California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits

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The collateral source rule ("Rule") provides that a tortfeasor cannot reduce an adverse judgment by the amount of collateral benefits received by the plaintiff.1 The Rule results in compensating the plaintiff twice for the same injuries, once from the tortfeasor and once from the collateral source. Commentators almost uniformly have criticized the Rule,2 primarily asserting that the Rule conflicts with the compensatory function of tort law and, consequently, contributes to increased insurance costs.3 Despite its controversial nature, the Rule has been a part of the American law of damages since 18544 and now is applied in one form or another in every state of the union.5 There are, however, many exceptions to the Rule.6 As a consequence of its many applications and exceptions,

1. See infra notes 25-26 & accompanying text.
3. Tort law seeks mainly to compensate the victim for his injuries. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984) [hereinafter cited as PROSSER AND KEETON]. Application of the Rule results in double recovery for plaintiff: once from his collateral source and once from the tortfeasor. In addition, because the plaintiff’s collateral source is often an insurance company and defendant’s judgment is paid by his insurance company, the insurance industry pays for the plaintiff’s double recovery. This expense is then passed on to the consumer in the form of higher premiums. See infra notes 27-39 & accompanying text.
4. See The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854); Maxwell, supra note 2, at 671 n.6; Note, supra note 2, at 741.
5. See Peckinpaugh, supra note 2, at 32; Note, supra note 2, at 742. These authors assert that Alabama does not apply the Rule. The Alabama courts recently have changed their approach, however, and now apply the Rule to all situations unless a statute provides otherwise. See, e.g., Gribble v. Cox, 349 So. 2d 1141 (Ala. 1977); Fleming, supra note 2, at 1480-84, 1516-23, 1535-40.
6. For example, exceptions to the Rule have been made in medical malpractice actions, CAL. CIV. CODE § 3333.1 (West Supp. 1986), products liability actions, ALA. CODE § 6-5-520-
the Rule has spawned a tremendous amount of litigation.\(^7\)

In California, one evolving exception to the Rule involves plaintiffs’ receipt of uninsured motorist benefits under California Insurance Code section 11580.2.\(^8\) After the plaintiff has received uninsured motorist benefits under his insurance policy, the exception prohibits the plaintiff from recovering the amount of those collateral benefits in a subsequent suit against the tortfeasor.\(^9\)

In 1970, the California Supreme Court affirmed its adherence to the Rule in *Helfend v. Southern California Rapid Transit District*,\(^10\) but expressly declined to address “the appropriateness of the rule’s application in the myriad of possible situations which we have not discussed or which are not presented by the facts of this case.”\(^11\) With that door open, in 1980 a California court of appeal in *Waite v. Godfrey*\(^12\) held that the Rule did not apply to uninsured motorist benefits received pursuant to California Insurance Code section 11580.2.\(^13\) In 1985, however, in *Van Dyne v. McCarty*\(^14\) another California court of appeal applied the Rule in a similar fact situation. As a result of these conflicting decisions, the Rule’s applicability in California to uninsured motorist benefits is unclear. The California Supreme Court has recently agreed to hear *Van Dyne* on appeal.\(^15\) Consequently, *Van Dyne* provides the California Supreme Court with an opportunity to resolve the conflict in the courts of appeal.

The plight of the innocent victims of traffic accidents caused by uninsured motorists has been a serious social problem in California.\(^16\) The California legislature has amended the state’s uninsured motorist statute repeatedly to ensure a just recovery for the injured party.\(^17\) Because un-

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\(^7\) Note, *supra* note 2, at 741.
\(^8\) CAL. INS. CODE § 11580.2 (West Supp. 1986). This section requires that all domestic automobile insurance policies provide minimal coverage for damage caused by the owner or operator of an uninsured motor vehicle unless the policy holder expressly refused such coverage in writing.
\(^11\) Id. at 6 n.3, 465 P.2d at 63 n.3, 84 Cal. Rptr. at 175 n.3.
\(^12\) 106 Cal. App. 3d 760, 163 Cal. Rptr. 881 (1980).
\(^13\) Id. at 775, 163 Cal. Rptr. at 891.
\(^15\) Van Dyne v. McCarty, S.F. No. 24830 (Cal. May 23, 1985).
\(^16\) Comment, *Uninsured Motorist Insurance: California's Latest Answer to the Problem of the Financially Irresponsible Motorist*, 48 CALIF. L. REV. 516, 516 (1960). In 1959, approximately 12% of all licensed drivers were uninsured, a total of 840,000 drivers. *Id*.
\(^17\) The uninsured motorist statute has been amended 18 times. For a complete legisla-
certainty over the Rule's application may lead to under- or over-compensating the injured party, determining whether the Rule is applicable to uninsured motorist benefits is essential to the establishment of a comprehensive scheme for providing a just recovery to the injured party.

This Note examines the Rule and its applicability to uninsured motorist benefits in California. The Note begins with a discussion of the Rule, its flaws, and the justifications for its continued existence. The Note then examines the important California cases that apply the Rule and analyzes the cases that recognize exceptions to the Rule. After discussing the nature, function, and purpose of the California uninsured motorist statute, the Note analyzes the two California appellate court cases that reach conflicting results in their applications of the Rule to uninsured motorist benefits. Finally, the Note concludes that the Rule should be applied uniformly to uninsured motorist benefits, except when the plaintiff's insurer has brought a previous action against the uninsured motorist.

The Collateral Source Rule

Although the collateral source rule serves both as a rule of damages and a rule of evidence, this Note is concerned primarily with its role as a rule of damages. With regard to damages, the Rule provides that "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or part of the harm for which the tortfeasor is liable." In other words, a judgment against the defendant is not reduced by the amount of benefits received by the plaintiff from a collateral source.

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18. See infra notes 24-44 & accompanying text.
19. See infra notes 48-81 & accompanying text.
20. See infra notes 83-97 & accompanying text.
21. See infra notes 101-13 & accompanying text.
22. See infra notes 114-45 & accompanying text.
23. See infra notes 146-219 & accompanying text.
24. Moceri & Messina, supra note 2, at 310. As a rule of evidence, the Rule provides that "evidence of the plaintiff being compensated by a collateral source for all or a portion of the damages caused by the defendant's wrongful act is generally inadmissible." 22 AM. JUR. 2D DAMAGES § 330 (1965); see Baroni v. Rosenberg, 209 Cal. 4, 6, 284 P. 1111, 1113 (1930). As a rule of damages, the Rule provides that the amount of damages recovered from a collateral source will not be set off from the judgment. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979). The Rule serves similar functions as a rule of damages and of evidence because it generally is believed that the jury will not take into account what it has not heard in evidence. The rationale is that if a jury hears evidence of collateral benefits, it will deduct these from the damage calculations. See, e.g., CAL. CIV. CODE § 3333.1 (West Supp. 1986). Section 3333.1 provides for the abrogation of the Rule as a rule of evidence in medical malpractice cases, which practically results in abrogating the Rule as a rule of damages. Id.
25. Restatement (Second) of Torts § 920(2) (1979).
To illustrate how the Rule operates, assume that motorist $A$'s automobile is hit by motorist $B$'s automobile. As a result, $A$ suffers personal injuries and seeks medical care. $A$'s insurance company reimburses $A$ in the sum of $10,000 for the medical expenses incurred as a result of the accident. $A$ then sues $B$ for negligence and the jury returns a verdict for $A$ in the amount of $20,000. According to the Rule, $B$ is liable for the entire amount of the judgment; the Rule precludes the reduction of the judgment against $B$ by the $10,000 paid to $A$ by $A$'s insurance company. Thus, $A$ recovers twice for the same injuries, once from his insurance company and once from $B$, the defendant.26

The Rule has been criticized because it conflicts with at least two basic principles of American tort law.27 First, the Rule conflicts with the compensatory function of tort law.28 In a negligence action, tort law seeks to compensate the plaintiff, that is, to put him in the place he occupied before the tort occurred.29 The Rule, on the other hand, requires that the defendant pay the judgment against him even though the plaintiff already has been compensated for the injuries suffered as a result of defendant's negligent conduct. The California Supreme Court has characterized this double recovery as punitive in nature.30 Punitive damages have no role in compensating the injured party. The sole purpose of punitive damages is to deter future tortious conduct by the defendant.31

Second, because a benefit is conferred upon the plaintiff as a result of the tortfeasor's conduct and is not deducted from the plaintiff's judgment, the Rule is in conflict with the damage mitigation principle enunciated in the second Restatement of Torts.32 That principle states:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.33

For example, if a surgeon performs an unprivileged operation resulting in pain and suffering, it may be shown that the operation averted future suffering.34 Any recovery for the present pain and suffering should be

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26. See Fleming, supra note 2, at 1478; Note, supra note 2, at 741.
27. West, supra note 2, at 395.
28. Restatement (Second) of Torts § 901(A) (1979). This Note addresses the Rule only as it applies to automobile accidents. In this context, compensation of the injured party is the primary function of tort law.
32. Restatement (Second) of Torts § 920 (1979).
33. Id.; see also Maxwell, supra note 2, at 669-70; West, supra note 2, at 395.
34. Restatement (Second) of Torts § 920 comment a (1979).
reduced by the value of the special benefit, avoidance of future suffering. The Rule, however, contravenes the principle of mitigation of damages because the special benefit, receipt of benefits from a collateral source, does not act to mitigate damages.

In addition to conflicting with basic tort principles, the Rule has been criticized on the basis that it has outlived its usefulness. Critics point out that when the Rule was first applied, the total amount of benefits received from collateral sources was small.\(^{35}\) Therefore, the Rule may have served a useful function in ensuring full compensation to the injured party.\(^{36}\) Today, however, the overwhelming percentage of compensation to tort victims comes from sources other than the tortfeasor.\(^{37}\) Studies have shown that two-thirds of tort victims' total recovery comes from collateral sources.\(^{38}\) Consequently, the Rule goes beyond ensuring full compensation for the plaintiff. Additionally, because insurance companies usually pay the judgment against a tortfeasor, this double recovery leads to an unnecessary increase in insurance costs to the public in exchange for an unnecessary windfall to plaintiffs.\(^{39}\)

Despite these criticisms, the Rule, with such widespread acceptance,\(^{40}\) is not without justification. Two rationales exist for the Rule. First, when there must be a choice between a windfall to the plaintiff or a windfall to the defendant, the party who is less culpable, the plaintiff, should prevail. The Tenth Circuit aptly stated this rationale for the Rule in *Grayson v. Williams*:\(^{41}\)

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35. Fleming, *supra* note 2, at 1478-80; Schwartz, *supra* note 2, at 348. These collateral benefits come from a variety of sources including the victim’s own insurance, social security, workers’ compensation, and unemployment insurance.


37. *See* J. O'Connell & R. Henderson, *Tort Law, No-Fault and Beyond* 115 (1975). A 1964 study found that only 55% of a tort victim's compensation came from the tortfeasor, while 38% came from the victim’s own insurance, with the remaining 7% coming from other sources, including social security, the victim’s employer, and workers’ compensation. A. Conrad, J. Morgan, R. Pratz, C. Voltz & R. Bombaugh, *Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation* 147 (1964). One commentator has stated that the "[t]ort recovery has thus long ceased to be the only, or even the principal, source of repairing accident losses, besides the private resources of the victim himself." Fleming, *supra* note 2, at 1480.

38. *See* J. O'Connell & R. Henderson, *supra* note 37, at 115. According to these authors, only 44 cents of every dollar of insurance premium actually reaches the tort victim due to administrative and litigation costs. Out of this 44 cents, 8 cents goes toward injuries already reimbursed by collateral sources and only 14.5 of the 44 cents goes to reimburse actual loss that has not been compensated from some other source. *Id.* at 120.

39. *See* J. O'Connell & R. Henderson, *supra* note 37, at 114-15. Since the defendant usually is represented in the negligence action by his insurance company, it is the insurance industry that pays twice for the plaintiff's injuries. Consequently, some critics have argued that the Rule leads to increased insurance costs for the public. *Id.*

40. *See supra* notes 4-5 & accompanying text.

41. 256 F.2d 61 (10th Cir. 1958).
Where a part of a wrongdoer's liability is discharged by payment from a collateral source, as here, the question arises who shall benefit therefrom, the wrongdoer or the injured person. No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act. If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.\textsuperscript{42}

The second rationale for the Rule is that it ensures that the plaintiff will be fully compensated. Compensation through legal redress is not always adequate:

Legal "compensation" for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. Moreover, the injured person seldom gets the compensation he "recovered," for a substantial attorney's fee usually comes out of it.\textsuperscript{43}

The Rule helps to remedy these problems inherent in compensating the tort victim.

In short, in justifying their adherence to the Rule, courts have balanced the conflicting principles of tort law relating to the Rule in favor of the injured party.\textsuperscript{44}

The applicability of the Rule to a particular situation is determined on a case by case basis.\textsuperscript{45} Generally, the source of the collateral benefits controls whether the Rule is applied in a particular situation.\textsuperscript{46} Certain sources of collateral benefits make the argument for application of the Rule more compelling. The following section of the Note discusses the applicability of the Rule to cases involving three different sources of collateral benefits and the policy reasons underlying that determination.

Application of the Collateral Source Rule

As stated above, application of the Rule often depends upon the source of the collateral benefits,\textsuperscript{47} which can be divided into three categories: payments from the plaintiff's automobile, medical, or life insurance company; plaintiff's workers' compensation coverage provided through

\textsuperscript{42} Id. at 65.

\textsuperscript{43} Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir. 1954); see also Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 12-13, 465 P.2d 61, 68-69, 84 Cal. Rptr. 173, 180-81 (1970) (The Rule ensures that the plaintiff is more fully compensated because of the non-recovery of attorney's fees under the American law of damages.).

\textsuperscript{44} 22 AM. JUR. 2D Damages § 206 (1965).

\textsuperscript{45} See Peterson v. Lou Bachrodt Chevrolet Co., 76 Ill. 2d 353, 392 N.E.2d 1 (1979). The Peterson court "refus[ed] to join those courts which, without consideration of the facts of each case, blindly adhere to 'the Rule, permitting the plaintiff to exceed compensatory limits in the interest of insuring an impact upon the defendant.' " Id. at 363, 392 N.E.2d at 5 (quoting Note, supra note 2, at 741-42).

\textsuperscript{46} See infra notes 48-82 & accompanying text.

\textsuperscript{47} See infra notes 48-82 & accompanying text.
his employer; and a third party who gratuitously conferred collateral benefits upon the plaintiff, such as free medical care from a physician.

Benefits Provided by Plaintiff's Insurance Company

The California Supreme Court in *Helfend v. Southern California Rapid Transit District*\(^48\) upheld the application of the collateral source rule to insurance benefits for which plaintiff had paid the premiums.\(^49\) In *Helfend*, the plaintiff sustained personal injuries as the result of the negligent operation of a motor bus by defendant's employee.\(^50\) The plaintiff incurred approximately $2700 in special damages, approximately $1300 of which represented medical expenses.\(^51\) Eighty percent of the plaintiff's medical expenses were paid by his personal medical insurance.\(^52\) The California Supreme Court upheld the trial court's refusal to admit evidence of the insurance payments.\(^53\) The *Helfend* court's holding was based upon the important public policy of encouraging individuals to purchase insurance:

The collateral source rule...embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim's providence.

The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities. ... If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit ... .\(^54\)

\(^48\) 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970).
\(^49\) Id. at 15, 465 P.2d at 69, 84 Cal. Rptr. at 181.
\(^50\) Id. at 4-5, 465 P.2d at 62, 84 Cal. Rptr. at 174.
\(^51\) Id. at 5 n.1, 465 P.2d at 62 n.1, 84 Cal. Rptr. at 174 n.1.
\(^52\) Id. at 5, 465 P.2d at 62, 84 Cal. Rptr. at 174.
\(^53\) Id. at 15, 465 P.2d at 69, 84 Cal. Rptr. at 181.
\(^54\) Id. at 9-10, 465 P.2d at 66, 84 Cal. Rptr. at 178 (footnote omitted).
The *Helfend* court's reasoning was not limited to plaintiff's insurance coverage. Rather, the court affirmed its adherence to the Rule in tort cases in which the benefits derive from an independent "collateral source—such as insurance, pension, continued wages, or disability payments—for which [the plaintiff] had actually or constructively paid . . ."  

In summary, in cases in which the plaintiff directly contributes to the fund providing the collateral benefits, the Rule's application is supported by two public policy rationales: favoring the injured party over the culpable tortfeasor and encouraging the public to purchase insurance benefits.

*Workers' Compensation Benefits Provided by Plaintiff's Employer*

In *DeCruz v. Reid,* the California Supreme Court held that the Rule is applicable to workers' compensation benefits, at least when the employer has waived its right of subrogation. In *DeCruz,* a worker died in an accident involving the use of farm equipment as a result of the defendant's negligence. The plaintiffs, dependents of the deceased worker, received $10,000 in workers' compensation benefits and the employer released its statutory right of subrogation, which, upon a tort recovery by plaintiffs, would have allowed the employer to recoup from plaintiffs the workers' compensation benefits paid to plaintiffs. Plaintiffs then filed a wrongful death action against the defendant. The trial court applied the Rule, thereby allowing the plaintiffs a "double recovery."

The California Supreme Court affirmed, allowing the plaintiffs a

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55. *Helfend,* 2 Cal. 3d at 13-14, 465 P.2d at 69, 84 Cal. Rptr. at 181.
56. See supra notes 41-42 & accompanying text.
57. *Helfend,* 2 Cal. 3d at 9-10, 465 P.2d at 66, 84 Cal. Rptr. at 178.
59. Id. at 226-27, 444 P.2d at 348-49, 70 Cal. Rptr. at 556-57.
60. Id. at 220, 444 P.2d at 344, 70 Cal. Rptr. at 552.
61. Id. at 221, 444 P.2d at 344, 70 Cal. Rptr. at 552.
62. Id. at 221, 444 P.2d at 344-45, 70 Cal. Rptr. at 552-53. The Workers' Compensation Act, *Cal. Lab. Code* §§ 3200-6208 (West 1971 & Supp. 1986), provides that an employer who becomes obligated to pay compensation as a result of the negligence of a third party may recover the amount so expended. *Witt v. Jackson,* 57 Cal. 2d 57, 69, 366 P.2d 641, 647-48, 17 Cal. Rptr. 369, 375-76 (1961). The employer can bring an action directly against the third party, *Cal. Lab. Code* § 3852 (West Supp. 1986), join as a party plaintiff in the employee's action against the tortfeasor, or consolidate a separately brought action. *Id.* § 3853. The employer also can allow the employee to prosecute the action himself and subsequently apply for a first lien against the amount of the employee's judgment, less an allowance for litigation expenses and attorney's fees. *Id.* § 3856(b) (West 1971).
63. *DeCruz,* 69 Cal. 2d at 221, 444 P.2d at 345, 70 Cal. Rptr. at 553.
double recovery because the employer waived its subrogation rights.\textsuperscript{64} The DeCruz court distinguished one of its previous decisions that had reasoned that the purpose of the employer's subrogation rights was to prevent a double recovery for the plaintiff.\textsuperscript{65} The court stated that, although “the waiver of subrogation rights by the employer . . . may inure to the benefit of the injured employee[,] . . . defendants cannot complain that the employer will not seek reimbursement from plaintiffs since neither plaintiffs nor the employer has profited directly or indirectly by any wrong attributable to either.”\textsuperscript{66} In other words, the benefits should inure to the innocent employee rather than to the culpable tortfeasor.

Unlike the situation involving payment of collateral benefits by plaintiff’s insurer,\textsuperscript{67} the plaintiff/employee does not directly contribute to the workers' compensation fund providing the benefits. Nevertheless, the employee constructively pays for the benefits through his labor.\textsuperscript{68} Benefits are part of the employee's wages. Accordingly, workers' compensation benefits fall into the category of “actual or constructive” payment of benefits by the plaintiff and application of the Rule has been justified on this basis.\textsuperscript{69}

The justification for applying the Rule to workers' compensation benefits, however, is not as strong as it is for applying the Rule to personal insurance benefits. In the personal insurance context, the plaintiff directly chooses to purchase insurance. Application of the Rule, therefore, encourages the purchase of insurance. In the workers' compensation context, however, the plaintiff/employee does not choose to purchase the insurance; the employer is required by statute to provide coverage.\textsuperscript{70} Consequently, not all jurisdictions apply the Rule to workers’ compensation benefits.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{64} Id. at 223-27, 444 P.2d at 346-49, 70 Cal. Rptr. at 554-57.
\item \textsuperscript{65} Witt v. Jackson, 57 Cal. 2d 57, 73, 366 P.2d 641, 650, 17 Cal. Rptr. 369, 378 (1961), discussed infra text accompanying notes 89-95.
\item \textsuperscript{66} DeCruz, 69 Cal. 2d at 227, 444 P.2d at 349, 70 Cal. Rptr. at 557.
\item \textsuperscript{67} See supra notes 48-57 & accompanying text.
\item \textsuperscript{68} See Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 6 n.5, 465 P.2d 61, 63 n.5, 84 Cal. Rptr. 173, 175 n.5 (1970).
\item \textsuperscript{69} Id. at 13-14, 465 P.2d at 69, 84 Cal. Rptr. at 181. It also has been argued that the purpose of the workers’ compensation awards are not compensatory but rehabilitatory. Continuing Education of the Bar, California Workers' Compensation Practice § 1.3 (3d ed. 1985). Consequently, because the plaintiff would be receiving the benefits for a purpose other than compensation, the operation of the Rule would not conflict with the compensatory function of tort law.
\item \textsuperscript{70} CAL. LAB. CODE § 3700 (West Supp. 1986). The employer may also be self-insured if he provides sufficient proof of ability to administer and pay workers' compensation claims. Id. § 3700(b).
\item \textsuperscript{71} See, e.g., Kirkham v. Hickerson Bros. Truck Co., 29 Colo. App. 303, 485 P.2d 513 (1971) (The Rule does not apply when, after receipt of workers' compensation benefits, the plaintiff sues the tortfeasor.); Schneider v. Farmers Merchant Inc., 106 Idaho 241, 678 P.2d 33 (1983) (The Rule does not apply when the employer and third-party tortfeasor arrived at a
\end{itemize}
Gratuitous Payments by a Third Party

In *Rodriguez v. McDonnell Douglas Corp.*, plaintiff was injured while working on defendant's premises. As a result, plaintiff required constant medical attention. Plaintiff tried to introduce the cost of medical care at trial as an element of damages, even though he had received the medical attention gratuitously. The trial court denied defendant's motion to show that plaintiff received the services gratuitously, and a California court of appeal affirmed, reasoning:

In so far as [the receipt of] gratuities are concerned, the [Rule's application] appears to be in keeping with the collateral source rule rationale: "The fact that either under contract or gratuitously such [medical] treatment has been paid for by another does not defeat the cause of action of the injured party to recover the reasonable value of such treatment from the tortfeasor." The court did not discuss the fact that plaintiff contributed nothing, either "actually or constructively," to the fund providing the benefits. The rationale for applying the Rule in gratuity cases is simply a decision to benefit the injured party rather than the wrongdoer.

Because gratuity cases have only this one justification for applying the Rule, courts are in conflict regarding whether the Rule should be applied in these cases. A majority of jurisdictions apply the Rule despite its single justification. There are, however, a growing number of jurisdictions that refuse to apply the Rule to gratuity cases.

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73. Id. at 639-42, 151 Cal. Rptr. at 405-06.
74. Id. at 661, 151 Cal. Rptr. at 418.
75. Id. at 660-62, 151 Cal. Rptr. at 418-19.
76. Id. at 661, 151 Cal. Rptr. at 418.
77. Id. at 662, 151 Cal. Rptr. at 419.
78. Id. (quoting Fifield Manor v. Finston, 54 Cal. 2d 632, 354 P.2d 1073, 1076, 7 Cal. Rptr. 377, 380 (1960)).
79. See supra notes 41-42 & accompanying text.
81. See, e.g., Peterson v. Lou Bachrodt Chevrolet Co., 76 Ill. 2d 353, 392 N.E.2d 1 (1979). The Peterson court reasoned that [i]n a situation in which the injured party incurs no expense, obligation or liability, we see no justification for applying the rule. We refuse to join those courts which, without consideration of the facts of each case, blindly adhere to the collateral source rule, permitting the plaintiff to exceed compensatory limits in the interest of...
Application of the Rule to particular collateral benefits, therefore, ultimately depends upon the justification proffered. When the injured party directly contributes to the fund that provides the benefits, the justification for the Rule is strongest. The next most compelling situation for application of the Rule is when the injured party makes constructive contributions to the source of the collateral funds, as in the case of workers’ compensation. Finally, when the injured party has made no contribution to a fund that provides the collateral benefits, the Rule is justified solely by the policy favoring the less culpable party. The courts openly disagree about the application of the Rule in the latter situation.

Exceptions to the Collateral Source Rule

The collateral source rule is a product of competing public policy concerns. As stated above, in certain cases the public policy concerns may weigh more heavily in favor of application of the Rule. The balancing of public policy concerns, however, may also result in the inapplicability of the Rule in certain situations. The California courts and the legislature have established three exceptions to the Rule as a result of these conflicting public policy concerns.

The Medical Malpractice Exception Resulting from the High Cost of Insurance

Legislatures recently have provided an exception to the collateral

... The purpose of compensatory tort damages is to compensate...; it is not the purpose of such damages to punish defendants or bestow a windfall upon plaintiffs. The view that a windfall, if any is to be enjoyed, should go to the plaintiff... borders too closely on approval of unwarranted punitive damages...

*Id.* at 363, 392 N.E.2d at 5 (citations omitted); see also Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1 (1939); Baldwin v. Kansas City Ry., 218 S.W. 955 (Mo. Ct. App. 1920); Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962); Drinkwater v. Dinsmore, 80 N.Y. 390 (1880). See generally Annot., 77 A.L.R.3d 366 (1977); Annot., 128 A.L.R. 686 (1940). Although the California Supreme Court has not ruled directly on gratuitous payments in this context, in *Helfend* v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970), the court in dicta seemed to embrace the growing minority rule when it approved of a New York decision, Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962), that held the Rule inapplicable to purely gratuitous benefits. *Helfend*, 2 Cal. 3d at 6 n.5, 465 P.2d at 63 n.5, 84 Cal. Rptr. at 175 n.5; see *supra* notes 48-57 & accompanying text. The *Helfend* court stated that the plaintiff had neither paid premiums for the services under some form of insurance coverage nor manifested any indication that he would endeavor to repay those who had given him assistance... On the other hand, New York has joined most states in holding that a tortfeasor may not mitigate damages by showing that an injured plaintiff would receive a disability pension... In these cases the plaintiff had actually or constructively paid for the pension by having received lower wages or by having contributed directly to the pension plan.

2 Cal. 3d at 6 n.5, 465 P.2d at 63 n.5, 84 Cal. Rptr. at 175 n.5. (citations omitted).

82. See *supra* notes 79-81 & accompanying text.
source rule in cases involving defendants subject to dramatically increasing insurance costs, such as medical malpractice actions. During the 1970's, medical malpractice insurance premiums increased substantially, causing the curtailment of service by health care providers. Because the Rule generally leads to increased insurance costs, the California legislature sought partially to remedy this "medical malpractice crisis" by abolishing the Rule in medical malpractice actions.

The legislature justified its action, which undermined the rationale of the Rule favoring the less culpable party, by stating that the medical malpractice crisis warranted such action. The legislature found that

83. Comment, supra note 2, at 1417.
84. See supra note 39 & accompanying text.
85. Comment, supra note 2, at 1417.
86. CAL. CIV. CODE § 3333.1 (West Supp. 1986). The statute reads:
(a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or workers' compensation act, any health, sickness or income-disability coverage, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.
(b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

Id.

87. See supra notes 41-42 & accompanying text.
88. The legislature expressed its goals in an amendment to the preamble to the Medical Injury Compensation Reform Act ("MICRA"), CAL. BUS. & PROF. CODE § 125.5 (West Supp. 1986):

The legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health care delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an ade-
the public policy favoring lower medical malpractice insurance outweighed the public policies favoring the less culpable party and encouraging the purchase of insurance.

Workers' Compensation Exception when Employer is a Concurrent Tortfeasor

The California Supreme Court in *Witt v. Jackson* also established a narrow exception to the collateral source rule in cases in which the plaintiff's employer provides collateral benefits in the form of workers' compensation and is a concurrent tortfeasor with a third party. The employer's statutory right to subrogation against third-party tortfeasors is defeated to the extent that his payments of workers' compensation benefits falls short of his share of responsibility for the employee's total recovery. To the extent that the employer is precluded from reimbursement, the third-party tortfeasor may reduce the judgment by the amount of the collateral benefits paid by the employer. Thus, the plaintiff is precluded from a double recovery.

The rule of negligence permitting only one recovery from concurrent tortfeasors provides the basis for this exception. The workers'
compensation benefits recovered are considered partial satisfaction by a joint tortfeasor and, thus, the liability of the other tortfeasor must be reduced pro tanto.\textsuperscript{95}

\textit{Double Liability Exception}

When application of the collateral source rule would expose the defendant tortfeasor to double liability, California courts have held that the Rule is inapplicable.\textsuperscript{96} The courts have reasoned that the well-recognized interest in protecting a defendant from double liability outweighs traditional judicial adherence to the Rule, mandating an exception to the Rule's application in cases in which double liability is possible.\textsuperscript{97}

In sum, application of the Rule in a particular case ultimately depends upon whether the injured party "actually or constructively" contributed to the source of the benefits\textsuperscript{98} and whether another applicable public policy weighs against applying the Rule.\textsuperscript{99} Courts have established exceptions to the Rule when there is an important, contravening public policy.\textsuperscript{100} Exceptions are most often made in cases in which insurance premiums have risen dramatically, or when another conflicting, well-founded rule of tort law is applicable to the fact situation presented. Both the source of the benefits and the relevant public policies must be considered when determining the applicability of the Rule to a given fact situation.

\textbf{California's Uninsured Motorist Statute}

The California legislature first enacted an uninsured motorist cover-
age statute in 1959. Although the statute subsequently has undergone some minor changes, its purpose has remained the same: protection of the insured motorist from injuries caused by an uninsured motorist.

California's uninsured motorist statute, insurance code section 11580.2, requires that every automobile insurance contract must contain a provision providing coverage for the insured against injury by an uninsured motorist. The insured contributes directly to this fund through his automobile insurance premiums. The amount of coverage is specified by statute and can be reduced or eliminated only by written agreement in a form specified by the statute. Section 11580.2 also grants the insurer subrogation rights for the amount of benefits paid to its

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102. For a complete legislative history, see P. Eisler & J. Molinelli, supra note 17, § 1.7.


105. Id. § 11580.2(a). This subdivision provides in part:

(a)(1) No policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle . . . shall be issued or delivered in this state to the owner or operator of a motor vehicle, or shall be issued or delivered by any insurer licensed in this state upon any motor vehicle then principally used or principally garaged in this state, unless the policy contains, or has added to it by endorsement, a provision with coverage limits at least equal to the limits specified in subdivision (m) and in no case less than the financial responsibility requirements specified in Section 16056 of the Vehicle Code insuring the insured, the insured's heirs or legal representatives for all sums which he, she, or they shall be legally entitled to recover as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle. The insurer and any named insured . . . may, by agreement in writing, in the form specified in paragraph (2), delete the provision covering damage caused by an uninsured motor vehicle (1) completely, or (2) delete such coverage when a motor vehicle is operated by a natural person or persons designated by name, or agree to provide such coverage in an amount less than that required by subdivision (m) but not less than the financial responsibility requirements specified in section 16056 of the Vehicle Code.

Id.

106. California Insurance Code § 11580.2(m) provides:

Coverage provided under an uninsured motorist endorsement or coverage shall be offered with coverage limits equal to the limits of liability for bodily injury in the underlying policy of insurance, but shall not be required to be offered with limits in excess of the following amounts:

(1) A limit of thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident.

(2) Subject to the limit for one person set forth in paragraph (1), a limit of sixty thousand dollars ($60,000) because of bodily injury to or death of two or more persons in any one accident.

Id. § 11580.2(m).

107. Id. § 11580.2(a)(1)-(2).
insured under the uninsured motorist coverage.\footnote{108} While this subrogation clause represents a departure from the common-law rule that personal injury claims are neither assignable nor subject to subrogation,\footnote{109} it serves two important functions. First, subrogation rights prevent the plaintiff from receiving a double recovery for his injuries because the insurer has a right to the proceeds of any judgment against a third-party tortfeasor.\footnote{110} Second, allowing the insurer to recoup the benefits paid to its insured lowers overall insurance costs, which results in lower premiums.\footnote{111}

As a result of the inclusion of the subrogation clause, the two primary criticisms of the collateral source rule are inapposite when applied to the receipt of benefits under the California uninsured motorist statute. Because the possibility of double recovery is eliminated, the Rule does not contradict the compensatory function of tort law.\footnote{112} In addition, because the plaintiff’s insurer can recoup the collateral benefits paid, application of the Rule would not increase insurance costs.\footnote{113}

\footnote{108} Id. § 11580.2(g). This section states:

The insurer paying a claim under an uninsured motorist endorsement or coverage shall be entitled to be subrogated to the rights of the insured to whom such claim was paid against any person legally liable for such injury or death to the extent that payment was made. Such action may be brought within three years from the date that payment was made hereunder.

\footnote{109} Id.

Under the right of subrogation, one party is substituted in the place of another as the possessor of any rightful claim possessed by the first party. 58 Cal. Jur. 3d Subrogation § 1 (1980). Under California Insurance Code § 11580.2(g), the insurer is subrogated automatically to the rights of the insured upon the payment of insurance benefits. Cal. Ins. Code § 11580.2(g) (West Supp. 1986). This allows the insurer to prosecute an action against a third-party tortfeasor in its own name for the amount of benefits paid to the insured. Johnson v. Oliver, 266 Cal. App. 2d 178, 181-82, 72 Cal. Rptr. 137, 140 (1968). Alternatively, the insurer may join with the insured in an action against the third-party tortfeasor. 4 B. Witkin, California Procedure § 113 (3d ed. 1985). The majority of jurisdictions also hold that, upon timely motion, the defendant tortfeasor can compel the joinder of either the missing insurer or insured. 3A J. Moore & J. Lucas, Moore's Federal Practice § 17.09 [2-1] (2d ed. 1985). Because the insurer is subrogated to the rights of the insured, however, it has only those rights to which the insured was entitled. 44 Am. Jur. 2d Insurance § 1795 (1982). Accordingly, a prior act by the subrogor/insured can destroy the subrogee/insurer's right of action. Id. § 1810.

\footnote{109} Comment, supra note 16, at 526.

\footnote{110} See P. Eisler & J. Molinelli, supra note 17, § 10.2. According to Eisler, the provision was designed for this purpose only. Id.

\footnote{111} The legislature considered the increased insurance costs resulting from mandatory uninsured motorist coverage. Traffic Accident Consequences Subcomm. of the Comm. on the Judiciary, Final Report to the Cal. Legis. at 15, reprinted in 3 Appendix to the Journal of the Assembly (1959).

\footnote{112} See supra notes 28-31 & accompanying text (discussion of the criticism of the Rule as contradictory to the compensatory function of tort law).

\footnote{113} See supra note 39 & accompanying text (discussion of the criticism of the Rule as leading to increased insurance costs).
Applicability of the Collateral Source Rule to California Uninsured Motorist Benefits

Two California appellate decisions have discussed the applicability of the collateral source rule to uninsured motorist benefits. Although the two cases are factually similar, the courts reached different conclusions on the issue of whether the Rule should be applied.

In *Waite v. Godfrey*, plaintiff sustained personal injuries and damage to her automobile as a result of an automobile accident caused by three negligent motorists. One of the motorists was considered an uninsured motorist because he fled the scene. Plaintiff filed suit against the remaining defendants and received a $12,000 settlement from her uninsured motorist coverage.

At the close of trial, the jury awarded plaintiff $20,000. The trial judge, however, applied the Rule and denied the defendants’ motion to set off the judgment by the amount of collateral benefits received.

The court of appeal reversed and allowed the setoff. Applying the California Supreme Court’s analysis of the Rule in *Helfend v. Southern California Rapid Transit District*, the court reasoned that the Rule was not applicable because payment of the collateral benefits did not allow defendants to benefit from their own wrong, but rather from the wrong of a third party, who was an uninsured motorist. Furthermore, because the collateral benefits were paid on behalf of a third-party motorist, payment of the benefits was similar to a payment from a joint tortfeasor. Thus, the court found that California Code of Civil Procedure section

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116. *Id.* at 763, 163 Cal. Rptr. at 883.
117. *Id.* A hit and run driver qualifies as an uninsured motorist under California Insurance Code § 11580.2(b) provided that four conditions are met:
   (1) The owner or operator of the motor vehicle is unknown.
   (2) There is physical contact of such automobile with: (a) the insured, or (b) an automobile which the insured is occupying;
   (3) The accident is reported to a designated peace officer within 24 hours;
   (4) A sworn statement is filed with the insurer within 30 days thereafter.
   CAL. INS. CODE § 11580.2(b) (West Supp. 1986); see P. EISLER & J. MOLINELLI, supra note 17, § 4.8 (summarizing California case law).
119. *Id.* at 765, 163 Cal. Rptr. at 884.
120. *Id.*
121. *Id.* at 775, 163 Cal. Rptr. at 891.
124. *Id.*
governed, which permits only one payment from joint tortfeasors. Because the collateral benefits were paid as a result of injury caused by a joint tortfeasor not joined as a party, the conduct of defendants before the court, who were insured, had no relationship whatsoever to the settlement received by the plaintiff. In other words, the conduct of the defendants before the court did not cause the payment of uninsured motorist benefits. Thus, there was no windfall to defendants that would reward them for their own wrongdoing. Therefore, the punitive aspect of the Rule, that of providing the plaintiff a windfall at the expense of the culpable defendant, is inapplicable. Absent such a setoff, there would be an excess recovery to the plaintiff. Furthermore, the Waite court noted that the Rule previously had been applied only to special damages and not general damages, such as those that uninsured motorist benefits are intended to cover. Finally, the court reasoned that, by not allowing a setoff of the collateral uninsured motorist benefits, the defendants would be subjected to the possibility of double liability due to the insurer's right of subrogation against defendants.

Reaching a conclusion contrary to that in Waite, another California appellate court discussed the applicability of the Rule to the uninsured motorist benefits in Van Dyne v. McCarty. In Van Dyne, plaintiff was injured in an automobile accident caused by three negligent motorists. One of the motorists was unidentified and, therefore, classified as an uninsured. Defendants Dunn, McDonald, the owner of the car driven by McCarty, and the unidentified driver were considered uninsured. Defendant McCarty, driver of McDonald's car, was insured.
insured motorist.\textsuperscript{134} Plaintiff received $15,000 in collateral benefits from her uninsured motorist coverage because two of the defendants were also uninsured.\textsuperscript{135}

The jury returned a $47,500 verdict against the two remaining defendants.\textsuperscript{136} Relying on \textit{Waite}, the trial court granted defendants' motion to reduce the judgment by the amount of the collateral uninsured motorist benefits received.\textsuperscript{137}

The court of appeal reversed.\textsuperscript{138} The court distinguished \textit{Waite} as factually inapposite on the grounds that the collateral benefits were paid in the present case because the defendants were uninsured, not because an unknown third party was uninsured.\textsuperscript{139} Accordingly, the uninsured motorist benefits were paid as a result of the defendants' wrongdoings, not those of a third party. The \textit{Van Dyne} court further explained that application of the Rule would not subject defendants to double liability because, at the time of the appeal, the three-year statute of limitations on the insurer's subrogation claim already had run.\textsuperscript{140}

Finally, the court stated that \textit{Waite} had failed to consider plaintiff's liability to her insurer for reimbursement of the benefits paid if the amount of such benefits also were recovered from a tortfeasor.\textsuperscript{141} Therefore, if the insurer chose to seek reimbursement, the plaintiff would have a net recovery of $32,500 from the tortfeasor.\textsuperscript{142} This recovery, plus the $15,000 originally received from the insurer, would result in a total recovery for plaintiff of $47,500, the exact amount that the jury found would compensate the plaintiff for the injuries caused by the defendants. Reimbursement of the insurer, therefore, would avoid a double recovery.

\textit{Waite} and \textit{Van Dyne} fail to provide a workable standard for applying the Rule to uninsured motorist benefits. Each case erroneously relies primarily upon the artificial distinction of whether the uninsured party is before the court to determine the applicability of the Rule. In doing so, each court failed to account for the Rule's public policy rationale of encouraging the purchase of insurance by individuals\textsuperscript{143} and placed undue emphasis on the punitive aspect of the Rule by considering only whether

\begin{footnotes}
\textsuperscript{134} Cal. Ins. Code § 11580.2(b) (West Supp. 1986); see supra note 117.
\textsuperscript{135} \textit{Van Dyne}, 166 Cal. App. 3d at 820, 212 Cal. Rptr. at 573.
\textsuperscript{136} \textit{Id.} at 819, 212 Cal. Rptr. at 573.
\textsuperscript{137} \textit{Id.} at 819-20, 212 Cal. Rptr. at 573.
\textsuperscript{138} \textit{Id.} at 822-23, 212 Cal. Rptr. at 574-75.
\textsuperscript{139} \textit{Id.} at 821, 212 Cal. Rptr. at 574.
\textsuperscript{140} \textit{Id.} at 821-22, 212 Cal. Rptr. at 574.
\textsuperscript{141} \textit{Id.} at 822, 212 Cal. Rptr. at 574-75. Under the terms of the plaintiff's policy, after payment of benefits for her injuries, the insurer was "entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment was made . . . ." \textit{Id.} at 822, 212 Cal. Rptr. at 574.
\textsuperscript{142} \textit{Id.} at 822, 212 Cal. Rptr. at 574-75.
\textsuperscript{143} See supra notes 48-57 & accompanying text.
\end{footnotes}
the defendants could be considered culpable. Additionally, each court failed to understand how the principle of subrogation operates in conjunction with the Rule. The next section of the Note further analyzes these cases and demonstrates that the Rule should be applied uniformly to uninsured motorist benefits.

An Alternative Analysis of California's Collateral Source Rule as Applied to the Receipt of Uninsured Motorist Benefits

Determining whether the collateral source rule should be applied to a particular fact situation requires a balancing of factors: the extent to which the injured party "actually or constructively" contributes to the benefit fund must be weighed against possible countervailing public policies. A consideration of these factors in the context of uninsured motorist benefits indicates that the Rule should be applied uniformly to the receipt of uninsured motorist benefits by injured motorists, except in cases in which an insurer has exercised his statutory subrogation right before or at the same time plaintiff files suit. This proposed rule is consistent with the rationales favoring application of the Rule and, contrary to the California appellate courts' rulings, there is no countervailing public policy.

The Rationales Underlying Application of the Rule to the Receipt of Uninsured Motorist Benefits

The source of the collateral benefits and the rationales underlying application of the collateral source rule support its application to the receipt of uninsured motorist benefits. First, with respect to uninsured motorist benefits, plaintiff is the source of the collateral benefits: plaintiff has paid directly into the fund providing the benefits in the form of insurance premiums for uninsured motorist coverage. The justification for application of the Rule is most compelling in this situation. In addition, application of the Rule to the receipt of uninsured motorist benefits is consistent with the public policy encouraging the purchase of insurance for protection against accidents. If a defendant were allowed to reduce the judgment against him by the amount of collateral benefits paid, the plaintiff would suffer a net loss because plaintiff's insurance premiums

144. See supra notes 28-31 & accompanying text.
145. See supra notes 108-13 & accompanying text.
146. See supra note 98 & accompanying text.
147. See supra notes 99-100 & accompanying text.
148. See supra notes 114-45 & accompanying text.
149. See supra note 57 & accompanying text.
would provide him with no benefit.\textsuperscript{151}

Application of the Rule to uninsured motorist benefits also serves the public policy favoring the innocent party over the tortfeasor.\textsuperscript{152} Reducing the plaintiff’s judgment by the amount of collateral benefits received would result in a windfall to the tortfeasor because he would not be required to pay for all the damage he has caused. Although application of the Rule may result in a windfall to the plaintiff, public policy favors this result because the plaintiff is the innocent party.

Finally, application of the Rule to uninsured motorist benefits would not necessarily result in over-compensation for the plaintiff, which is one of the main criticisms of the Rule.\textsuperscript{153} Under California Insurance Code section 11580.2(g),\textsuperscript{154} the insurer’s statutory right to subrogation, allowing reimbursement from the plaintiff for the amount of benefits paid,\textsuperscript{155} avoids a double recovery. Consequently, operation of the Rule in this instance does not frustrate the compensatory function of tort law.\textsuperscript{156} Application of the Rule simply would shift the burden of the loss from the insurer to the tortfeasor.\textsuperscript{157} If, however, the insurer waives his right of subrogation or simply fails to exercise it, the plaintiff will receive a double recovery. Nevertheless, the public policy against permitting a double recovery would be outweighed in the context of uninsured motorist benefits by the competing public policies mentioned above that support application of the Rule: encouraging the purchase of insurance and favoring the innocent party over the tortfeasor.\textsuperscript{158}

In sum, application of the Rule to the receipt of uninsured motorist benefits is consistent with the Rule’s underlying public policy rationales. In addition, application of the Rule in this context may not result in a double recovery for the plaintiff because of the operation of the statutory subrogation right.

Application of the Rule in the fact situations presented in \textit{Waite}\textsuperscript{159} and \textit{Van Dyne}\textsuperscript{160} also is consistent with the Rule’s underlying rationales. The \textit{Waite} court reasoned that, because the payment of the uninsured

\textsuperscript{151.} See id.
\textsuperscript{152.} See supra notes 41-42 & accompanying text.
\textsuperscript{153.} See supra notes 28-29 & accompanying text.
\textsuperscript{154.} \textit{CAL. INS. CODE} § 11580.2(g) (West Supp. 1986) (granting the insurer a statutory right of subrogation); see supra notes 108-13 & accompanying text.
\textsuperscript{156.} See supra notes 28-29 & accompanying text. Of course, if the tortfeasor were insolvent, there would be no double recovery problem in the first place because the only recovery would be from the insurer.
\textsuperscript{157.} Fleming, \textit{supra} note 2, at 1498-99.
\textsuperscript{158.} See supra notes 41-43 & accompanying text.
\textsuperscript{159.} \textit{Waite v. Godfrey}, 106 Cal. App. 3d 760, 163 Cal. Rptr. 881 (1980); see supra notes 115-31 & accompanying text.
\textsuperscript{160.} \textit{Van Dyne v. McCarty}, 166 Cal. App. 3d 817, 212 Cal. Rptr. 571 (1985); see supra notes 132-42 & accompanying text.
motorist benefits did not depend on the culpability of the defendants, the defendants would not "garner the benefits of [their] victim's providence." The court stated that these benefits were in "no conceivable sense traceable to any act of the defendants." The court also placed undue emphasis on the punitive nature of the Rule. Contrary to the Waite court's reasoning, the defendants in Waite did benefit from the plaintiff's "thrift and providence." If the plaintiff had not been insured, the defendants unquestionably would have had to pay the full judgment amount regardless of whether the third driver was insured. Thus, the setoff in fact did result in a windfall to defendants. Because a windfall would have accrued to either plaintiff or defendant, the Waite court should have adhered to the policy favoring the injured party over the tortfeasor and applied the Rule.

In addition, the Waite court ignored the California Supreme Court's statement that when the injured party receives benefits from his own insurance policy, the punitive nature of the Rule is not controlling. The main justification of the Rule in the personal insurance context is the public policy of encouraging persons to purchase insurance. Allowing a defendant to reduce his liability by the amount of the collateral insurance benefits frustrates this policy because it does not allow the purchaser of insurance to reap the benefits of his foresight. Thus, the Waite court's emphasis on the punitive aspects of the Rule is misplaced as well as outweighed by the policy of encouraging individuals to purchase insurance.

The court in Van Dyne reasoned that application of the Rule in that case was supported by the underlying rationale of favoring the innocent party over the tortfeasor. The court, however, erroneously relied upon the fact that the uninsured drivers were before the court. As stated above, the punitive aspect of the Rule does not depend on whether the uninsured driver is before the court; it is equally applicable if the uninsured driver is not before the court. Additionally, the Van Dyne court failed to take into account the additional public policy rationale applica-

163. In that case, the defendants in Waite would have had a comparative equitable indemnity claim against the third driver. See American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 606-07, 578 P.2d 899, 917, 146 Cal. Rptr. 182, 200 (1978).
166. Van Dyne, 166 Cal. App. 3d at 821, 212 Cal. Rptr. at 574.
167. Id. at 820-21, 212 Cal. Rptr. at 573-74.
168. See supra notes 159-63 & accompanying text.
ble to uninsured motorist benefits of encouraging the purchase of insurance.\textsuperscript{169} In short, application of the Rule to \textit{Van Dyne} also was supported by both underlying rationales.

The Recognized Exceptions to Application of the Collateral Source Rule

As discussed above, courts and legislatures have adopted three principal exceptions to the collateral source rule.\textsuperscript{170} Contrary to the courts' views in \textit{Waite}\textsuperscript{171} and \textit{Van Dyne},\textsuperscript{172} however, the rationales for these exceptions do not apply to uninsured motorist benefits. Application of the Rule to the receipt of uninsured motorist benefits does not lead to increased insurance costs, which is the rationale underlying the medical malpractice exception,\textsuperscript{173} does not involve a payment from a joint tortfeasor as in the case of workers' compensation payments when an employee is a concurrent tortfeasor with a third party,\textsuperscript{174} and does not subject the defendant to double liability.\textsuperscript{175}

\textbf{The High Cost of Insurance}

Insurance costs would not be increased by application of the collateral source rule in the usual uninsured motorist case. The insurance industry only would pay as the collateral source of the plaintiff. The insurance industry would not pay any subsequent judgment against the defendant because the defendant is uninsured. The defendant himself would have to satisfy the judgment. Thus, application of the Rule requires the insurance industry to pay only once, as the plaintiff's collateral source, and not twice, as is the case with many applications of the Rule.

Additionally, insurance code section 11580.2(g)\textsuperscript{176} gives the plaintiff's insurer a right of subrogation against any tort recovery. This in turn results in a net decrease in insurance costs. Indeed, the viability of the right of subrogation requires the strictest application of the Rule.\textsuperscript{177} If the tortfeasor's liability is reduced by the amount of collateral benefits,

\begin{footnotes}
169. \textit{See supra} notes 150-51 & accompanying text.
170. \textit{See supra} notes 83-100 & accompanying text.
172. \textit{Van Dyne} v. McCarty, 166 Cal. App. 3d 817, 212 Cal. Rptr. 571 (1985); \textit{see supra} notes 132-42 & accompanying text.
173. \textit{See infra} notes 176-80 & accompanying text.
174. \textit{See infra} notes 184-91 & accompanying text.
175. \textit{See infra} notes 196-208 & accompanying text.
176. \textit{CAL. INS. CODE} § 11580.2(g) (West Supp. 1986).
177. \textit{Tait, supra} note 2, at 116; \textit{see infra} notes 205-08 & accompanying text. Subrogation allows the insurer who has indemnified a plaintiff to recoup the amount of indemnity from the defendant who caused the loss. Without the Rule, a judgment against the defendant would reflect only damages not previously indemnified, leaving the insurer nothing to claim by subrogation. In order for the subrogation principle to work, the Rule must be applied.
\end{footnotes}
the plaintiff as a result has no further cause of action for the amount of
the collateral benefits. Consequently, because the insurer's rights are de-
pendent upon those of the insured, the insurer will have no right to
recoup the collateral benefits, and the purpose of the subrogation clause
would be circumvented.\textsuperscript{178} Therefore, application of the Rule in this
context is necessary for the exercise of subrogation rights, which in turn
decreases insurance costs.

Application of the Rule in situations similar to that in \textit{Waite} and
\textit{Van Dyne} also would not lead to increased insurance costs. All of the
defendants before the court in \textit{Waite} were insured, and the uninsured
driver was not before the court.\textsuperscript{179} The defendant's insurer in \textit{Waite}
would bear the burden of the Rule rather than the tortfeasor himself.
This burden, however, has merely shifted from the plaintiff's insurance
c company to the defendant's insurance company because of the right of
subrogation, which results in no net increase in insurance costs to society
because the plaintiff's insurer can seek reimbursement for the plaintiff.\textsuperscript{180}
In \textit{Van Dyne}, two of the three defendants were uninsured.\textsuperscript{181} With re-
spect to the two uninsured defendants, they, not an insurance company,
would have to pay the judgment. Thus, as stated above, the Rule only
requires the insurance industry to pay once, as the plaintiff's collateral
source.\textsuperscript{182} In the case of the one insured defendant, as was the case in
\textit{Waite}, the burden would merely shift to the defendant's insurer, which
would result in no net higher insurance costs.\textsuperscript{183}

In summary, application of the Rule to uninsured motorist benefits
would not result in higher costs to the insurance industry. Therefore, the
first recognized rationale for an exception to the Rule, prevention of esca-
lating insurance costs, is inapplicable in the context of uninsured motor-
ist benefits.

\textit{Workers' Compensation Exception When Employer is Concurrent Tortfeasor}

The workers' compensation exception to the collateral source rule is
applicable only when the employer is a concurrent tortfeasor with a third
party.\textsuperscript{184} This exception is inapplicable in the context of uninsured
motorist benefits because the source of those benefits necessarily is not a
concurrent tortfeasor with a third party.\textsuperscript{185} In \textit{Witt v. Jackson},\textsuperscript{186} the

\begin{itemize}
  \item \textsuperscript{178} Tait, \textit{supra} note 2, at 116.
  \item \textsuperscript{179} Waite \textit{v. Godfrey}, 106 Cal. App. 3d 760, 771-72, 163 Cal. Rptr. 881, 888 (1980).
  \item \textsuperscript{180} The plaintiff's insurer's subrogation rights would merely work against the defend-
  ant's insurer rather than against the defendant personally.
  \item \textsuperscript{181} Van Dyne \textit{v. McCarty}, 166 Cal. App. 3d 817, 820, 212 Cal. Rptr. 571, 573 (1985).
  \item \textsuperscript{182} \textit{See supra} notes 175-78 & accompanying text.
  \item \textsuperscript{183} \textit{See supra} notes 179-80 & accompanying text.
  \item \textsuperscript{184} \textit{See supra} notes 89-95 & accompanying text.
  \item \textsuperscript{185} \textit{See supra} notes 89-95 & accompanying text.
  \item \textsuperscript{186} 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961); \textit{see supra} notes 89-95 & accom-
\end{itemize}
California Supreme Court case establishing this exception, the collateral source benefits were paid by a joint tortfeasor. The employer paid the workers' compensation benefits through its own insurance and then was joined as a concurrently negligent tortfeasor. Because the source of the collateral benefits was a concurrently negligent joint tortfeasor, civil procedure code section 877 applied and required a pro tanto reduction of the other joint tortfeasor's liability.

In the context of uninsured motorist benefits, the source of the collateral benefits, the plaintiff cannot be a joint tortfeasor. The Witt exception only applies when the defendant contributes to the fund providing the benefits. Thus, the rationale for the exception recognized in Witt is not applicable to these benefits.

The Waite court established an exception to the Rule based upon an incorrect application of the Witt exception. In Waite, the collateral source benefits were not provided by a joint tortfeasor as they were in Witt. Rather, the benefits in Waite were provided by plaintiff's own insurance, precipitated by the negligence of an unknown tortfeasor; plaintiff had contributed directly to the fund from which the collateral benefits were paid. Thus, the Waite court's reliance on the reasoning in Witt was misplaced and led to an unsound conclusion.

In contrast to Waite, the court in Van Dyne, faced with a similar fact pattern, correctly concluded that the Witt exception was not applicable. The Van Dyne court, however, erroneously based its decision on the fact that the uninsured motorist was before the court. This distinction is irrelevant in determining whether the Witt exception applies because the plaintiff, not a tortfeasor, was the source of the collateral benefits.


187. Witt, 57 Cal. 2d at 68-69, 366 P.2d at 647, 17 Cal. Rptr. at 375.
189. See supra notes 89-95 & accompanying text.
191. See supra notes 89-95 & accompanying text.
192. Van Dyne v. McCarty, 166 Cal. App. 3d 571 (1985); see supra notes 132-42 & accompanying text.
193. Van Dyne, 166 Cal. App. 3d at 820-21, 212 Cal. Rptr. at 573-74.
194. Id.
195. See supra notes 190-91 & accompanying text.
The Double Liability Exception

Contrary to the appellate courts' views in both *Waite* and *Van Dyne*, application of the collateral source rule to uninsured motorist benefits does not subject the defendant to double liability, except in cases in which the insurer previously has recovered against the defendant. The *Waite* and *Van Dyne* courts concluded that, after the tortfeasor had satisfied the plaintiff's judgment for the total amount of damages, the insured could invoke its statutory subrogation rights and sue the tortfeasor for the amount of benefits paid, thereby subjecting the tortfeasor to double liability.\(^{198}\) The courts in *Waite* and *Van Dyne*, however, failed to fully consider the effect of subrogation rights on the Rule.

Upon payment of an uninsured motorist claim, the plaintiff's insurer is subrogated *pro tanto* for the amount of benefits paid to any right of action the insured may have against any person causing such injury.\(^{199}\) The subrogee's rights are only those rights possessed by the subrogor.\(^{200}\) Thus, with respect to insurance payments, the insurer has only those rights of action possessed by the insured.

The principle of subrogation allows the insurance company to bring an action as the real party in interest for the payments made.\(^ {201}\) Accordingly, it is not improper to split a cause of action when, as a result of partial subrogation, the insurance company and the insured bring separate actions against the tortfeasor.\(^ {202}\) In the alternative, subrogation allows the insured and insurer to join in one action against the tortfeasor.\(^ {203}\) Most jurisdictions also hold that, upon a timely motion, the defendant may join both the insured and the insurer in a single

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198. *Van Dyne*, 166 Cal. App. 3d at 821-22, 212 Cal. Rptr. at 574; *Waite*, 106 Cal. App. 3d at 774-75, 163 Cal. Rptr. at 890. The court in *Van Dyne* concluded that the defendant was not subject to double liability because the three-year statute of limitations had run. *Van Dyne*, 166 Cal. App. 3d at 822, 212 Cal. Rptr. at 574. Implicit in the court's holding is the assumption that the insured would have such a right if the three-year statute of limitations had not run. The defendant thus would be subject to double liability.
199. CAL. INS. CODE § 11580.2(g) (West Supp. 1986); see also 44 AM. JUR. 2D Insurance § 794, at 782-83 (1982) ("Generally, upon payment of a loss, the insurer . . . is entitled to be subrogated pro tanto to any right of action which the insured may have against a third person whose negligence or wrongful act caused the loss." (footnote omitted)).
200. 44 AM. JUR. 2D Insurance § 1795 (1982).
Because the insurer's rights depend on those of the insured, the insured may defeat the insurer's rights before the latter brings an action. When the insured alone sues and recovers the full judgment, application of the Rule defeats the insurer/subrogee's right of action against the tortfeasor. Because the subrogor cannot recover twice on the same cause of action, the right of the subrogee against the tortfeasor is defeated once the subrogor fully recovers. If the tortfeasor pays the insured, the insurer can no longer look to the tortfeasor, but must seek reimbursement from the subrogor himself. Thus, there is no possibility that a defendant will be subject to double liability when the Rule is applied to a situation in which the insured sues the tortfeasor first.

When the insurer seeks to exercise its right of subrogation against the defendant before the insured has brought suit against the defendant, or contemporaneously with such a suit, an exception to the Rule is required. For example, in *Johnson v. Oliver*, the plaintiff received $1350 from her insurance policy for personal injuries sustained from a collision caused by the defendant. Through the subrogation clause, the insurer reached an agreement with the defendant to reimburse partially the insurer for the amount of benefits paid to the injured party. The plaintiff subsequently filed a suit against the defendant for personal injuries arising out of the collision. The court correctly held that the statutory subrogation clause did not transfer the entire cause of action to the insurance company. The plaintiff was entitled to bring her own action for personal injuries against the tortfeasor. The court, however, expressly declined to define the rights of the respective parties in any further litigation arising from the accident.

If the plaintiff in the above action recovered a judgment against the defendant, the amount of the judgment would have to be reduced by the sum already paid to the insurer. Otherwise, the defendant would be sub-

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205. 44 AM. JUR. 2D *Insurance* § 1810 (1982).
208. If the principle of subrogation is to work, the Rule must be recognized. See Tait, *supra* note 2, at 116. This is so because if the tortfeasor's liability to the plaintiff is reduced by the amount of the collateral benefits, the plaintiff will have no cause of action for that amount to which the collateral source can be subrogated.
210. *Id.* at 179, 72 Cal. Rptr. at 138.
211. *Id.*
212. CAL. INS. CODE § 11580.2(g) (West Supp. 1986).
213. *Johnson*, 266 Cal. App. 2d at 182, 72 Cal. Rptr. at 140.
214. *Id.*
215. *Id.*
jected to double liability, a result that California courts will not permit.\textsuperscript{216} Therefore, in order to avoid double liability, the Rule should not be applied to receipt of uninsured motorist benefits when the insurer brings an action against the tortfeasor before or contemporaneously with the insured.

Thus, while any countervailing public policy is eliminated by providing an exception to the uniform application of the Rule in situations similar to that in \textit{Johnson}, the possibility still exists that the plaintiff may receive a double recovery if the insurer does not exercise its right of subrogation. This objection, however, is outweighed by the rationales underlying the Rule that support its application in the context of uninsured motorist benefits. As noted above, with respect to uninsured motorist benefits, plaintiff contributed directly to the fund that provides the benefits.\textsuperscript{217} The argument for application of the Rule is strongest in this context because the plaintiff is the source of the fund that provides the collateral benefits. Application of the Rule to these collateral benefits also is consistent with the public policies encouraging the purchase of insurance\textsuperscript{218} and favoring compensation of the less culpable party.\textsuperscript{219} Thus, the public policies favoring application of the Rule outweigh the possibility of double recovery, indicating that the Rule should be applied uniformly, except in cases similar to \textit{Johnson}.

\textit{Summary}

None of the rationales underlying the traditional exceptions to the collateral source rule are applicable with respect to uninsured motorist benefits: application of the Rule to uninsured motorist benefits would not increase overall insurance costs;\textsuperscript{220} the source of the collateral benefits is not a joint tortfeasor;\textsuperscript{221} and application of the Rule would not result in double liability to the defendant.\textsuperscript{222} The double liability rationale underlying an exception to the Rule, however, does mandate an exception to the Rule as applied to uninsured motorist benefits when the insurer exercises his right of subrogation before or at the same time that the insured brings suit.\textsuperscript{223}

\textsuperscript{217} See supra notes 149-52 & accompanying text.
\textsuperscript{218} Helfend, 2 Cal. 3d at 9-10, 465 P.2d at 66-67, 84 Cal. Rptr. at 178-79.
\textsuperscript{219} See supra text accompanying notes 41-42
\textsuperscript{220} See supra notes 176-80 & accompanying text.
\textsuperscript{221} See supra notes 184-91 & accompanying text.
\textsuperscript{222} See supra notes 196-208 & accompanying text.
\textsuperscript{223} See supra notes 209-18 & accompanying text.
Conclusion

The collateral source rule has been the subject of much criticism by courts and commentators. Its application to particular fact situations has been haphazard and lacking a unifying principle. The application of the Rule to uninsured motorist benefits is indicative of this problem.

Determination of the applicability of the Rule to a particular fact situation requires a balancing of two factors: the extent to which the injured party directly contributes to the fund providing the collateral benefits should be balanced against any countervailing public policy. Recognized countervailing public policies include the desire to prevent the rapid increase in insurance costs and policies embodied in applicable tort principles.

Contrary to the reasoning of California appellate courts, a balancing of these factors with respect to uninsured motorist benefits illustrates that application of the Rule is required, except in those instances in which the insurer previously has recovered against the tortfeasor. This result is consistent with the rationale favoring application of the Rule. Furthermore, countervailing public policies outweigh these underlying rationales only when the insurer brings an action against the defendant based on his right to subrogation before or contemporaneously with the insured.

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