finding that the trial court erred in granting the defendant's motion in limine.²³⁴ The court stated, however, that in light of the fact that the Kansas Supreme Court granted the motion for rehearing and oral arguments were scheduled, the original decision in *Rose I* was suspended until an order on rehearing was issued.²³⁵ Despite the *Rose I* decision, the Kansas Court of Appeals ruled that the *Bates* decision extended to all plaintiffs regardless of the type of medical insurance.²³⁶

In reaching its conclusion, the court relied on *Bates*, stating that the purpose of a personal injury action is to award damages to the injured party to restore her to her pre-injury status.²³⁷ The court reasoned that, in some situations, insurance companies and healthcare providers agree in advance that the medical provider will accept a certain amount for a specified procedure.²³⁸ Any amount in excess of the agreed upon charge is then written off and not billed to the injured party.²³⁹ In those situations, the injured party never becomes liable for the amount written off.²⁴⁰ Accordingly, the Kansas Court of Appeals ruled that when an injured party's insurance company has previously contracted with the medical provider for an agreed charge, the amount written off by the medical provider is not a collateral source benefit, and therefore, the plaintiff may not include the amount writ-

229. *Id.*

230. *Id.*

231. *Fischer v. Farmers Ins. Co.*, No. 90,246, slip op. at 2 (Kan. Ct. App. Feb. 18, 2005).

232. No. 90,246, slip op. (Kan. Ct. App. Feb. 18, 2005).

233. *Id.* at 2.

234. *Id.* at 11.

235. *Id.*

236. *Id.* at 4-5.

237. *Id.* at 4.

238. *Id.*

239. *Id.* at 8-9.

240. *Id.* at 8.

ten off in her claim for economic damages.²⁴¹ The plaintiff is limited to introducing evidence of only the amount actually paid by collateral sources.²⁴² The Kansas Court of Appeals concluded by pointing out that preventing the injured party from introducing evidence of the amount of damages charged and limiting the injured party to only those damages paid will help insurance companies.²⁴³ The court reasoned that because the tortfeasor's insurance company actually pays the judgment, the public policy rationale of the collateral source rule is unsupported and the "make the tortfeasor pay" justification is a fallacy.²⁴⁴

The Kansas Court of Appeals issued its opinion in *Fischer* on February 18, 2005, but did not release it for publication.²⁴⁵ Five days later, an outside party filed a motion requesting the court to publish its decision, arguing that the opinion addressed a common issue among personal injury claims and would provide guidance to future litigators.²⁴⁶ The court did not address the motion until June 9, 2005, six days after the Kansas Supreme Court issued *Rose II*.²⁴⁷ The order simply stated that the motion to publish had been considered but was denied.²⁴⁸

In light of the conflicting decisions, Kansas practitioners lack clear understanding of the current status of the law; however, Kansas practitioners can be certain that *Bates* remains good law.²⁴⁹ When Medicaid pays the plaintiff's medical bills, the plaintiff is limited to introducing evidence of economic damages only in the amount actually paid by Medicaid.²⁵⁰ It is unclear whether *Bates* extends to other types of insurance.²⁵¹ Despite the fact that the Kansas Supreme Court substituted *Rose I* with *Rose II*, which did not address the collateral source issue, *Rose I* makes the court's opinion on the issue clear.²⁵² Both the majority and the dissent in *Rose I* agreed that the collateral source rule applied by definition to the amount written off by sources "wholly independent of and collateral to the [tortfeasor]."²⁵³ The dissent opined that the collateral source rule should not apply in the spe-

241. *Id.* at 13.

242. *Id.*

243. *Id.* at 12.

244. *Id.* at 12-13.

245. *Id.* at 1.

246. See Motion to Publish Memorandum Opinion, *Fischer*, No. 90,246 (Feb. 23, 2005).

247. See Order on Motion to Publish Memorandum Opinion, *Fischer*, No. 90,246 (June 9, 2005) [hereinafter *Fischer* Order].

248. *Id.*

249. See *Bates v. Hogg*, 921 P.2d 249 (Kan. Ct. App. 1996).

250. *Id.* at 253.

251. Kansas Hospital Ass'n Brief, *supra* note 195, at 8.

252. See *Rose v. Via Christi Health Sys., Inc. (Rose I)*, 78 P.3d 798, 806 (Kan. 2003), modified *on reh'g*, 113 P.3d 241 (Kan. 2005).

253. *Id.* at 806 (emphasis omitted).

cific situation in which the collateral source provider is the tortfeasor.²⁵⁴ This rule should not apply because the collateral source payments are no longer independent of the tortfeasor.²⁵⁵ The court in *Rose II* did not indicate that its ruling on the collateral source issue as stated in *Rose I* had changed or would be decided differently in the future.²⁵⁶

Even though the Kansas Court of Appeals issued its conflicting opinion in *Fischer*, the court specifically chose not to publish the decision.²⁵⁷ The Kansas Supreme Court's rule regarding opinions of the appellate court states that when an opinion is not formally published, "no new points of law making the decision of value as precedent are believed to be involved."²⁵⁸ The Kansas Court of Appeals clearly waited to announce its decision not to publish *Fischer* until the Kansas Supreme Court ruled in *Rose II*. Had the Kansas Court of Appeals intended its holding in *Fischer* to be valued as precedent, it would have published the decision.

Moreover, the Kansas Court of Appeals recently applied the common law collateral source rule in its July 15, 2005, opinion in *Zak v. Riffel*.²⁵⁹ Citing the decision in *Rose I*, the Kansas Court of Appeals stated that "[t]he purpose of the collateral source rule is to prevent the tortfeasor from escaping full liability resulting from his or her actions by requiring the tortfeasor to compensate the injured party for all of the harm, not just the net loss."²⁶⁰ The Kansas Court of Appeals adopted the following language used in *Rose I*:

A benefit secured by the injured party either through insurance contracts, advantageous employment arrangements, or gratuity from family or friends should not benefit the tortfeasor by reducing his or her liability for damages. If there is to be a windfall, it should benefit the injured party rather than the tortfeasor.²⁶¹

The court in *Zak* relied on the reasoning stated for the collateral source rule in *Rose I*, despite its own prior opinion in *Fischer*.²⁶² While some Kansas practitioners will argue that the collateral source

254. *Id.*

255. *Id.*

256. See *Rose v. Via Christi Health Sys., Inc. (Rose II)*, 113 P.3d 241 (Kan. 2005). The composition of the Kansas Supreme Court has changed since *Rose I*. Justice Robert L. Gernon wrote *Rose I*, joined by Justices Donald L. Allegrucci, Robert E. Davis, and Lawton R. Nuss. *Rose I*, 78 P.3d at 798. Justice Marla J. Luckert dissented, joined by Chief Justice Kay McFarland and Judge J. Patrick Brazil, assigned to hear the case on behalf of Justice Bob Abbott. *Id.* Since *Rose I*, Justice Carol A. Beier replaced Justice Abbott and Justice Eric Rosen replaced Justice Gernon. Kansas Supreme Court, <http://www.kscourts.org/supct/scbios.htm> (last visit Oct. 21, 2005).

257. *Fischer Order*, *supra* note 247.

258. KAN. SUP. CT. R. 7.04.

259. 115 P.3d 165, 174 (Kan. Ct. App. 2005).

260. *Id.* at 174 (citing *Rose I*).

261. *Id.* (quoting *Rose I*, 78 P.3d at 798) (emphasis omitted).

262. *Fischer v. Farmers Ins. Co.*, No. 90,246, slip op. at 13 (Kan. Ct. App. Feb. 18, 2005).

rule does not apply to the amount written off by all types of insurance, as ruled by the Kansas Court of Appeals in *Fischer*, the Kansas Supreme Court will likely disagree based on its reasoning in *Rose I*.

III. ANALYSIS

A. *Kansas Should Not Abolish the Collateral Source Rule*

Even though the Kansas legislature has attempted for many years to abolish the collateral source rule, abrogating the rule will only harm Kansans. First, the rule does not affect the affordability of liability insurance. Second, despite attempts to mislead Kansans to believe that a medical malpractice crisis caused the increase in the premiums, no such crisis exists. Finally, abolition of the rule severely harms those injured by the negligent acts of others.

1. The Collateral Source Rule Does Not Affect the Affordability of Liability Insurance

To determine whether the collateral source rule impacts liability insurance premiums, one must examine the financial structure of an insurance company.²⁶³ An insurance company makes money through a combination of investment income and the collection of premiums.²⁶⁴ The respective state regulatory commission heavily monitors both the types of investments and the quality of investments made by insurance companies.²⁶⁵ In addition to state regulations, insurer associations also dictate the types of investments and the amounts invested.²⁶⁶ Accordingly, an insurance company's profitability is largely determined by the bond market.²⁶⁷

Insurance companies also make money by collecting premiums.²⁶⁸ The combined ratio, the ratio of the premium dollars collected to the amount paid out in claims, determines the insurance company's profitability.²⁶⁹ An insurance company breaks even when the premiums collected equal the claims paid.²⁷⁰ At the end of the year, an insurance company's profits from market investments may

263. Mitchell J. Nathanson, *It's the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 PENN ST. L. REV. 1077, 1082 (2004).

264. *Id.* at 1082, 1087-88.

265. *Id.* at 1082.

266. *Id.*

267. *Id.* at 1082-83.

268. *Id.* at 1087-88.

269. *Id.* at 1088.

270. *Id.* An insurance company breaks even when the combined ratio is 100. *Id.* When the combined ratio exceeds 100, the insurance company suffers a loss, and when the combined ratio is less than 100, the insurance company incurs a gain. *Id.* For example, an insurance company suffers a net loss when it has a combined ratio of 107—for every \$1.00 of insurance premium collected, \$1.07 is paid out in losses and expenses. *See id.*

offset any minimal loss resulting from the combined ratio.²⁷¹ Accordingly, when market interest rates are down, insurance companies have less in market investment income to offset combined ratio losses.²⁷² Many have concluded that the perceived medical malpractice “crisis” is not caused by increased malpractice claims and soaring jury verdicts, but rather is a result of the cyclical nature of the bond market.²⁷³

Although insurance companies’ profitability depends on their market investment income, they blame soaring premiums on paid losses caused by an increased number of lawsuits and inconceivably high jury verdicts.²⁷⁴ The data does not support this assertion.²⁷⁵ Instead, studies have established that the premiums rise and fall with the market.²⁷⁶ When market investment profits are high because of a strong economy, premiums remain relatively stable, but when market investment profits decline, insurance companies raise premiums to offset such losses.²⁷⁷ In fact, studies show that while paid losses have increased, the paid losses have closely tracked healthcare cost inflation since 1975.²⁷⁸

The data shows that tort reform measures aimed at reducing the amount paid out by insurance companies to injured victims have not reduced premiums.²⁷⁹ Insurance companies do not refute this data and will not assure legislatures contemplating such reforms that the reforms will lower premiums.²⁸⁰ The data further shows that neither the amount of claims filed nor the amount awarded to injured victims is soaring.²⁸¹ While jury verdicts from 1992 to 2001 increased 70%, the increase came in a decade that saw over a 51% increase in medical costs and over a 26% general inflation increase.²⁸² While insurance companies report an increase in claims filed, studies show that only one out of every six incidents of medical malpractice are pursued by the injured patient.²⁸³ Medical errors are increasing, with an estimated 195,000 people dying each year from preventable medical error, not including those injured or permanently disabled as a result of

271. *Id.*

272. *Id.*

273. *Id.* at 1081; *see supra* note 106.

274. *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 *EMORY L.J.* 1263, 1273-74 (2004).

275. *Id.* at 1274.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 1275-76; *see* 1986 REPORT ON PROPOSAL NO. 29, *supra* note 96, at 590.

281. Finley, *supra* note 274, at 1268-70.

282. *Id.* at 1269. Also, in 2001 ninety percent of the medical malpractice cases tried involved death or permanent disability of the patient, which warranted high damage awards. *Id.*

283. *Id.* at 1270.

negligent treatment.²⁸⁴ A Harvard medical practices study even stated that “the real tort crisis may consist in too few claims.”²⁸⁵

The number of claims filed and the number of claims paid does not affect the insurance premium.²⁸⁶ Rather, studies report six factors that determine the insurance premium: “(1) medical cost inflation, (2) the cyclical nature of the insurance market, (3) the need to shore up reserves for policies in force, (4) a decline in investment income, (5) overall financial safety considerations, and (6) the supply and demand of coverage.”²⁸⁷ Because tort reforms aimed at reducing the amount of the claims paid by insurance companies have little effect, if any, on the insurance premiums, which actually fluctuate with market investment profits, the collateral source rule does not affect the affordability of insurance premiums.²⁸⁸

2. There Is No Medical Malpractice “Crisis”

The collateral source rule does not affect the affordability of liability insurance. Yet, lawmakers continue efforts to eliminate the rule.²⁸⁹ Abrogation of the collateral source rule helps one group: insurance companies.²⁹⁰ Those in favor of abolishing the collateral source rule offer a number of startling “facts” to support the need for tort reforms.²⁹¹ Proponents of tort reform report to state legislatures that the number of tort claims filed have significantly increased; jury verdicts have reached astronomical amounts; frivolous lawsuits outnumber legitimate claims; doctors are leaving states without satisfactory tort reforms in place, which affects the availability of healthcare; and businesses are leaving states without tort reform, which causes job loss.²⁹² These claims are simply not true. As discussed above, the number of personal injury claims has not significantly increased.²⁹³ The number of tort claims filed has actually decreased per capita over the last ten years.²⁹⁴ Additionally, the amounts awarded by juries

284. *Id.* at 1271.

285. *Id.*

286. *Id.* at 1273.

287. *Id.*

288. *See id.*

289. *See supra* Part B.1.

290. *See Fischer v. Farmers Ins. Co.*, No. 90,246, slip op. at 12 (Kan. Feb. 18, 2005); 1985 REPORT ON PROPOSAL NO. 47, *supra* note 96, at 870.

291. CTR. FOR JUSTICE & DEMOCRACY, HOW THE INSURANCE INDUSTRY CREATES “CRISES” AND LEADS THE CHARGE FOR “TORT REFORM,” http://www.centerjd.org/private/mythbuster/MB_ins_ind_creates_crises.htm (last visited Oct. 21, 2005) [hereinafter CTR. FOR JUSTICE & DEMOCRACY, INSURANCE INDUSTRY CREATES “CRISES”].

292. *See* Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind “Tort Reform,”* 5 YALE J. HEALTH POL’Y L. & ETHICS 357, 357-63 (2005); JOANNE DOROSHOW & EMILY GOTTLIEB, CTR. FOR JUSTICE & DEMOCRACY, SHAKEDOWN: HOW THE INSURANCE INDUSTRY EXPLOITS A NATION IN TIMES OF CRISIS 8-9 (2002), <http://www.centerjd.org/private/papers/Shakedown.pdf%20copy.pdf>.

293. *See supra* notes 281-85 and accompanying text.

294. Geoff Boehm, *supra* note 292, at 358.

have increased proportionally with increases in medical costs and general inflation.²⁹⁵

Proponents of tort reform have also failed to produce evidence of the purported “frivolous” lawsuits.²⁹⁶ Plaintiff’s personal injury attorneys face serious sanctions for filing frivolous claims.²⁹⁷ If a plaintiff’s attorney were to bring a frivolous lawsuit, the attorney could also be sued for malicious prosecution and other similar tort actions. Furthermore, most plaintiff’s attorneys enter into a contingency fee agreement with the plaintiff.²⁹⁸ Under a contingency fee agreement, the attorney is reimbursed for expenses advanced on behalf of the plaintiff and earns a fee only if the plaintiff recovers.²⁹⁹ Facing sanctions, lawsuits and the loss of advanced expenses and fees discourage attorneys from filing frivolous claims.³⁰⁰

Threats that doctors are being forced to leave states without tort reforms are also unfounded.³⁰¹ In explaining the American Medical Association’s campaign in support of tort reform, AMA President Richard Corlin stated that “many practitioners, both generalists and specialists, just can’t afford the liability premiums, forcing them to retire early, limit their practice or relocate.”³⁰² The American Tort Reform Association touted much of the same. “Pennsylvania, like other states where malpractice insurance rates have soared in the absence of meaningful civil justice reforms, is facing a physician shortage crisis.”³⁰³ The National Association of Independent Insurers agreed, stating that in West Virginia “doctors will continue to flee and turn to states where the litigation climate and insurance rates are more palatable.”³⁰⁴

These claims, however, turned out to be false.³⁰⁵ In West Virginia, the *Charleston Gazette* investigated the claims of the West Virginia Medical Association that the state was experiencing a “mass exodus of doctors from the state” as a result of the failure to enact tort reform.³⁰⁶ The paper reported that the number of doctors practicing

295. Finley, *supra* note 274, at 1269.

296. Geoff Boehm, *supra* note 292, at 358-60.

297. *Id.* at 359.

298. *Id.*

299. *Id.*

300. *Id.*

301. DOROSHOW & GOTTLIEB, *supra* note 292, at 8-9.

302. *Id.* at 8 (quoting Simon Avery, Associated Press, *Doctors Vow Tort Reform to Reduce Insurance Costs*, Mar. 11, 2002).

303. *Id.* (quoting AM. TORT REFORM ASS’N, INSURANCE RATE HIKES FORCE PENNSYLVANIA DOCTORS TO CLOSE DOORS (2001), <http://www.atra.org/alert.fl.ml?aid=7265>).

304. *Id.* (quoting Property and Casualty.com, *Tort Reform Necessary to Quell WV Medical Malpractice Crisis*, Dec. 14, 2001, <http://www.propertyandcasualty.com/content/news/article.asp?docid={2c80c973-f01a-11d5-a77e-00d0b7694f32}>).

305. *Id.* at 9.

306. *Id.*

in West Virginia had actually increased more than 14% over the prior ten years.³⁰⁷ A 2001 editorial stated that

[t]he Medical Association has made much of the fact that Wheeling[, West Virginia] has lost three of its neurosurgeons in the past year. But two of those neurosurgeons are near the top of the list for the number of malpractice suits brought against them. In all but one of the 19 lawsuits brought against those two doctors, the insurance company representing them settled out of court, apparently paying damages. The third neurosurgeon left town shortly after being sued for malpractice. That neurosurgeon admitted drilling into the wrong side of his patient's head during an operation, possibly leaving her permanently scarred. The same neurosurgeon lost a jury trial for \$1.8 million for botching a surgery that caused multiple cerebral aneurysms and cardiac arrest. Is Wheeling really worse off for losing these doctors?³⁰⁸

Pennsylvania's physician population increased more than 13% in a ten-year period compared to a minimal 3% general population increase.³⁰⁹ Overall, studies show that threats that physicians will leave states without tort reforms are unfounded.³¹⁰ "Despite anecdotal reports that favorable state tort environments with strict . . . tort and insurance reforms attract and retain physicians, no evidence suggests that states with strong . . . reforms have done so."³¹¹

Advocates of tort reform also claim that reforms create a business-friendly legal environment and that such reforms help to retain and attract business to the state, which result in a healthy job market.³¹² Kansas legislators who support abrogation of the collateral source rule have claimed that abrogation of the rule would combat the problem of job loss in Kansas.³¹³ The legal climate in Kansas, however, is extremely business friendly. The United States Chamber of Commerce annually ranks states according to the "fairness" of the state's legal system.³¹⁴ Kansas ranked sixteenth in the nation in the 2005 poll.³¹⁵ Additionally, opponents of tort reform question the objectivity of the report because the "fairness" of a state's court system

307. *Id.*

308. *Id.* (quoting Editorial, *Malpractice Association Distorts Facts*, CHARLESTON GAZETTE, Mar. 1, 2001, at 4A).

309. *Id.*

310. *Id.*

311. *Id.* (quoting Eleanor D. Kinney, *Malpractice Reform in the 1990s: Past Disappointment, Future Success?*, 20 J. HEALTH POL. POL'Y & L. 99, 120 (1995)).

312. *See, e.g.*, Legislative Update (Sharon Schwartz, Kansas Representative), Mar. 24, 2005, <http://skyways.lib.ks.us/gouvernement/schwartz/week%2001%2005.htm>.

313. *See, e.g., id.*

314. KAN. CHAMBER OF COMMERCE, *State Ranks in Bottom Third, Federal Study Shows Kansas Needs to Work Harder for Solid Job Growth*, <http://www.kansaschamber.org/forms/adv03/v3num20.htm> (last visited Oct. 21, 2005).

315. U.S. CHAMBER INST. FOR LEGAL REFORM, 2005 STATE LIABILITY SYSTEMS RANKING STUDY 8 (2005), <http://www.instituteforlegalreform.org/harris/pdf/HarrisPoll2005-Summary.pdf>. According to the poll, the top fifteen are labeled "best" and sixteen through thirty-five are labeled "moderate." *Id.*

is actually judged by the perceptions and the opinions of corporate lawyers and in-house corporate counsel.³¹⁶ Because the United States Chamber of Commerce spent more than \$53,000,000 in lobbying efforts in 2004, more than any other organization has ever spent on lobbying in a year, some question the motivation for the poll.³¹⁷

Using “facts,” such as astronomical jury awards and job loss, the insurance companies convince legislatures, as well as private citizens, that tort reforms are needed. The insurance industry spends millions on advertising and lobby efforts to spread its agenda.³¹⁸ Unfortunately, the “facts” reported are not always the truth.³¹⁹ In 1986, advertisements in *Readers’ Digest*, *Newsweek*, and other highly read publications exclaimed such things as “The Lawsuit Crisis is Bad for Babies” and “Even Clergy Can’t Escape the Lawsuit Crisis.”³²⁰ When members of Congress asked the Insurance Information Institute to substantiate the clergy claims, the Institute was unable to do so, which led Congressman John J. LaFalce of New York to report,

The information they gave us would lead us to conclude that there are only about a dozen of these religious malpractice cases pending throughout the country, and that the only one that has gone to trial was dismissed in favor of the defendant. In other words, . . . at the time these ads were run, the insurance industry had not yet paid out one cent pursuant to any court judgment in any of these cases. Yet, they form an integral part of its national advertising campaign.³²¹

The insurance industry also reports on specific cases to substantiate the need for tort reforms.³²² Few conversations about the state of the tort system conclude without referring to the McDonald’s hot coffee case.³²³ Consumers learn of the over \$2.7 million jury award, but rarely are presented with the actual facts of the case.³²⁴ Insurance advertisements fail to explain that the burns suffered by the plaintiff

316. Press Release, Ctr. for Justice & Democracy, What’s Happened to the Chamber of Commerce? (Mar. 7, 2005), <http://www.centerjd.org/press/release/Chamber050307.htm>.

317. *Id.* The Center for Justice and Democracy has even noted that [w]ith the U.S. Chamber attacking the very communities it should be promoting, a huge budget of special interest money now pouring into the organization to protect and defend some of America’s most harmful industries, and a far-reaching partisan political agenda, one has to ask, “What’s happened to the Chamber of Commerce?” Press Release, Ctr. for Justice & Democracy, National Consumer Group Blasts U.S. Chamber’s “Report” on Business/Litigation Climate (Mar. 2005), <http://www.centerjd.org/press/release/050308ChamberNat.htm> (statement from Joanne Doroshow).

318. See CTR. FOR JUSTICE & DEMOCRACY, INSURANCE INDUSTRY CREATES “CRISES,” *supra* note 291.

319. See *id.*

320. *Id.*

321. *Id.* (quoting *The Liability Insurance Crisis: Hearings Before the Subcomm. on Economic Stabilization of the H. Comm. on Banking, Finance, and Urban Affairs*, 99th Cong. 2 (1986) (statement of Rep. John J. LaFalce)).

322. See Amy Bickel, *Kline Talks About Tort Reform at Chamber Event*, THE HUTCHINSON NEWS, Apr. 21, 2005; Lectric Law Library, *The Actual Facts About the McDonalds’ Coffee Case*, <http://www.lectlaw.com/files/cur78.htm> (last visited Oct. 21, 2005).

323. See Lectric Law Library, *supra* note 322.

324. *Id.*

were extremely severe, that McDonald's knew that the excessive coffee temperature had caused previous injuries, and that the amount awarded in punitive damages represented only two days of McDonald's coffee sales.³²⁵

Reporters have exposed insurance companies for using fictitious cases to gain support for tort reforms.³²⁶ While advocating for tort reform during a speech on April 21, 2005, Kansas Attorney General Phill Kline discussed a case involving two men who sued a mower manufacturer after injuring themselves while using their lawn mower as a hedge trimmer.³²⁷ A *USA Today* article from January 30, 2005, had already reported that the case was fabricated.³²⁸ An insurance company included the story in an advertising campaign, but insurance industry officials later confirmed that no such case ever existed.³²⁹

Some of the insurance industry's advertising campaign efforts have even led to lawsuits.³³⁰ In 1984, the insurance industry launched an extensive campaign aimed at nationwide tort reform.³³¹ One industry spokesperson stated that the goal was "to withdraw [from the market] and let the pressure for reform build in the courts and in the state legislatures."³³² In 1986, the Insurance Information Institute spent \$6.5 million dollars on advertising efforts to convert the perceived "insurance crisis" to a "lawsuit crisis."³³³ In response to such efforts, states and public interest groups filed an antitrust action charging insurance companies with conspiring to create an artificial insurance crisis.³³⁴ The insurance companies settled the claim in 1995.³³⁵

3. Abrogation of the Collateral Source Rule Helps Insurance Companies but Harms Those Injured by the Negligent Acts of Others

The slight beneficial impact that abrogation of the common law collateral source rule may have on insurance companies is outweighed by the grave societal impact on people injured by the negligent acts of others.³³⁶ When the jury is presented with evidence that the insurance

325. *Id.*

326. *See* Bickel, *supra* note 322.

327. *Id.*

328. *Id.*

329. *Id.*

330. CTR. FOR JUSTICE & DEMOCRACY, INSURANCE INDUSTRY CREATES "CRISES," *supra* note 291.

331. *Id.*

332. *Id.* (quoting J. OF COMMERCE, June 18, 1985, at 10A).

333. *Id.* (citing Herbert, *\$6.5 Million in Ads Targets Lawsuit Crisis*, J. OF COMMERCE, Mar. 19, 1986, at 1).

334. *Id.*

335. *Id.*

336. *See* Nathanson, *supra* note 263, at 1109.

company paid the plaintiff's medical bills, the tortfeasor is relieved of paying the full amount of the damages he has caused.³³⁷ The injured party, on the other hand, suffers in a number of ways.

The injured party has paid premiums to secure the insurance coverage that provides the benefits.³³⁸ The tortfeasor benefits from insurance coverage secured by the injured party, while the injured party is left uncompensated for the cost of premiums.³³⁹ Furthermore, the injured party suffers because the benefits paid on behalf of the injured party apply to the injured party's lifetime cap on benefits.³⁴⁰

A jury can award the plaintiff both economic and non-economic damages. When the jury awards economic damages for medical bills incurred, and the plaintiff's insurance company has already paid some of the medical bills, the plaintiff recovers more than the exact amount of economic damages. This extra amount compensates the plaintiff for the litigation costs and attorney's fees incurred for having to bring the action to recover damages.³⁴¹ When a jury awards dollar for dollar only the actual out-of-pocket economic damages suffered by the plaintiff, the plaintiff ends up losing money.³⁴² Such a system affects an injured party's right to seek damages from a tortfeasor.³⁴³ Furthermore, a jury uses economic damages to help calculate the non-economic damages suffered by a plaintiff.³⁴⁴ When a jury is presented with evidence that the economic damages were minimal, the jury is likely to believe that the non-economic damages were minimal as well.³⁴⁵

Those in favor of abrogating the collateral source rule seek to make evidence of plaintiff's insurance admissible but want evidence that the defendant is insured to remain inadmissible. Kansas has long recognized that the evidence of a defendant's liability insurance is inadmissible because it is considered highly prejudicial.³⁴⁶ When juries learn that the defendant is insured, juries may award higher damages than they would have against the individual defendant because they understand that the insurance company, not the defendant, will pay the damages.³⁴⁷ Evidence of a plaintiff's insurance coverage is equally prejudicial.³⁴⁸ When juries learn that the plaintiff is insured,

337. *Bates v. Hogg*, 921 P.2d 249, 255 (Kan. Ct. App. 1996) (Rulon, J., dissenting) (citing 2 MINZER ET AL., *DAMAGES IN TORT ACTIONS* § 9.60, at 9-88 (1991)).

338. Edwards, *supra* note 37, at 321-22.

339. *Id.*

340. HEALTH INSURANCE IN KANSAS, *supra* note 42.

341. Edwards, *supra* note 37, at 322.

342. *Id.*

343. *Id.*

344. KTLA Brief, *supra* note 48, at 13.

345. *Id.*

346. KAN. STAT. ANN. § 60-454 (1994); *McKissick v. Frye*, 876 P.2d 1371, 1385 (Kan. 1994).

347. *See Denton v. Con-Way S. Express, Inc.*, 402 S.E.2d 269, 270-71 (Ga. 1991).

348. *Id.*

they may act with prejudice because they believe the plaintiff's insurance company covered the plaintiff's expenses.³⁴⁹ If Kansas were to abolish the common law collateral source rule, the plaintiff would be harmed by the unfair prejudicial evidence of insurance coverage while the defendant would remain protected.³⁵⁰

B. *Constitutional Analysis of Abrogation of the Collateral Source Rule*

The Kansas legislature has sought to abrogate the collateral source rule since the 1970s.³⁵¹ Even though the Kansas Supreme Court has declared the statutes unconstitutional,³⁵² the Kansas legislature continues its attempt to eliminate the rule.³⁵³ The continued efforts will fail, however, because abolition of the collateral source rule, no matter how presented, will violate the Kansas Constitution.

1. *The Statutes Are Unconstitutional Because the Legislative Purpose Is No Longer Rational*

Since the first legislative effort to abrogate the collateral source rule in Kansas, the legislature has asserted that the purpose of the statute is to ensure affordable malpractice insurance to Kansas health-care providers.³⁵⁴ Proponents of the constitutionality of the laws have relied upon the stated purpose each time the laws have been challenged.³⁵⁵ In *Wentling v. Medical Anesthesia Services* and in *Farley v. Engelken*, the courts used intermediate review,³⁵⁶ but today, the statutes would even fail under a rational basis test. Under a rational basis test, the party challenging the statute has the burden to prove that the classification is not rationally related to the government's legitimate interest.³⁵⁷ If any set of facts could lead the legislature to believe that the classification was justified by the legislative goal, then the law would be constitutional.³⁵⁸ When *Wentling* and *Farley* were decided, it was conceivable that abolition of the collateral source rule may have an impact on the rising cost of malpractice insurance premiums.³⁵⁹ Time has shown that malpractice premiums are not determined by the

349. *Id.*

350. *See id.*; KAN. STAT. ANN. § 60-454 (1994).

351. *See supra* Part II.B.1.

352. *See supra* Part II.B.1.

353. *See supra* Part II.B.1.

354. *See supra* Part II.B.1.

355. *See, e.g.*, *Thompson v. KFB Ins. Co.*, 850 P.2d 773, 779 (Kan. 1993); *Farley v. Engelken*, 740 P.2d 1058, 1066 (Kan. 1987); *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939, 950 (Kan. 1985).

356. *Farley*, 740 P.2d at 1064; *Wentling*, 701 P.2d at 950.

357. *Farley*, 740 P.2d at 1062.

358. *Id.*

359. *See supra* Part II.B.1.a-c.

amount of claims paid but are more a reflection of the cyclical nature of the investment and insurance markets.³⁶⁰ When the Kansas Supreme Court in *Wentling* invalidated the Kansas statute abrogating the collateral source rule, the court relied on the rationale expressed in *Doran v. Priddy*.³⁶¹ While the *Doran* opinion used an intermediate scrutiny test to invalidate the statute, the opinion essentially invalidated the statute by using language from the rational basis test. The court explained that

[e]ven if we assume medical malpractice statutes which single out one profession for special protection from rising costs for tortious conduct in a time of general inflation betoken legitimate interests, these interests are not thwarted by requiring more even treatment of indigent injured parties with other classes of injured parties referenced in the same statute.³⁶²

At the time the court decided *Farley*, Justice Tyler C. Lockett, in his concurring opinion, believed that the statute challenged in *Farley* failed the rational basis test because the legislative purpose was not rational.³⁶³

Even though some once believed abrogation of the collateral source rule would serve a legitimate government interest, that rationale is no longer valid. Abrogation of the collateral source rule will not impact malpractice insurance premiums.³⁶⁴ Therefore, the Kansas legislature can no longer create classifications for the purpose of lowering malpractice premiums to survive a rational basis review.

2. Right to a Remedy

Abolition of the collateral source rule impairs injured Kansans' right to a remedy in violation of the Kansas Constitution. Section 18 of the Kansas Constitution provides, "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."³⁶⁵ Remedy by due course of law is defined as the "reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure and after a fair hearing."³⁶⁶ The court in *Farley* discussed the right to a remedy.³⁶⁷ While the court in *Farley* did not reach the issue of whether the challenged statute violated the right to a remedy, it did find that the statute threatened the right requiring intermediate review.³⁶⁸ The

360. Finley, *supra* note 274, at 1273.

361. *Wentling*, 701 P.2d at 950-51.

362. *Doran v. Priddy*, 534 F. Supp. 30, 37 (D. Kan. 1981).

363. *Farley*, 740 P.2d at 1068-69 (Lockett, J., concurring).

364. *See supra* Part III.A.1.

365. KAN. CONST., Bill of Rights, § 18.

366. *Farley*, 740 P.2d at 1064 (quoting *Ernest v. Faler*, 697 P.2d 870 (1985)).

367. *Id.*

368. *Id.*

defendant in *Farley* argued that the plaintiff's right to a remedy was not threatened because the plaintiff could still bring an action to recover damages.³⁶⁹ The court agreed that the statute did not prevent the plaintiff from bringing an action but stated that "it impairs his remedy if a jury determines the victim is not entitled to full compensation from the defendant because the victim has received benefits from independent sources."³⁷⁰

Abrogation of the collateral source rule violates the constitutional right to a remedy.³⁷¹ As clearly stated in *Farley*, if the jury awards the plaintiff less than full compensation because the plaintiff received benefits from collateral sources, then the right to a remedy is impaired.³⁷² Any statute abrogating the collateral source rule will violate this right guaranteed by the Kansas Constitution.

3. Equal Protection

Abolition of the collateral source rule will violate the Kansas Constitution's equal protection guarantee.³⁷³ Allowing juries to hear evidence of a plaintiff's insurance coverage, but not evidence of a defendant's insurance coverage, violates the Equal Protection Clause by treating litigants unequally.³⁷⁴ Evidence of insurance prejudices the jury and contaminates the trial.³⁷⁵ Kansas has always excluded evidence of a defendant's liability insurance because of its highly prejudicial nature.³⁷⁶ To date, bills introduced by the Kansas legislature have sought to allow only evidence regarding the plaintiff's insurance.³⁷⁷ A law admitting only one party's insurance payments, when both parties are insured, treats personal injury litigants unequally and violates the Kansas Constitution.

C. Kansas' Unequal Treatment of Medicaid Recipients—The Limits Placed on the Collateral Source Rule by Bates v. Hogg Are Unconstitutional

The 1996 Kansas Court of Appeals decision in *Bates v. Hogg* violates both the United States and Kansas constitutions. Injured Kansans insured by Medicaid are discriminated against and treated differently than injured Kansans whose medical bills are paid by other

369. *Id.*

370. *Id.*

371. KAN. CONST., Bill of Rights, § 18.

372. *Farley*, 740 P.2d at 1064.

373. KAN. CONST., Bill of Rights, § 1.

374. *Id.*

375. *Denton v. Con-Way S. Express, Inc.*, 402 S.E.2d 269, 270-71 (Ga. 1991).

376. KAN. STAT. ANN. § 60-454 (1994); *McKissick v. Frye*, 876 P.2d 1371, 1385 (Kan. 1994); *see also Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 255 (1963).

377. *See, e.g., KAN. STAT. ANN. § 60-3802* (1994), *invalidated by Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993) (allowing only evidence that a plaintiff was insured).

means.³⁷⁸ Such discrimination violates the constitutional guarantees of equal protection, uniform operation of laws, and the right to a remedy.

The decision in *Bates* violates the equal protection clauses of the United States Constitution and the Kansas Constitution. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, “No State shall . . . deny to any person . . . the equal protection of the laws.”³⁷⁹ Section 1 of the Kansas Bill of Rights, titled “Equal rights,” provides, “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”³⁸⁰ Kansas has construed Section 1 of the Kansas Bill of Rights as an equal and parallel provision to the Fourteenth Amendment of the United States Constitution.³⁸¹ Equal protection is offended when one group is treated differently than a similarly situated group.³⁸² Equal protection requires that all parties injured by the negligent acts of others have an equal right to receive compensation from the tortfeasor.³⁸³ Such compensation can be in the form of both economic and non-economic damages.³⁸⁴ Economic damages are generally those damages in which a dollar amount can be assessed—such as past and future medical bills, and past and future lost wages.³⁸⁵ Non-economic damages are generally those damages that are realized but difficult to assess with precise dollar amounts—such as pain and suffering, emotional loss, and disability.³⁸⁶ While easy to define separately, juries often rely upon the amount of economic damages in assessing an injured party’s non-economic damages.³⁸⁷ The amount of economic damages often aids the jury in assessing the severity of the claim and appreciating the non-economic damages.³⁸⁸

Under *Bates*, injured parties insured by Medicaid are prevented from admitting evidence of the total amount of medical bills incurred and, instead, are limited to admitting evidence of the medical bills actually paid by Medicaid.³⁸⁹ Medicaid contracts with healthcare providers to pay a substantially reduced rate for medical services provided

378. *Bates v. Hogg*, 921 P.2d 249, 253 (Kan. Ct. App. 1996).

379. U.S. CONST. amend. XIV, § 1.

380. KAN. CONST., Bill of Rights, § 1.

381. *Coburn v. Agustin*, 627 F. Supp. 983, 986 (D. Kan. 1985) (citing *State ex rel. Schneider v. Liggett*, 576 P.2d 221 (Kan. 1978)).

382. *Bates*, 921 P.2d at 253.

383. *Farley v. Engelken*, 740 P.2d 1058, 1069 (Kan. 1987) (Lockett, J., concurring).

384. *Bates*, 921 P.2d at 252.

385. *Id.*

386. *Id.*

387. KTLA Brief, *supra* note 48, at 13.

388. *Id.*

389. *Bates*, 921 P.2d at 253.

to Medicaid patients.³⁹⁰ The medical services provided to Medicaid patients are the same, but the amount actually paid is substantially less.³⁹¹ Injured litigants covered by Medicaid have fewer medical bills for the same medical care than injured litigants covered by other insurance.³⁹² Therefore, indigent litigants forced to rely on Medicaid for healthcare coverage are treated differently than litigants covered by other forms of insurance.³⁹³ Juries determining both economic and non-economic damages for injured litigants, who are covered by private health insurance, assess damages on the total amount of medical bills *charged*. Juries determining both economic and non-economic damages for injured litigants, who are covered by Medicaid, assess damages on the amount of medical bills actually *paid by Medicaid*. Such treatment impairs the indigent litigant's equal right to recover compensation from a negligent tortfeasor.³⁹⁴

Even though *Wentling* invalidated section 60-471 of the Kansas Statutes Annotated because of an invalid classification, *Bates* reinstates that classification.³⁹⁵ In *Wentling v. Medical Anesthesia Services*, the Kansas Supreme Court held section 60-471 unconstitutional on equal protection grounds under the constitutions of both the United States and Kansas.³⁹⁶ The court ruled that the statute "discriminates between those who pay for insurance . . . and anyone who must rely upon charity or other gratuitous care," stating that the statutory classification "embodies elements of putativeness and discrimination which violate the rights of citizens to equal treatment under the law."³⁹⁷ Under the rationale used in *Wentling*, *Bates* violates the equal protection clauses of the United States and Kansas constitutions by discriminating between those who can afford private insurance and those who cannot.³⁹⁸

Bates further violates equal protection by affording special treatment to one class of tortfeasors over another.³⁹⁹ Tortfeasors who injure indigent parties are accountable for lower damages than tortfeasors who injure parties covered by private health insurance.⁴⁰⁰ The Kansas Supreme Court held in *Farley v. Engelken* that unequal treatment of tortfeasors was unconstitutional.⁴⁰¹ The statute challenged in

390. *Id.*

391. *See* *Rose v. Via Christi Health Sys., Inc. (Rose I)*, 78 P.3d 798, 800 (Kan. 2003), *modified on reh'g*, 113 P.3d 241 (Kan. 2005).

392. *Id.*

393. *See* *Bates*, 921 P.2d at 253.

394. *Farley v. Engelken*, 740 P.2d 1058, 1069 (Kan. 1987).

395. *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939, 950 (Kan. 1985).

396. *Id.* at 951.

397. *Id.* at 950.

398. *See id.*

399. *Farley*, 740 P.2d at 1068.

400. *See* *Bates*, 921 P.2d at 253.

401. *Farley*, 740 P.2d at 1068.

Farley treated negligent medical providers differently than other tortfeasors.⁴⁰² The court held the special treatment afforded to negligent medical providers unconstitutional despite the legislature's purpose in enacting the law, which was to address the concern of availability and affordability of healthcare in the state.⁴⁰³ Similar to *Farley*, the special treatment of tortfeasors in *Bates* is arbitrary and serves no legitimate state interest. The classification is determined solely on the financial status of the injured party.⁴⁰⁴ The benefit to tortfeasors who injure indigent parties is arbitrary and unconstitutional, while the indigent parties are disadvantaged and denied a remedy.⁴⁰⁵

Bates also violates Article 2, Section 17 of the Kansas Constitution, which provides for the uniform operation of laws.⁴⁰⁶ Article 2, Section 17 provides, "All laws of a general nature shall have a uniform operation throughout the state."⁴⁰⁷ Laws do not have uniform operation throughout the state when a class is defined and then one group within that class is discriminated against.⁴⁰⁸ In *Boyer v. Ferguson*,⁴⁰⁹ the Kansas Supreme Court held that a statute prohibiting sales of certain items on Sunday violated Section 17.⁴¹⁰ The statute violated the constitutional guarantee to a uniform operation of laws because it carved out an exception to the prohibition of the sale of certain items for certain types of businesses.⁴¹¹ "Since a class was defined, and then a large segment of that class exempted from the operation of the statute, the Act was held to not have a uniform application throughout the state."⁴¹²

The United States District Court for the District of Kansas in *Doran v. Priddy* held that section 60-471 of the Kansas Statutes Annotated violated Article 2, Section 17.⁴¹³ The Kansas statute allowed evidence of collateral source payments to be admitted in actions against healthcare providers, unless the collateral source payments were made by a collateral source paid for by the injured party or the party's employer.⁴¹⁴ The court in *Doran* held that the statute violated Section 17 because the statute discriminated between litigants who

402. *Id.* at 1060-61.

403. *Id.* at 1068.

404. *See id.*

405. *See id.* at 1067.

406. KAN. CONST. art. 2, § 17.

407. *Id.*

408. *Doran v. Priddy*, 534 F. Supp. 30, 38 (D. Kan. 1981).

409. 389 P.2d 775 (Kan. 1964).

410. *Id.* at 781.

411. *Doran*, 534 F. Supp. at 37-38. Small businesses with fewer than three employees and businesses selling farm equipment were allowed to sell the prohibited items. *Id.*

412. *Id.* at 38.

413. *Id.*

414. *Id.* at 35.

paid for their health insurance and those litigants forced to rely on other collateral sources for medical care.⁴¹⁵ “[T]he discrimination is one which renders the statute one which does not have uniform application and is violative of Article 2, Section 17 of the Kansas Constitution.”⁴¹⁶ Similar to the statute criticized in *Doran*, the court in *Bates* treats injured victims who pay for their insurance differently than injured victims forced to rely on government aid for healthcare.⁴¹⁷ Thus, the rule in *Bates* does not have uniform application and violates Article 2, Section 17 of the Kansas Constitution.⁴¹⁸

Bates also violates Section 18 of the Kansas Bill of Rights, which guarantees the right to a remedy.⁴¹⁹ In *Farley v. Engelken*, the Kansas Supreme Court reviewed the constitutionality of a state statute that made the common law collateral source rule inapplicable in medical malpractice cases.⁴²⁰ In deciding what standard of review to use, the court stated that “if a jury determines the victim is not entitled to full compensation from the defendant because the victim has received benefits from independent sources,” then the right to a remedy is impaired.⁴²¹ Under the decision in *Bates*, if the injured party is insured by Medicaid, the injured party is restricted to claiming only those medical bills actually paid by Medicaid.⁴²² Because juries often rely upon the total medical bills incurred to judge the severity of the injuries and determine the amount of non-economic damages awarded, the injured party’s right to a remedy is impaired.⁴²³

Bates violates the constitutional guarantees of equal protection, uniform operation of laws, and the right to a remedy. Medicaid recipients in Kansas will continue to suffer until the *Bates* decision is found unconstitutional. In light of the recent decisions from the Kansas Supreme Court in *Rose II* and from the Kansas Court of Appeals in *Fischer*, it looks to be a long and arduous road for supporters of the collateral source rule.

IV. CONCLUSION

Kansas has struggled with whether the collateral source rule should be abrogated for many years. The legislature has successfully

415. *Id.* at 38. The court found that the classification of healthcare provider tortfeasors was justified by the states interest in reducing medical malpractice costs, but the discrimination of injured parties did not further the state interest. *Id.*

416. *Id.*

417. *See Bates v. Hogg*, 921 P.2d 249, 253 (Kan. Ct. App. 1996).

418. KAN. CONST. art. 2, § 17; *see Doran*, 534 F. Supp. at 38.

419. KAN. CONST., Bill of Rights, § 18; *see Farley v. Engelken*, 740 P.2d 1058, 1063-64 (Kan. 1987).

420. *Farley*, 740 P.2d at 1060-61.

421. *Id.* at 1064.

422. *See Bates*, 921 P.2d at 253.

423. KTLA Brief, *supra* note 48, at 13.

passed laws eliminating the rule three times, but the Kansas Supreme Court has held each piece of legislation unconstitutional. The Kansas Court of Appeals in *Bates*, however, has placed limits on the common law rule, which results in discrimination against Kansans covered by Medicaid. The discrimination in *Bates* is unconstitutional for violating the guarantees of equal protection, uniform operation of laws, and the right to a remedy. Furthermore, the disconnect between *Rose I* and *Fischer* leaves Kansas practitioners uncertain of how to apply the collateral source rule.

While the Kansas legislature may have originally believed that abrogating the collateral source rule would ensure affordable malpractice premiums, time and studies have shown that the rule will not affect insurance premiums. Instead, eliminating the rule will gravely impact injured Kansans. Without the collateral source rule, injured Kansans will be prevented from collecting the full amount of their damages. The companies insuring the negligent tortfeasor, on the other hand, will benefit by receiving premiums for coverage and then benefit again by not having to pay the full amount of the damages the tortfeasor caused. Without the collateral source rule in place, injured Kansans will be left carrying the burden of the negligence of others, while the insurance industry will benefit from increased profits. In the future, the Kansas legislature will have to decide between protecting injured Kansans and “protect[ing] the purses of . . . special interest.”⁴²⁴

424. 1985 REPORT ON PROPOSAL NO. 47, *supra* note 96, at 870.